

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

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Volume 5  
January 1, 1975, through December 31, 1975

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



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

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Volume 5  
January 1, 1975, through December 31, 1975

This Volume includes Assistant Secretary Decisions Nos. 472 - 600  
and Reports on Rulings No. 58

U.S. Department of Labor  
W.J. Usery, Jr., Secretary  
Labor - Management Services Administration  
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Assistant Secretary of Labor for Labor-Management Relations  
Office of Federal Labor - Management Relations  
Louis S. Wallerstein, Director



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## PREFACE

This Volume of Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491, As Amended, covers the period from January 1, 1975, through December 31, 1975. 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. 472-600); 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 No. 58).



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SHOWING DATE ISSUED, AREA OFFICE CASE NUMBER(S) AND TYPE OF CASE

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

<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE</u>	<u>PAGE</u>
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482	U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey	1-31-75	32-3128 32-3160 32-3166 32-3232 32-3248 32-3254 32-3548	RA RA CU RA RA RA RA	92
483	American Federation of Government Employees, AFL-CIO, National Office, and American Federation of Government Employees, AFL-CIO, Local 2677	2-4-75	22-3702	CO	102
484	Veterans Administration Hospital, Montrose, New York	2-4-75	30-5611	RO	108
485	Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California	2-4-75	72-3863	ULP	112
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507	Headquarters, U.S. Army Training and Doctrine Command (TRADOC) Fort Monroe, Virginia	4-28-75	22-5337	RA	243
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511	Dugway Proving Ground, Department of the Army, Department of Defense, Dugway, Utah	4-30-75	61-2235	ULP	286
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513	Office of Federal Highway Projects, Federal Highway Administration, Department of Transportation	5-23-75	71-2949	ULP	310
514	Army and Air Force Exchange Service, MacDill Air Force Base Exchange, MacDill Air Force Base, Florida	5-23-75	42-2541	ULP	313
515	Department of the Army, United States Army Infantry Center, Civilian Personnel Office, Fort Benning, Georgia	5-23-75	40-5218	ULP	325
516	Internal Revenue Service, Wilmington, Delaware District	5-23-75	20-4503	ULP	332
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523	Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas and Veterans Administration, Department of Data Management, Washington, D.C.	6-24-75	63-4716 63-4717 63-4718 63-4719 63-4720 63-4815	ULP ULP ULP ULP ULP ULP	377
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528	General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices	6-30-75	50-11103	ULP	424
529	Department of the Navy and U.S. Civil Service Commission	6-30-75	72-4718 72-4759	ULP ULP	429

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535	Denver Airway Facilities Hub Sector FAA, Rocky Mountain Region, DOT Aurora, Colorado	7-29-75	61-2350 61-2367	RA. ULP	466
536	Internal Revenue Service	7-29-75	22-5976	ULP	475
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545	Army and Air Force Exchange Service, Post Exchange, Defense Depot Memphis	8-28-75	41-4082	RO	545
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548	Department of the Navy, Norfolk Naval Shipyard	8-28-75	22-5518	ULP	554
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566	National Aeronautics and Space Administration (NASA), Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas	10-24-75	63-4826	ULP	632
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568	Department of Health, Education and Welfare, Public Health Service Indian Hospital, Claremore, Oklahoma	10-24-75	63-5452	RO	640
569	Defense Mapping Agency Aerospace Center, St. Louis, Missouri	10-24-75	62-4279	RO	643
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576	Department of Navy, Military Sealift Command	10-31-75	22-5395	NCR	672
577	Department of the Navy, Naval Weapons Station, Concord, California	10-31-75	70-4518	ULP	679
578	Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida	11-26-75	42-2573	ULP	684
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583	General Services Administration, Region 3, Public Buildings Service, Central Support Field Office	11-26-75	22-5570	ULP	706
584	Department of the Navy, Naval Undersea Center, San Diego, California	11-26-75	72-5273	AC	712
585	Department of Transportation, Federal Aviation Administration, Eastern Region	11-26-75	30-5951	ULP	714
586	Department of the Army, Fort McPherson, Georgia	11-26-75	40-6126	CU	718
587	Department of the Navy, Naval Air Station, Fallon, Nevada	11-26-75	70-2477 70-2496 70-4076	ULP	720
588	United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky	11-26-75	41-3126 41-3128 41-3129	CA CA CA	725
589	National Park Service	12-10-75	22-5755 22-5796	RA/AC CU/AC	730
590	Department of the Air Force, Aeronautical Systems Division, Air Force Systems Command, Wright-Patterson Air Force Base, Ohio	12-10-75	53-7818	AC/CU	734

<u>A/SLMR No.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE */</u>	<u>PAGE</u>
591	Department of Army, Headquarters, Western Area Military Traffic Management Command, Directorate of Personal Property, Oakland Army Base, Oakland, California	12-10-75	70-4743	RO	736
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593	Arizona Air National Guard, Phoenix, Arizona	12-10-75	72-5294 72-5183	RO CU	741
594	Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, USN, Long Beach, California	12-10-75	72-5321	CU	743
595	U.S. Department of Agriculture, Forest Service, Regional Office, Juneau, Alaska	12-10-75	71-2975	ULP	745
596	Department of Health, Education and Welfare, Office of the Secretary, Headquarters	12-10-75	22-6269 22-6291	CU CU	753
597	Bellingham Flight Service Station, Federal Aviation Administration-N.W. Region, Department of Transportation, Bellingham, Washington	12-10-75	71-3288	ULP	755
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599	Federal Aviation Administration, Airways Facilities Division, Alaskan Region	12-18-75	71-3006	RO	772
600	Federal Aviation Administration (FAA) and Federal Aviation Administration, Eastern Region	12-18-75	22-5554	RO	776

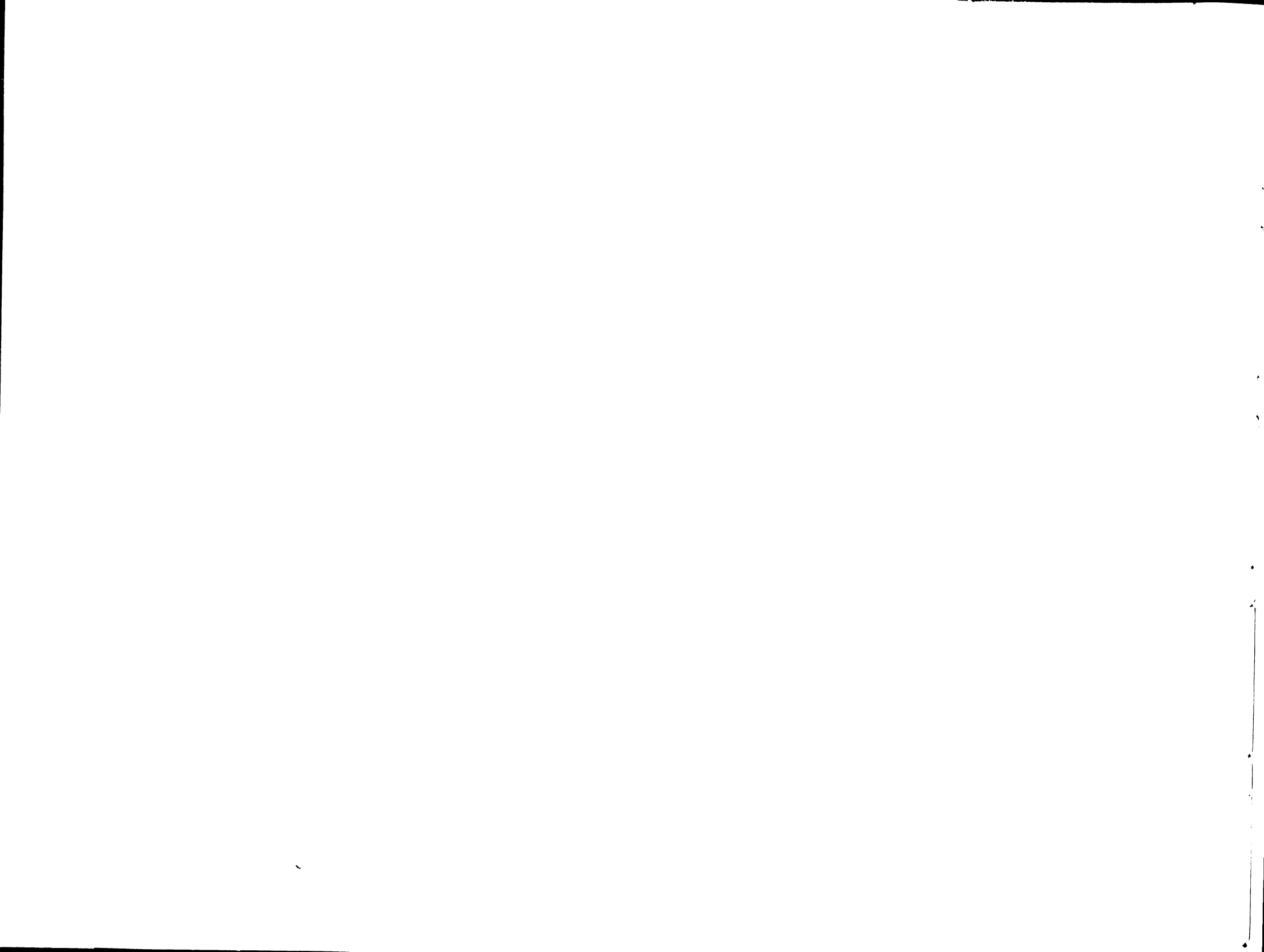


NUMERICAL TABLE OF REPORTS ON RULINGS OF THE ASSISTANT SECRETARY  
SHOWING DATE ISSUED AND TYPE OF CASE

<u>R A/S NO.</u>	<u>DATE ISSUED</u>	<u>TYPE OF CASE */</u>	<u>PAGE</u>
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\*/ TYPE OF CASE  
OBJ = Objections to Election





ALPHABETICAL TABLE OF DECISIONS OF THE ASSISTANT SECRETARY \*/

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\*/ To facilitate reference, listings in this Table contain only key words in the case title.  
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<u>TITLE</u>	<u>A/SLMR NO(S).</u>	<u>TITLE</u>	<u>A/SLMR NO(S).</u>
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<u>TITLE</u>	<u>A/SLMR NO(S).</u>	<u>TITLE</u>	<u>A/SLMR NO(S).</u>
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<u>TITLE</u>	<u>A/SLMR NO(S).</u>	<u>TITLE</u>	<u>A/SLMR NO(S).</u>
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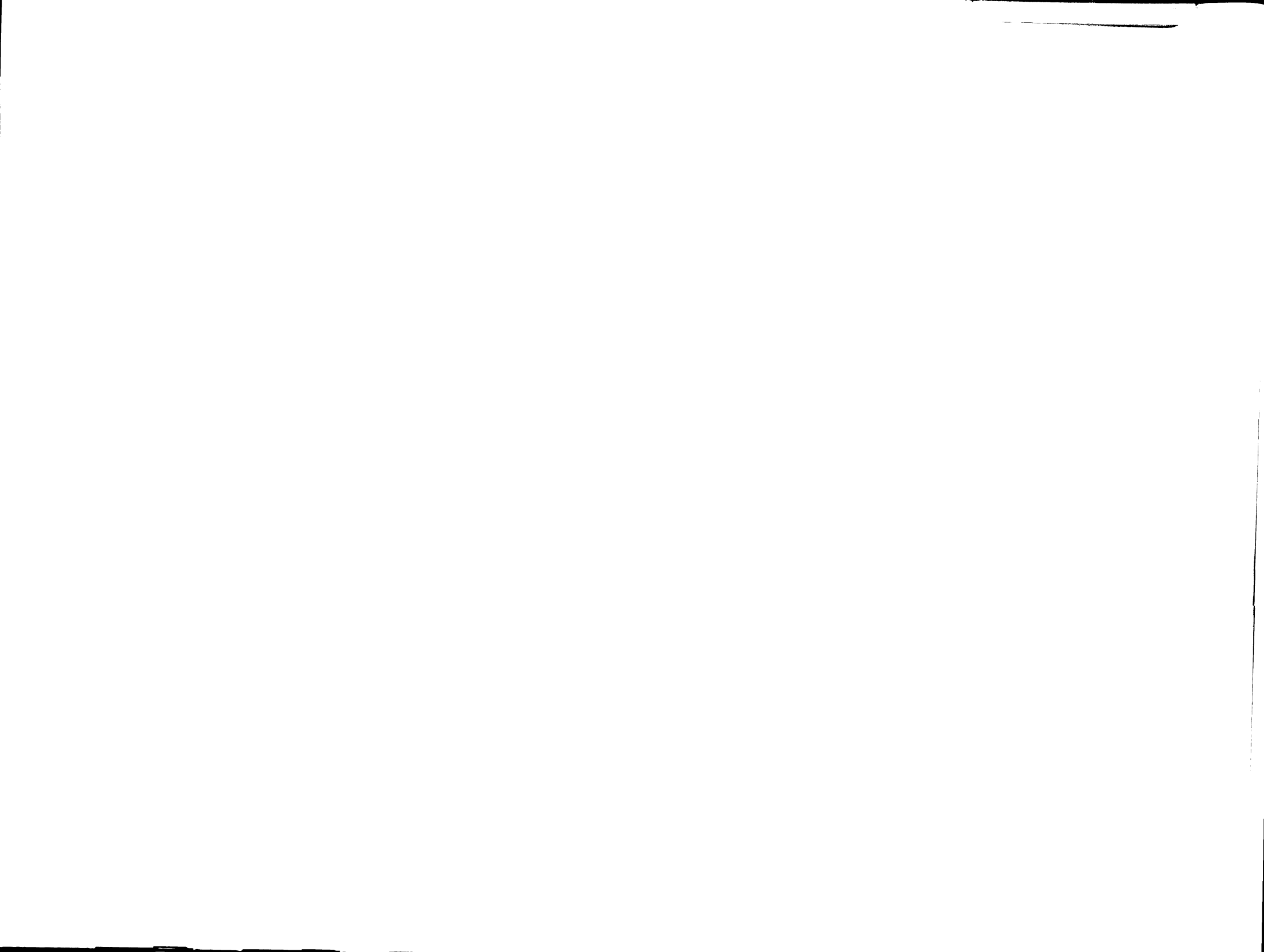
<u>TITLE</u>	<u>A/SLMR NO(S).</u>
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DECISIONS  
OF THE  
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

Nos. 472-600

January 1, 1975 through December 31, 1975



UNITED 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

MIRAMAR NAVAL AIR STATION,  
 COMMISSARY STORE,  
 SAN DIEGO, CALIFORNIA  
 A/SLMR No. 472

This proceeding arose upon the filing of an unfair labor practice complaint by the National Federation of Federal Employees, Local Union 63 (Complainant). The amended complaint alleged that the Miramar Naval Air Station Commissary Store, San Diego, California (Respondent) had violated Section 19(a)(1) and (2) of the Order by terminating an employee because of her activities as a union steward.

The Administrative Law Judge concluded that the primary motivation behind the discharge herein was a desire on the part of the Respondent's officials to rid themselves of a union steward who was advocating changes in the general working conditions of employees. In this regard, the Administrative Law Judge found that the discriminatee's complaints regarding the pushing of hand carts, the handling of heavy cartons of merchandise, and the failure to get periodic relief at the cash registers in the mornings and afternoons were complaints on behalf of all employees, rather than personal in nature. He further found that the discriminatee's advocacy of an unpopular proposal of consecutive days-off for cashiers, which had been submitted by the Complainant during negotiations, did not give the Respondent a license to retaliate against the discriminatee on the pretext that she was creating dissension among the employees. In sum, the Administrative Law Judge concluded that Respondent's officials had interfered with the discriminatee's exercising of rights granted by the Order and, thereby, violated Section 19(a)(1). He found further that her discharge constituted a violation of Section 19(a)(2) of the Order, and recommended to the Assistant Secretary that she be reimbursed for wages lost due to the improper discharge. Noting that Mrs. Knorr was a temporary limited employee, whose tenure could not exceed one year from the date of hire, the Administrative Law Judge recommended that she be reimbursed for all days she would have worked, up to the one year anniversary date of her employment by the Respondent.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the Respondent's conduct herein violated Section 19(a)(1) and (2) of the Order. He ordered that the discriminatee be reimbursed and made whole for any loss of earnings suffered as a result of the discrimination against her. Noting the absence of evidence that the discriminatee's appointment would have been extended beyond the one year anniversary date, the Assistant Secretary did not order reinstatement or extend the period for back pay beyond Mrs. Knorr's anniversary date, although requested to do so by the Complainant in its exceptions.

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

MIRAMAR NAVAL AIR STATION,  
 COMMISSARY STORE,  
 SAN DIEGO, CALIFORNIA

Respondent

and

Case No. 72-4282

NATIONAL FEDERATION OF FEDERAL  
 EMPLOYEES, LOCAL UNION 63  
 SAN DIEGO, CALIFORNIA

Complainant

DECISION AND ORDER

On September 19, 1974, Administrative Law Judge Gordon J. Myatt issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendations.

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

1/ In its exceptions, the Complainant contends that employee Knorr is entitled to reinstatement in addition to the back pay which the Administrative Law Judge recommends should be awarded. The Administrative Law Judge found only that Knorr was entitled to be reimbursed for the wages she lost up to the one year anniversary date of her appointment. Although the Complainant argues that temporary appointments such as Knorr's may be extended in certain circumstances, there is no record evidence to support a finding that her appointment would have been extended beyond the one year anniversary date. In such circumstances, I agree with the Administrative Law Judge that reinstatement is inappropriate in this matter and that Knorr should be reimbursed only up to the anniversary date of her appointment.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Miramar Naval Air Station, Commissary Store, San Diego, California, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees in the exercise of their rights assured by the Executive Order by discharging an employee for assisting the National Federation of Federal Employees, Local Union 63.

(b) Discouraging membership in the National Federation of Federal Employees, Local Union 63 by discriminating against an employee in regard to hiring, tenure, promotion, or other conditions of employment based on union membership considerations.

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

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

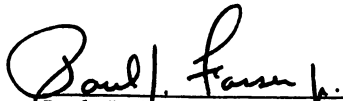
(a) Reimburse employee Carole L. Knorr for any loss of earnings she may have suffered as a result of the discrimination against her by payment to her of a sum of money equal to that which she would have earned as wages from the date of her final termination (including the days lost between her initial discharge and subsequent recall) up to the one year anniversary date of her employment, less any amounts earned by her through other employment during said period. 2/

(b) Post at the Miramar Naval Air Station, Commissary Store, San Diego, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the officer-in-charge of the Commissary Complex and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that the notices are not altered, defaced or covered by any other material.

2/ An award of back pay pursuant to this remedial order is clearly appropriate under the authority of Section 6(b) of the Executive Order, the Back Pay Act of 1966 (5 U.S.C. 5596), and the Civil Service Commission's implementing regulations at 5 CFR 550.801, et. seq. (subpart H). See also, Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401.

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

Dated, Washington, D. C.  
January 16, 1975

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



NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of rights assured by the Order by discharging an employee for assisting the National Federation of Federal Employees, Local Union 63.

WE WILL NOT discourage membership in the National Federation of Federal Employees, Local Union 63 by discriminating against employees in regard to hiring, tenure, promotion, or other conditions of employment based on union membership considerations.

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

WE WILL reimburse Carole L. Knorr and will make her whole for any loss of earnings suffered as a result of the discrimination against her.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 9061, 450 Golden Gate Avenue, San Francisco, California 94102.

..... :  
In the Matter of :  
MIRAMAR NAVAL AIR STATION :  
COMMISSARY STORE :  
SAN DIEGO, CALIFORNIA :  
Respondent :  
and :  
NATIONAL FEDERATION OF :  
FEDERAL EMPLOYEES, LOCAL :  
UNION 63 :  
SAN DIEGO, CALIFORNIA :  
Complainants :  
..... :

Case No. 72-4282

Basil L. Mayes, Esq.  
San Diego, California  
For the Respondent

Mr. Homer R. Hoisington  
Regional Business Agent  
Santa Rosa, California  
For the Complainants

Before: GORDON J. MYATT  
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a Complainant filed, June 1, 1973, and an amended complaint filed October 1, 1973, under Executive Order 11491, as amended, by National Federation of Federal Employees, Local No. 63 (hereinafter called the Union)

against Miramar Naval Air Station, Commissary Store (hereinafter called the Respondent Activity) a Notice of Hearing was issued by the Regional Director for Labor-Management Services Administration on December 28, 1973. The Complaint alleged that the Respondent Activity violated Sections 19(a)(1) and (2) of the Executive Order.

A hearing was held in this matter on January 8 and 9, 1974, in San Diego, California. All parties were represented by counsel and afforded full opportunity to be heard and to introduce the relevant evidence on the issues involved. Briefs were filed by the parties and have been duly considered.

Upon the entire record herein, 1/ including my observation of the witnesses and their demeanor while testifying, and upon the relevant evidence adduced at the hearing I make the following findings, conclusions, and recommendations:

Findings of Fact

A. Background Facts

The Respondent Activity is located at the Miramar Naval Air Station and is one of four Commissary Stores comprising the Navy Commissary Store Complex in San Diego, California. The Officer in charge of the San Diego Commissary Complex at the times material herein was Commander V. L. Reeder. Each commissary store within the Complex was under the direct supervision of a Commissary Store

1/ Counsel for the Respondent Activity filed a motion to correct the transcript in the following manner in order to accurately reflect the testimony given at the hearing.

- "p. 24 line 4 'discussed' to 'discussion'
- p. 27 line 2 'Complaint' to 'complaint'
- p. 47 line 15 'brief' to 'relief'
- p. 79 line 21 'point' to 'page'
- p. 85 line 12 'no' to 'know'
- p. 85 line 17 'checkers' to 'checker'
- p. 87 line 22 insert 'she' between 'and' and 'bad'
- p. 94 line 23 'refused' to 'refuse'
- p. 95 line 1,3,4 'refused' to 'refuse'
- p. 113 line 5 'Knoww' to 'Knorr'
- p. 113 line 18 'one' to 'done'
- p. 132 line 22 '19(a)' to '19(b)'
- p. 175 line 2 'registered' to 'registers'
- p. 176 line 4 'some' to 'none' "

Upon review of the record and the notes taken at the hearing, I find the Respondent's motion to be meritorious. Accordingly, the motion is hereby granted, and the record is corrected in the manner indicated above.

Officer, who in this case was Chief Warrant Officer J. B. Kidd. The commissary stores provided articles of foodstuff and various sundries to authorized patrons at the lowest practical cost. The testimony indicates that the dollar volume of the store at Miramar was in excess of two million dollars a month and that the sales were made to approximately three thousands customers per day. The Respondent Activity employed between 30 and 36 sales checkers who operated the 20 cash registers. Other individuals who were employed served in various other capacities in the store. It was the practice of the store to remain closed on Mondays of each week.

The Union has been recognized as the exclusive representative of the employees at the store (cashiers, warehouse, and produce employees) since June 30, 1966. The Parties stipulated that the Union submitted proposals to the Respondent for a bargaining agreement on August 14, 1972. The record shows that negotiations were taking place during the time of the events described below.

B. The Alleged Violations of the Executive Order

Carole L. Knorr, the alleged discriminatee, was hired by Respondent Activity as a cashier on June 15, 1972. Mrs. Knorr was hired on a temporary limited basis which meant that her tenure was not to exceed 1 year. 2/ Her immediate supervisor was Beverly Castle who was in charge of the checkout branch. The store itself was under the supervision of Chief Warrant Officer (CWO) James Kidd.

2/ Subchapter Four of the Federal Personnel Manual sets forth the tenure of temporary limited employees as follows:

4-2. Tenure of temporary limited employees

- (1) Temporary limited appointment is for a specified period not to exceed one year.
- (2) Temporary limited employees do not have the protection of reduction in force procedures.
- (3) Temporary limited employees may be separated at any time upon notice in writing from an appointing officer.
- (4) Temporary limited appointment does not confer a competitive status.
- (5) Temporary employees do not serve a probationary period.



During the summer months Mrs. Knorr performed her duties as a cashier in a satisfactory manner. In addition to checking out customers purchases, the cashiers were required to stock merchandise on the shelves when they were not working at the checkout counters. Mrs. Knorr was unhappy with this procedure because cashiers often had to push loaded handcarts in the aisles and unload heavy cartons of merchandise. <sup>3/</sup> She complained about this practice to her fellow employees and to other store personnel.

Sometime during the early part of October, Mrs. Knorr was appointed union steward for the cashiers by the Union. Mrs. Castle and CWO Kidd were notified of this fact by the Union. As she had no prior experience in the performance of her duties, Frank Carpenter, Chief Union Steward and a warehouse employee, instructed her to bring all problems directly to him. <sup>4/</sup> It was shortly after her appointment as Union Steward that Mrs. Knorr's problems with the supervisory officials of the Respondent Activity began to escalate.

About mid-November, one of the cashiers came to Mrs. Knorr with a problem concerning a discrepancy in her cash account. Mrs. Knorr suggested that the employee discuss the matter with the Chief Steward. Instead of following this advice, the employee spoke with Tyler, as he was passing through the area. Tyler attempted to follow through on the matter by making an inquiry at the cash cage. His efforts in this regard were brought to the attention of Kidd and Mrs. Castle. Shortly thereafter, Kidd summoned both union stewards in his office with Mrs. Castle present. Kidd asked Mrs. Knorr and Tyler if they were aware of the Union constitution and of the requirements in handling union matters. Kidd wanted to know why Mrs. Knorr had not handled the problem instead of Tyler, since she was the

<sup>3/</sup> In theory, the male employees working in the produce department were suppose to stock the handcarts and to lift the very large cartons down for the cashiers. According to Mrs. Knorr, this procedure was more honored in the breach than in its practice, and the female cashiers had to handle the heavy cartons.

<sup>4/</sup> Clayton Tyler, an employee in the produce department, was appointed steward of that section at the same time that Mrs. Knorr received her appointment. From the testimony, it is apparent that he likewise was inexperienced in performing duties as union steward.

steward for that section. He also wanted to know if Mrs. Knorr was aware of the union procedures and the contract provisions. He told Tyler that he did not go through the proper chain of command and was not following established procedures in pursuing the grievance of the employee. He also stated that Tyler failed to get permission of his supervisor to engage in union activities on working time.

Again in mid-November Mrs. Knorr was involved in an incident which caused the displeasure of her superiors. It was customary for management to require cashiers to take compensatory time when they were compelled to work beyond their normal closing time due to delays in checking out their cash draws. In addition, on Sundays employees were allowed to leave 15 to 30 minutes before the normal closing hour due to the slowness of business. The CWO would normally come in and lock the doors and close the store early. When this occurred the employees were paid for a full 8 hours.

Mrs. Knorr had been delayed in checking out and required to stay beyond her normal quitting time. In keeping with the practice, Mrs. Castle asked her to sign a slip for compensatory time to cover the overtime worked. Mrs. Knorr refused to sign and stated that all employees should receive time and a half in wages for the overtime. Mrs. Knorr requested payment of overtime rather than the compensatory time off. Mrs. Castle informed her that if she refused to sign for compensatory time, management would make all of the employees stay until the normal closing hour on Sundays and that she would inform the other employees as to the reason why they would no longer be able to leave early. The Sunday following this particular incident, Mrs. Knorr clocked out 15 minutes early in order to take a family member to the airport. When Mrs. Castle discovered this, she spoke to CWO Kidd and recommended that Mrs. Knorr be terminated. She subsequently spoke to Mrs. Knorr about clocking out early. When Mrs. Knorr explained the reason for doing so, Mrs. Castle told her to forget the whole matter. <sup>5/</sup>

<sup>5/</sup> Mrs. Knorr was paid for a full shift even though she left early.

During her tenure as steward, Mrs. Knorr continued to complain about the cashiers having to push the heavy carts and unload them to stock the shelves. The record testimony shows that several cashiers were unhappy about this duty and expressed complaints to Mrs. Knorr. She advised the employees to keep a record of the time spent performing this work. 6/

Another item which proved to be a source of friction in the store was the fact that the employees had no scheduled breaks in the morning or in the afternoon. Normally the cashiers remained at their stations until the flow of customers subsided and then they were relieved in order to go on their break. There is testimony in the record that Mrs. Knorr did not agree with this practice and advised other employees on occasion that they should have scheduled relief in the morning and in the afternoon. There is no indication that she discussed this with her supervisors. A number of the employees testified that they were advised by Mrs. Knorr to simply turn off their lights and leave their work station when they needed relief under the pretense of going to the bathroom. Mrs. Knorr, however, denied ever giving such advice to the employees.

Mrs. Knorr also brought up another problem which affected the working conditions at the store to her immediate supervisor. On many occasions when the cashiers were working on Sundays, their lunch hours were delayed because of lack of relief and the number of customers to be served. When this occurred the employees on the late lunch break would find that the eating facilities were closed in the commissary area. Mrs. Knorr complained about this to Mrs. Castle. 7/

6/ Mrs. Knorr testified that she spoke with her immediate supervisor regarding the complaints about stocking the shelves, but Mrs. Castle denied any such discussions. I do not credit Mrs. Castle's denial, as it was apparent from my observation of this witness while testifying that she was inclined to color her testimony in order to make it appear that Mrs. Knorr's complaints were personal rather than on behalf of the employees.

7/ Unlike her denial of ever receiving a complaint about the pushing of the carts, Mrs. Castle testified that she did not recall Mrs. Knorr discussing this matter. As indicated previously, I credit Mrs. Knorr's testimony and find that she also complained about eating arrangements on the Sunday shift.

As noted before, negotiations were taking place between the Respondent Activity and the Union during the time that Mrs. Knorr was a union steward. One of the proposals being advanced by the Union was consecutive days off for the cashiers. Normally only the permanent full time cashiers received two consecutive days off during a work-week. Other employees had split-days off and the store was closed on Mondays. Mrs. Castle testified that the Union seized upon the idea of two consecutive days off as an inducement to get the nonunion cashiers to become members. Mrs. Knorr frequently discussed the advantages of joining the Union and of having two consecutive days with her coworkers during her lunch breaks. According to Mrs. Castle, she did this with such persistence that some of the cashiers complained and asked to have their lunch hours changed in order to avoid conversation with Mrs. Knorr. There is testimony by some of the employees that Mrs. Knorr also told them the union officials were going to correct a number of problems at the store which they considered unfair to the employees. 8/

In order to booster the Union's position about the need for consecutive days off, Carpenter asked Mrs. Knorr to get a schedule of the employees hours and their days off. Mrs. Knorr went to the office and asked Shirley Anuat, the office employee, for a copy of the work schedule. Anuat told her that the schedule was posted in the counting room. Mrs. Knorr then stated that the schedule and the shift rotations of the employees were not properly changed and that she wanted proof of this fact. Mrs. Knorr also asked to see the timecards of the employees because she stated that the employees were suppose to sign them. Anuat refused to give any of the records to Mrs. Knorr. Later Anuat informed her supervisor of Mrs. Knorr's request and she advised Kidd of this fact. He ordered a report made in writing of the incident.

The store had a system of rating the productivity of the cashiers. The rating was based on the amount of money taken in and the number of customers served minus the number of errors divided by the number of hours the employees worked. Mrs. Knorr's productivity rating in July was 534, in August it was 550, in September it was

8/ Employees Mailloux and Morasse testified that Mrs. Knorr said the Union was "going to get Commander Reeder." Under cross-examination, however, they both admitted that the statements were made in the context of the on-going negotiations, and that the Union was directing its attention to correcting the working conditions rather than attacking Commander Reeder personally.

525, and in October it dropped to 417. Because her rating had dropped more than a 100 points, Mrs. Castle talked with Mrs. Knorr about her productivity and her attention to her job duties. The record indicates that for the month of November Mrs. Knorr's productivity increased to 504.

Mrs. Castle was aware of the discussions among the cashiers and the concern expressed by them about the two consecutive days off proposal advanced by the Union. Sometime in November she conducted an informal survey among the employees, and ascertained that the only employees in favor of the proposal were the three full time employees who ordinarily received two consecutive days off. This survey, however, did not prevent the Union from continuing to press for this item during negotiations, nor did it prevent Mrs. Knorr from continuing to advance the proposal among the cashiers. It is evident that there was discussions between the other cashiers and Mrs. Castle regarding the union proposal, and that based on these conversations, the employees feared that their hours would be reduced if the Union were successful in achieving its goal. The employees expressed concern about this and asked Mrs. Castle what could they do. She suggested that Commander Reeder had a "open door" policy and they should seek to discuss the matter with him. As a consequence, a number of employees wrote letters to the Commander expressing dissatisfaction with the union proposal and in some instances with the Union itself. On the basis of these letters, Commander Reeder set up a meeting with the employees on a Sunday morning (December 10) prior to the opening of the store. Reeder invited Archie McLaren, then President of the Union, to attend the meeting. <sup>9/</sup> He also asked McLaren to have the Chief Steward (Carpenter) present, but Carpenter did not attend the meeting. Mrs. Knorr was also absent from the meeting as she was on sick leave.

During the course of the meeting, the employees expressed their concern about the two consecutive days off which was being proposed by the Union. Reeder told the employees that if they all had two consecutive days off, management would have to increase the number of employees in order to handle the customers. Although

<sup>9/</sup> Although McLaren was President of the local, he was not an employee of the Respondent Activity. He was employed by the Social Security Administration.

he did not specifically state the number of hours each employee worked would be reduced, he testified that this was clearly implied. He also told the employees it would be wiser for them to take compensatory time off rather than to insist on overtime pay because of limited funding. The employees then began discussing their dissatisfaction with the Union and Mrs. Knorr's activities as their steward. The management officials left the meeting and the employees remained with McLaren. They complained to McLaren that they had not been consulted about the two consecutive days off proposal and that Mrs. Knorr was constantly harrasing them, and annoying regarding the Union. McLaren took the position that Mrs. Knorr was alienating the employees and promised he would remove her as the union steward.

The following evening there was a union meeting at which McLaren as President resigned and was succeeded by Carpenter. Mrs. Knorr attended the meeting although she was out sick on leave at the time. <sup>10/</sup>

On December 12, the store was quite crowded and several employees began to complain to Mrs. Castle about Mrs. Knorr's absence. They wanted to know why she could attend the union meeting while out on sick leave, but could not report to work to help them during the rush hour. Mrs. Castle relayed the complaints to Kidd.

On December 14, when she returned to work, Mrs. Knorr was called into Kidd's office and informed that she was being terminated. Mrs. Castle and Carpenter were present at the time. <sup>11/</sup> Kidd told Mrs. Knorr that she had abused her sick leave and was seen "socializing" at a union meeting while on sick leave. He stated that her productivity was down, and that she harrassed and demoralized the other employees in the store. He also stated that he had letters from employees complaining about her conduct. He told her that she had asked for

<sup>10/</sup> Mrs. Knorr was out on sick leave from December 7 until December 14. She testified that she contacted her doctor regarding the wisdom of attending the union meeting and was advised that she could do so without jepordizing her health.

<sup>11/</sup> Kidd had advised Carpenter earlier that day that he was going to fire Mrs. Knorr.

"confidential" information from the office employees. When Mrs. Knorr asked to see the letters from the employees complaining about her, Kidd refused to show them. He stated that he did not have to discuss the matter with her and would not allow her to say anything in her behalf. Mrs. Knorr left from the store before he could secure the completed copies of her termination papers. On December 26, because of a technical deficiency in the manner of her termination, Mrs. Knorr was recalled to work but assigned to a different store. She worked until December 29, when she was finally terminated.

An investigation of the discharge was conducted by the assistant officer-in-charge of the Complex because of a complaint filed by the Union. He reviewed the productivity record of the Respondent, her leave record, and on the basis of information supplied by Kidd and Mrs. Castle determined that the termination was proper.

Concluding Findings

The Respondent Activity asserts that Mrs. Knorr was discharged because she was an unsatisfactory employee. The Respondent points to the drop in her productivity rating during the month of October, the complaints expressed by some of the cashiers regarding her advocacy on behalf of the Union and the two consecutive days off proposal, and her general "improper attitude." Respondent alleges that this conduct demoralized the cashiers and interfered with the efficient operation of the store. Despite the arguments advanced by the Respondent Activity, however, the record evidence and the credited testimony persuade me that the primary motivation behind the discharge was a desire on the part of Respondent's officials (Kidd and Castle) to rid themselves of a union steward who was advocating changes in the general working conditions of the employees.

Both Kidd and Mrs. Castle made a determined effort to portray Mrs. Knorr as a chronic complainer expressing her own personal views rather than seeking changes for the benefit of all the cashiers. The facts, however, belie this contention. It is true that Mrs. Knorr objected to pushing the handcarts and handling the heavy cartons of merchandise before she became union steward. But it is equally apparent that after she assumed this position, she

expressed the same complaints, not only for herself but for other employees as well. The testimony of employee Cozad clearly supports Mrs. Knorr's statement that other employees objected to pushing the heavy carts and stocking the shelves. Indeed, in her capacity as steward Mrs. Knorr advised other employees to keep track of the amount of time that they were spending on stocking the shelves. Thus, it is proper for Mrs. Knorr, in her representative capacity, to express these complaints to her supervisor. 12/

Similarly, Mrs. Knorr's objection to taking compensatory time in lieu of receiving wages for overtime, and her complaints about the failure to get periodic relief at the cash registers in the mornings and afternoons were complaints on behalf of all of the employees. As in the case of stocking the shelves, she sought to get the other cashiers to keep a record of their overtime, for the obvious purpose of making it an issue for the Union. This is a clear indication that her concern was on behalf of the employees and not a purely personal one.

The fact that the Union, and Mrs. Knorr as steward, advocated an unpopular proposal of consecutive days-off, did not give the Respondent license to retaliate against the steward under pretext of claiming that she was causing dissension among the employees. The proper place for the Respondent to have voiced its objection to the proposal was at the bargaining table with the union officials and not against the union steward who was advocating the proposition. It is true that a number of employees expressed their objections to the proposal directly to management because of a fear of reduction in hours. But this is not sufficient reasons to allow management to interfere with the right of the union steward to support and advocate the proposal, albeit unpopular.

Further evidence of the willingness of Respondent's officials to seize upon an incident to justify its conduct is found in the accusation that she sought confidential records. Mrs. Knorr went to the office to secure

12/ Although Mrs. Castle testified that Mrs. Knorr's objections were purely personnel and not on behalf of all the employees, I do not credit her in this regard.

the work schedules and to see the timecards in order that the Union could get information to support its proposal of consecutive days-off. She did not do this surreptitiously nor covertly, but made an out right request for the information. If the documents were "confidential" as stated by Kidd, then a simple refusal to give the information would have been sufficient. But this hardly a reason to be cited for the unsuitability of the employee who was making a good faith request on behalf of the Union.

In sum, I find and conclude that the Respondent's officials interfered with the rights assured Mrs. Knorr, as an employee and a union steward, to assist the Union. Section 1(a) of the Executive Order states as a matter of policy that employees have the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization ... (Emphasis supplied). It is clear from the record in this case that the Respondent's supervisors were determined to retaliate against Mrs. Knorr for exercising the rights assured her by the Executive Order, and in so doing, violated Section 19(a)(1). The nature of this conduct, which resulted in discrimination against the employee regarding tenure of employment, inherently discourages membership in the Union and constitutes a violation of Section 19(a)(2) of the Order.

Recommendations

Having found that the Respondent has engaged in conduct which violates Section 19(a)(1) and (2) of the Order by interfering with rights assured employees and thereby discouraging membership in a labor organization, I shall recommend to the Assistant Secretary that he adopt the following recommended order designed to effectuate the policies of Executive Order 11491, as amended.

Having found that Mrs. Knorr was wrongfully discharged for reasons proscribed by the Executive Order, it is necessary to fashion a remedy which will fully correct the misconduct engaged in by the Respondent Activity and effectuate the purposes and policies of the Order. As a temporary limited employee, Mrs. Knorr's tenure could not exceed one year from the date of hire. Furthermore, she was subject to separation--for lawful

reasons--at any time upon written notice, without the right of any form of appeal from such action. At the time of the hearing herein, the one year anniversary date of her employment had long since expired. But application of the provisions of the Executive Order does not depend upon the type of tenure an employee enjoys. Rather, it is to be applied uniformly to all persons who come within the definition of employees as spelled out in Section 2(b) of the Order. In these circumstances, I shall recommend that Mrs. Knorr be reimbursed for the wages she lost due to her unlawful discharge. The wages are to be calculated from the day following her final termination on December 29, 1972, but shall include the days lost between December 14 and December 26 (the dates of the initial discharge and subsequent recall), and shall include the days she would have worked, but for the unlawful action taken against her, up to the one year anniversary date of her employment by the Respondent. To do otherwise, in my judgement, would mean ignoring the circumstances of this case, and perhaps more important, it would allow the Respondent Activity to benefit from its own willful misconduct. For these reasons, I found this remedy to be appropriate and necessary in order to effectuate the purposes and policies of the Executive Order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of the Executive Order 11491, as amended, and Section 203.5(b) of the Regulations, the Assistant Secretary of labor for Labor-Management Relations hereby orders that the Miramar Naval Air Station, Commissary Store, San Diego, California, shall:

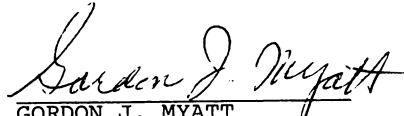
1. Cease and desist from:
  - (a) Interfering with and restraining employees in the exercise of the rights assured by the Executive Order by discharging an employee for assisting Local Union 63, National Federation of Federal Employees.
  - (b) Discouraging membership in Local Union 63, National Federation of Federal Employees by discriminating against an employee regarding tenure of employment.

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

(a) Pay to Carole L. Knorr back wages calculated in the manner set forth in the Section of this Order entitled recommendations.

(b) Post at its Miramar Naval Air Station, Commissary Store, San Diego, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the officer-in-charge of the Commissary Complex, or other appropriate official and shall be posted and maintained by him for sixty(60) consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that the notices are not altered or defaced or covered by any other material.

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

  
GORDON J. MYATT  
Administrative Law Judge

Dated: September 19, 1974  
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE  
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS  
and in order to effectuate the policies of  
EXECUTIVE ORDER 11491, as amended  
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT retaliate or take reprisals against employees because they seek to assist a labor organization.

WE WILL NOT discriminate against employees with regard to tenure of employment and thereby discourage membership in a labor organization because they exercise rights assured by the Executive Order.

WE WILL reimburse Carole L. Knorr for any back wages that she lost as a result of her unlawful termination from the position as a cashier at the Commissary Store.

\_\_\_\_\_  
(Agency or Activity)

Dated: \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

January 16, 1975

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

INTERNAL REVENUE SERVICE,  
OFFICE OF THE REGIONAL COMMISSIONER,  
WESTERN REGION  
A/SLMR No. 473

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This case involved an unfair labor practice complaint filed by National Treasury Employees Union, and its Chapter 081 (Complainant) against Internal Revenue Service, Office of Regional Commissioner, Western Region (Respondent) alleging violations of Sections 19(a)(1) and (6) of the Order. The case was transferred to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations after the parties submitted a stipulation of facts and exhibits to the Assistant Regional Director. The complaint alleged essentially that the Respondent, contrary to established practice, refused to allow the Complainant to post a notice to employees on Respondent's bulletin board, and also refused to allow Complainant the use of an "agency room" to meet with its members during a coffee break. The Respondent admitted it had refused to allow the Complainant to post its notice and also that it had refused the Complainant's requested use of the "agency room." It contended, however, that such conduct was not violative of the Order.

In finding that Respondent violated Section 19(a)(6) of the Order in both instances, the Assistant Secretary, citing Los Angeles Air Route Traffic Control Center, Federal Aviation Administration, A/SLMR No. 283, noted that the granting of the use of bulletin board space and the use of agency facilities for employee organization meetings are privileges, not rights, and, as such, may reasonably be conditioned. However, such privileges, once granted, become, in effect, established terms and conditions of employment which may not thereafter be unilaterally changed. With regard to the Respondent's refusal to allow the Complainant use of the bulletin board, the Assistant Secretary noted that the asserted reason for Respondent's refusal, i.e., that the notice was inaccurate and misleading, went beyond the reasonable conditions previously established. As to the Respondent's refusal to allow Complainant the use of "agency room" for meeting purposes, the Assistant Secretary noted that an established term and condition of employment cannot be altered in the absence of either mutual agreement of the parties or upon their reaching impasse over the matter where there is no existing negotiated agreement. The Assistant Secretary

further found that the actions of the Respondent necessarily had a restraining influence upon unit employees and a concomitant coercive effect upon their rights assured by the Order in violation of Section 19(a)(1).

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,  
OFFICE OF THE REGIONAL COMMISSIONER,  
WESTERN REGION

Respondent

and

Case No. 70-4199

NATIONAL TREASURY EMPLOYEES UNION  
AND CHAPTER 081, NATIONAL TREASURY  
EMPLOYEES UNION

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Assistant Regional Director Gordon M. Byrholdt's September 13, 1974, Order Transferring Case to the Assistant Secretary of Labor under Section 206.5(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 both parties, I find as follows:

On February 25, 1974, the Complainant filed a timely unfair labor practice complaint alleging that the Respondent had violated Section 19(a)(1) and (6) of the Order based on its improper refusal to allow the Complainant to post a notice to its members on the Respondent's bulletin board and on the refusal of the Respondent, on or about October 12, 1973, to allow the Complainant to use an "agency room" during a coffee break.

The evidence establishes that the Complainant was certified as the exclusive representative of a unit of the Respondent's professional and nonprofessional employees on August 4, 1971. At all times material herein, no negotiated agreement existed between the Complainant and the Respondent.

In August 1971, the Respondent granted the Complainant the use of space on the Respondent's official bulletin boards. <sup>1/</sup> From August 1971, to October 24, 1973, the date of the filing of the charge herein, on various unspecified occasions, the Complainant requested and the Respondent allowed the posting of union material on the Respondent's bulletin boards. On one occasion, in or about December 1973, the Complainant requested, and management refused, to post a submitted document because it reflected on the motives or the integrity of the Internal Revenue Service.

On or about July 9, 1973, during a local negotiating session, the Complainant requested one additional position on its bargaining team for a "member-observer." The Respondent agreed to this proposal. In this connection, on or about July 16, 1973, the Complainant submitted a handwritten notice to be posted on the Respondent's official bulletin boards which notified members that regular negotiations were imminent and that anyone who wished to attend as a "member-observer" should contact certain specified officers of the Complainant. The notice further indicated that opportunities for attendance at the negotiation sessions were limited and that members desiring to attend would get one-half of the time on administrative leave and one-half on annual leave. The Respondent refused to post this notice and, in subsequently discussing the matter with representatives of the Complainant, the Respondent's Labor-Management Relations Specialist asserted that the reason for the refusal to post the notice was that the material was inaccurate and misleading to employees and supervisors in that it implied that an unlimited number of employees could "watch" the

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<sup>1/</sup> The granting of bulletin board space was governed by Treasury Personnel Manual, Chapter 711, paragraph 7-3, which reads as follows:

USE OF BULLETIN BOARDS AND DISTRIBUTION OF UNION LITERATURE

Bulletin boards may be made available for the use of exclusively recognized labor organizations and distribution of union literature on Agency premises by labor organizations holding exclusive recognition, may also be permitted. The terms and conditions of such use shall be subject to negotiation. The posting or distribution of literature which in the judgment of management officials attacks the integrity or motives of any individual, other labor organizations, government agencies or activities of the Federal Government is prohibited. In addition, prior approval of the content of the literature and the time, place and method of circulation for posting on the premises may be required by the appropriate management official to see that it conforms to established standards. The distribution of union literature will be permitted only during non-duty hours of the employee distributing and receiving it.



negotiations. The representatives of the Complainant disagreed that the notice was misleading, and stated that, even if it was, because the notice advised employees to contact the Union regarding the matter, any misconceptions could be cleared up at that time. The Respondent's Labor-Management Relations Specialist replied that it would still be misleading to supervisors and offered to meet with designated representatives of the Complainant so that the notice could be reworded and thereby be posted. The Complainant refused.

On December 1, 1969, by letter from the Respondent to the Complainant's President, the Complainant was granted the use of the Respondent's facilities for meetings with employees. 2/ In pertinent part, the December 1, 1969, letter stated as follows:

Complainant's request for use of meeting rooms including coffee rooms will be submitted in writing at least three days in advance. The request will specify the date, the room that is desired, an alternate date that is acceptable to the union, the purpose of the meeting, and the time the room will be required. Management will advise the organization as soon as possible of the decision.

From December 1969, to the date of the filing of the charge herein, on various and unspecified occasions, the Complainant requested, and the Respondent granted, the use of Agency rooms including use of certain rooms during break periods. 3/ It was stipulated that on one occasion,

2/ The use of Agency meeting rooms was governed by Treasury Personnel Manual, Chapter 711, paragraph 7-2, which states in pertinent part:

USE OF FEDERAL FACILITIES Bureaus may provide facilities, if available, to recognized labor organizations for business and membership meetings during non-duty hours . . . , subject to safety and security regulations and provided that such meetings will not interfere with the proper functioning of the public business. Request for the use of the facilities must be made in advance to the appropriate management official and shall indicate the date, time and general purpose of the meetings. These meetings may be attended and conducted by non-employee members unless for security reasons it has been determined by appropriate management officials that attendance should be restricted to employees.

3/ At all times between December 1969, and October 12, 1973, to the best of the belief and knowledge of the Respondent, the latter was the only Region of the Internal Revenue Service to interpret Treasury Personnel Manual, Chapter 711, paragraph 7-2, as to include break times in the definition of non-work times.

"on or about December 1973", management refused a request for the use of an Agency room by the Complainant because space was not available and the request was made with only two days advance notice.

On or about October 12, 1973, the Complainant requested the use of an Agency room to conduct a meeting during a coffee break at a Los Angeles post of duty. The Respondent, in refusing the request, asserted: (1) that the granting of Agency facilities for meetings by the Complainant was discretionary and made on an ad hoc basis, and (2) that the request went beyond the Complainant's submitted collective bargaining proposals with regard to the use of Agency facilities and, therefore, all prior practices that went beyond the Complainant's proposal "went out the window." 4/

The parties indicated in their stipulation and briefs that they desired the following issues to be considered in this matter:

1. Whether or not the Respondent's refusal to post the Complainant's announcement on the Respondent's official bulletin boards violated Section 19(a)(1) and (6) of Executive Order 11491, as amended?

2. Whether or not the Respondent's refusal of the Complainant's request for the use of an Agency room during a coffee break violated Section 19(a)(1) and (6) of Executive Order 11491, as amended?

All of the facts set forth above are derived from the parties' stipulation of facts, issues and accompanying exhibits.

With regard to issue No. 1, it previously has been found that the use of Agency bulletin boards is not a right of individual employees or organizations which represent employees but, rather, is a privilege which ordinarily may be granted or withheld by an agency or activity. 5/ In this connection, it also has been decided that because the use of bulletin boards is a privilege, it follows that the granting of such privilege may be reasonably conditioned to, among other things, prevent violations of law and that the privilege can be withdrawn if it is demonstrated clearly that the reasonable conditions set for bulletin board use have been violated. In the instant case, when granting the use of its bulletin boards, the Respondent set certain conditions upon

4/ During the negotiations which subsequently led to the execution of a negotiated agreement between the Complainant and the Respondent, the Complainant requested the use of Agency facilities for meetings between the Complainant and its members "after duty hours" which the Respondent interpreted as precluding the use of Agency facilities for this purpose during lunch and break periods.

5/ See Los Angeles Air Route Traffic Control Center, Federal Aviation Administration, A/SLMR No. 283.

their use 6/ which, in my view, were reasonable. However, I find that, under the circumstances of this case, the Respondent's actual restrictions upon the use of its bulletin boards went beyond those standards which the Respondent itself had established. Thus, the evidence shows that the only conditions set upon the use of the bulletin board space were those established by the Respondent's Personnel Manual, Chapter 711, paragraph 7-3. And nowhere in that section of the Respondent's Personnel Manual does there appear the conditions which were asserted here by Respondent as the basis for refusing to post the notice proffered by Complainant on July 16, 1973. 7/

Under these circumstances, I find that the Respondent violated Section 19(a)(6) of the Order by its application of the condition on the use of its bulletin boards which, in my view, were beyond the standards it had previously established. Thus, in granting the Complainant the use of its bulletin boards, under certain specified reasonable conditions, the Respondent, in effect, established a term and condition of employment with respect to its unit employees; *viz.* a channel of communication between unit employees and their exclusive representative. By its action in refusing to allow the Complainant to post a notice based upon the alleged failure to satisfy a requirement not previously announced or established, I find that the Respondent, in effect, unilaterally changed such term and condition of employment in violation of Section 19(a)(6) of the Order. Moreover, in my view, such unilateral conduct by the Respondent necessarily had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Order. Consequently, I conclude that the Respondent's improper conduct described above also violated Section 19(a)(1) of the Order.

With regard to issue No. 2, I also am persuaded that the Respondent violated Sections 19(a)(1) and (6) of the Order for essentially the same reasons set forth above with respect to issue No. 1. Thus, under the circumstances set forth above, the Respondent was not required to grant the use of its facilities for the Complainant's benefit in meeting with unit employees. In my view, the use of meeting rooms is a privilege which, if granted, may be conditioned by specified reasonable conditions. And, in the instant case, the use of the Respondent's facilities was conditioned upon requirements set forth in Respondent's personnel manual, 8/ as well as in a letter from the Respondent to the Complainant granting the use of Respondent's facilities, which requirements I find to be reasonable. Thereafter, as noted above, the Respondent refused the request of the Complainant for the use of an

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6/ See footnote 1 above.

7/ I reject also the argument of the Respondent that an arbitration award involving the Internal Revenue Service and another Chapter of the Complainant established a standard which is not readily apparent upon the reading of the Respondent's Personnel Manual, paragraph 7-3. Thus, that arbitration proceeding involved the interpretation and application of a clause in a prior negotiated agreement to which neither Chapter 081 nor the Respondent were parties.

8/ See footnote 2 above.

agency room on the basis that it had total discretion in this area and that the Complainant's request went beyond its submitted collective bargaining proposals.

Under the circumstances of this case, I reject the Respondent's argument that the granting of the privilege of the use of certain of its facilities is dependent upon the exercise of Respondent's discretion on a case-by-case application. Thus, in my view, the grant of such privilege in the context of this case, under certain specified conditions, established a term and condition of employment for unit employees which could not thereafter be withheld at the whim or caprice of the Respondent. Further, I reject the Respondent's argument that the Complainant's bargaining proposals, which included provisions for the utilization of Respondent's facilities for meetings with unit employees under certain limited circumstances, resulted in abrogation of this existing term and condition of employment. In my view, where there is no negotiated agreement in existence, established terms and conditions of employment may not be altered in the absence of either mutual agreement by the parties or upon their reaching an impasse following good faith bargaining concerning the matter involved. There is no evidence in this case of the parties having reached agreement or impasse on the issue of altering the use of the Respondent's facilities.

Accordingly, based on the foregoing considerations, I find that the Respondent's conduct on or about October 12, 1973, in refusing to allow the Complainant the use of its facilities in meeting with unit employees constituted an application of conditions different from those previously established by the Respondent itself and, thus, constituted a unilateral change in established terms and conditions of employment in violation of Section 19(a)(6) of the Order. Moreover, for the reasons noted above in connection with issue No. 1, I find that such conduct also violated Section 19(a)(1) of the Order.

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Office of the Regional Commissioner, Western Region shall:

1. Cease and desist from:

(a) Changing existing personnel policies and practices or other matters affecting the working conditions of unit employees without first meeting and conferring with Chapter 081, National Treasury Employees Union.

## NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change existing personnel policies and practices or other matters affecting the working conditions of unit employees without first meeting and conferring with Chapter 081, National Treasury Employees Union.

WE WILL NOT interfere with, restrain, or coerce employees by refusing the utilization of Activity bulletin boards and/or meeting rooms by Chapter 081, National Treasury Employees Union for reasons different from or inconsistent with previously announced and applied conditions.

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

(b) Interfering with, restraining, or coercing employees by refusing the utilization of Activity bulletin boards and/or meeting rooms by Chapter 081, National Treasury Employees Union for reasons different from or inconsistent with previously announced and applied conditions.

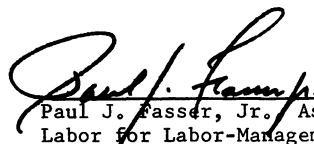
(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights protected by Executive Order 11491, as amended.

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

(a) Post at all its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commissioner, Western Region and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to all employees are customarily posted. The Commissioner, Western Region, shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

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

Dated, Washington, D. C.  
January 16, 1975

  
Paul J. Passer, Jr. 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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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

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

U.S. DEPARTMENT OF THE ARMY,  
 PICATINNY ARSENAL,  
 DOVER, NEW JERSEY  
 A/SLMR No. 474

U.S. DEPARTMENT OF THE ARMY,  
 PICATINNY ARSENAL,  
 DOVER, NEW JERSEY

The Petitioner, Local 1437, National Federation of Federal Employees (NFFE), sought an election in a unit composed of all eligible professional Class Act employees of the Picatinny Arsenal, including employees of three Project Manager groups, which are tenants of the Arsenal. The General Schedule nonprofessional employees of the Activity are represented currently by Local 225, American Federation of Government Employees, AFL-CIO (AFGE), the Intervenor herein, in a unit coextensive with the petitioned for professional employee unit.

The AFGE contended that the claimed unit was inappropriate in that there does not exist a community of interest between the professional employees of Project Manager groups and Picatinny Arsenal professional employees. It cited the lack of similarity in missions, job functions, grievance procedures and a lack of common supervision.

The Assistant Secretary found that the professional employees of the Project Manager groups and Picatinny Arsenal constituted an appropriate unit for the purpose of exclusive recognition under the Order. In reaching this conclusion, he noted that all professional employees of the Project Manager groups and the Arsenal are subject to the same personnel policies and procedures which are administered centrally; the areas of consideration for promotions and vacancies are the same; there are similar employee job classifications with substantially the same job functions in the Project Manager groups and the Arsenal; there are many work related contacts between these employees; and the Project Managers utilize the facilities and personnel of the Arsenal in carrying out their missions.

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

Activity

and

Case No. 32-3619(RO)

LOCAL 1437, NATIONAL FEDERATION OF  
 FEDERAL EMPLOYEES

Petitioner

and

LOCAL 225, AMERICAN FEDERATION OF  
 GOVERNMENT EMPLOYEES, AFL-CIO 1/

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 James E. Kerwin. 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, Local 1437, National Federation of Federal Employees, herein called NFFE, seeks an election in a unit consisting of all professional, nonsupervisory Class Act employees, including engineering and science interns of Picatinny Arsenal and tenant activities serviced by the Picatinny Arsenal Civilian Personnel Office, including the Office of the Project Manager for Selected Ammunition, the Office of the Project Manager for Munitions Production, Base Modernization and Expansion, the Office of the Project Manager for Safeguard Munitions, the U.S. Army Health Clinic, the U.S. Army Communications Command Detachment, the U.S.

1/ The name of the Intervenor, Local 225, American Federation of Government Employees, AFL-CIO, herein called AFGE, appears as corrected at the hearing.

Army Materiel Command Surety Field Office located at Dover, New Jersey, the U.S. Army Safeguard Systems Command, Eastern Area Contract Field Office, Whippany, New Jersey, and the Picatinny Arsenal Engineering Field Office, White Sands, New Mexico.

The Activity, the Picatinny Arsenal (Arsenal), contends that the claimed unit is appropriate as such unit resembles precisely, and is coextensive with, the General Schedule, nonprofessional, unit represented by the AFGE. The AFGE contends that the claimed unit is inappropriate because of the inclusion of the professional employees of three tenant Project Manager groups which share space on the Arsenal compound. 2/ It maintains that a community of interest does not exist between these groups and Picatinny Arsenal professional employees because of an alleged lack of similarity in missions, job functions, grievance procedures and a lack of common supervision.

The mission of the Arsenal is to operate a commodity center for nuclear missions, radiological materiel, artillery and mortar ammunition, non-chemical and non-biological bombs, mines, grenades, demolition devices, explosives and explosive devices, propellants, pyrotechnics (less burning smoke-type items which are the responsibility of Edgewood Arsenal), boosters, jatoes and rocket and missile warhead sections, and related test and handling equipment. The Arsenal reports directly to the U.S. Army Armament Command (ARMCOM) and ARMCOM reports to the U.S. Army Materiel Command (AMC). Among the tenants of the Arsenal are three Project Manager groups which share space on the compound with the Arsenal.

The mission of the Project Manager for Safeguard Munitions is to manage, direct and control the development, production and deployment of safeguard munitions insuring that the effort is conducted in a timely, efficient and economical manner. This Office is under the overall direction of the Commanding General, SAFSCOM, and the Commanding General, AMC.

The mission of the Project Manager for Munitions Production, Base Modernization and Expansion is to be responsible for project management of the Munitions Production, Base Modernization and Expansion (MPBME) program in accordance with Army directives and other regulations pertinent to the MPBME program and directives of the Commanding General, AMC, Policies and Procedures. This Project Manager exercises centralized management authority over the planning, direction, control and execution of the MPBME program of all U.S. Army Ammunition Plants and Arsenals and for Government equipment located in central storage at contract-owned and operated facilities included in the MPBME program.

The Project Manager for Selected Ammunition is empowered to develop, produce and stockpile highly classified and unique munitions for use by artillery, infantry, and the Air Force in support of the Army, Air Force,

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2/ They are, as noted above, the Office of the Project Manager for Selected Ammunition; the Office of the Project Manager for Munitions Production, Base Modernization and Expansion; and the Office of the Project Manager for Safeguard Munitions.

Navy and Marine Corps and is under the overall direction of the Commanding General, AMC.

The Arsenal and two of the tenants - the Office of the Project Manager for Selected Ammunition and the Office of the Project Manager for Safeguard Munitions - report directly to the ARMCOM and ARMCOM, in turn, reports directly to the AMC. One tenant, the Office of the Project Manager for Munitions Production, Base Modernization and Expansion, reports directly to the AMC.

While the record indicates that each of the tenant Project Managers is engaged in a separate and distinct mission, it also reveals that the success of their missions is dependent upon close coordination between the Arsenal's professionals and Project Manager groups' professionals. It also reveals that there are many work-related contacts between these employees. Thus, the Project Manager groups issue work authorizations to Government activities to perform services for the Project Manager groups. In this regard, the Arsenal is one of the Government activities performing services for the Project Manager groups in the areas of research, engineering and development, and the Project Manager employees coordinate the work performed by Arsenal personnel with the work performed for the Project Manager groups at other installations. The evidence establishes that the three Project Managers have assigned between 50 to 95 percent of their research and development appropriated funds to work authorizations at the Arsenal.

The record discloses that a large percentage of the employees currently assigned to the Project Managers had previous experience at the Arsenal. Further, professionals in both the Arsenal and the Project Managers groups are skilled in similar job related disciplines, such as nuclear propulsion, explosives, and the like. While the record reveals that professional employees in the Project Manager groups do not manage or supervise professional employees at the Arsenal, professionals in the Project Manager groups are concerned with the overall operation of a particular project and their responsibility involves direct overseeing of the various projects. Work contacts occur among the professionals in the Project Manager groups and the Arsenal professionals when they meet periodically to discuss work problems, the progress of certain work, deadlines, future scheduling, etc., in connection with the coordination of work performed at the Arsenal for the Project Manager groups. The evidence indicates that all professionals, whether assigned to the Project Manager groups or to the Arsenal, share common job classifications and that employees so classified utilize similar skills and perform substantially similar duties.

All of the employees of the Project Manager groups and the Arsenal perform their duties pursuant to policies and procedures established by the U.S. Army. The Project Manager groups are all housed in Building 171 which is on Arsenal property and is among other Arsenal engineering buildings. Although Arsenal personnel are not assigned to this building, the record reveals that some Arsenal professionals are detailed to the Project Manager groups working in the building. The Arsenal Civilian Personnel Office administers personnel programs for all

of the employees, whether employed by the Arsenal or by the Project Manager groups, including matters relating to promotions, transfers, reductions-in-force, grievance procedures and incentive award programs. In this regard, although there are some variances in grievance appeal rights, the Arsenal Civilian Personnel Office administers all grievances through at least the third step, and appeals with respect to all grievances are directed to the same appellate review office. The record reveals that the area of consideration for vacancies or promotions includes the Arsenal and its tenant activities and that working conditions, with minor deviations, are the same for all personnel at the Arsenal.

Based on the foregoing circumstances, I find that the unit sought herein is appropriate for the purpose of exclusive recognition under the Order. In this regard, particular note was taken of the facts that the Project Manager groups and the Arsenal professionals are subject to the same personnel policies and procedures which are administered centrally; the areas of consideration for promotions and vacancies include the Arsenal and its tenants; there are similar job classifications with substantially the same job functions in the Arsenal and in the Project Manager groups; there are many work related contacts between employees in both groups; and the Project Managers utilize the facilities and personnel of the Arsenal in carrying out their missions.

Under these circumstances, I find that the employees in the petitioned for unit share a clear and identifiable community of interest. Further, I find that such a unit will promote effective dealings and efficiency of agency operations.

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

All professional General Schedule employees, including engineering and science interns of Picatinny Arsenal and tenant activities serviced by the Picatinny Arsenal Civilian Personnel Office, including the Office of the Project Manager for Selected Ammunition, the Office of the Project Manager for Munitions Production, Base Modernization and Expansion, the Office of the Project Manager for Safeguard Munitions, the U.S. Army Health Clinic, the U.S. Army Communications Command Detachment, the U.S. Army Materiel Command Surety Field Office, located at Dover, New Jersey, the U.S. Army Safeguard Systems Command, Eastern Area Contracts Field Office, Whippany, New Jersey, and Picatinny Arsenal Engineering Field Office, White Sands, New Mexico; excluding nonprofessional General Schedule and Wage Grade employees, firefighters, employees of the Microdata Branch, employees whose primary function is the preparation of technical drawings, including illustrators, technicians (draft), engineering draftsmen (mechanical) and

-4-

engineering draftsmen, telephone operators, temporary employees, Army Materiel Command interns, nonappropriated fund employees, employees of the Defense Property Disposal Activity, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards 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 were out ill, or on vacation, or on furlough, including those in the military who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they wish to be represented for the purpose of exclusive recognition by Local 1437, National Federation of Federal Employees; by Local 225, American Federation of Government Employees, AFL-CIO; or by neither.

Dated, Washington, D.C.  
January 16, 1975

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

3/ The unit exclusions were agreed upon by the Activity and the NFFE, and the Area Administrator approved such exclusions.

-5-

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

PENNSYLVANIA ARMY NATIONAL GUARD  
 A/SLMR No. 475

This case involved an unfair labor practice complaint filed by the Association of Civilian Technicians, Inc. (Complainant) against the Pennsylvania Army National Guard (Respondent). The complaint alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Executive Order by unilaterally implementing a Bulletin on "Maintenance of Strength Monthly Recruiting Effort," issued on January 17, 1974, concerning recruiting by unit employees, without consulting with the exclusive representative.

The Assistant Secretary concurred with the Administrative Law Judge's finding that, although the Respondent was not obligated to meet and confer with the Complainant on the issuance of the directive of January 17, 1974, regarding a change in the recruiting obligations of the unit employees, it violated Section 19(a)(6) by failing to afford the Complainant an opportunity to meet and confer on the procedures relating to the implementation of the change in recruiting policy, and on the impact of such action on adversely affected unit employees. In this regard, the Assistant Secretary found, in agreement with the Administrative Law Judge, that the terms and conditions of employment of certain of the unit employees were changed materially as a result of the Bulletin which affected substantially the recruiting responsibilities of technicians. The Assistant Secretary also concurred with the conclusion of the Administrative Law Judge that such conduct by the Respondent was in violation of Section 19(a)(1) of the Order.

Based on the foregoing circumstances, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Executive Order, and that it take certain affirmative actions consistent with his decision.

## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PENNSYLVANIA ARMY NATIONAL GUARD

Respondent

and

Case No. 20-4433(CA)

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.

Complainant

## DECISION AND ORDER

On October 18, 1974, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendation. Thereafter, the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Report and Recommendation, and the Complainant filed an answering brief to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in the subject case, including the exceptions and supporting briefs filed by both parties, and the Complainant's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

In agreement with the Administrative Law Judge, I find that the terms and conditions of employment of certain of the unit employees were changed materially as a result of the Respondent's Bulletin of January 17, 1974, which increased substantially the emphasis on the recruiting responsibility of technicians by directing that all excepted technicians cease their normal activities and devote their full time to recruiting during the first full working week of each month. Accordingly, although the Respondent was not obligated to meet and confer with the Complainant concerning its decision to effectuate this material change, in my view, it was obligated to meet and confer with regard to the procedures to be utilized to effectuate the implementation of the change in recruiting policy and with regard to the impact of such change on adversely affected employees.

## ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for

Labor-Management Relations hereby orders that the Pennsylvania Army National Guard shall:

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT implement the Bulletin on "Maintenance of Strength Monthly Recruiting Effort," issued January 17, 1974, directing a material change in the recruiting obligations of certain unit employees, without affording the Association of Civilian Technicians, Inc., or any other exclusive representative, the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such new policy, and on the impact of such new policy on adversely affected unit employees.

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

WE WILL notify the Association of Civilian Technicians, Inc., or any other exclusive representative, of intended changes with respect to recruiting policy and, upon request, afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures management will observe in effectuating such new policy, and on the impact such change in policy will have on the unit employees adversely affected by such action.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By: \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

1. Cease and desist from:

(a) Implementing its Bulletin of January 17, 1974, directing a material change in the recruiting obligations of employees represented exclusively by the Association of Civilian Technicians, Inc., or any other exclusive representative, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating its new policy set forth in the January 17, 1974, directive and on the impact such directive will have on the unit employees adversely affected by such action.

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

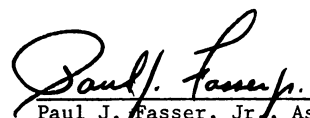
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify the Association of Civilian Technicians, Inc., or any other exclusive representative, of intended changes with respect to the recruiting obligations of unit employees and, upon request, meet and confer, to the extent consonant with law and regulations, on the procedures management will observe in effectuating such change in policy, and on the impact such change will have on unit employees adversely affected by such actions.

(b) Post at the facilities of the Pennsylvania Army National Guard, copies of the attached notice marked "Appendix" on the forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Department of Military Affairs Commanding General and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding General shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C.  
January 16, 1975

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



U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



..... :  
PENNSYLVANIA ARMY NATIONAL GUARD, :  
Respondent :  
and : CASE NO.  
ASSOCIATION OF CIVILIAN TECHNICIANS, INC., : 20-4433 (CA)  
Complainant :  
..... :

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 14120, 3535 Market Street, Philadelphia, Pennsylvania 19104.

ERRATA

The last paragraph of the Appendix (page 2) attached to the Decision in the above-captioned case relating to the Office to be contacted regarding questions concerning Notice or compliance has been corrected to show that communications should be with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, Room 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania, 19104.

*Rhea M. Burrow*  
RHEA M. BURROW  
Administrative Law Judge

DATED: October 25, 1974  
Washington, D. C.



Statement of the Case

..... :  
PENNSYLVANIA ARMY NATIONAL GUARD, :  
Respondent :  
and :  
ASSOCIATION OF CIVILIAN TECHNICIANS, INC., :  
Complainant :  
..... :

CASE NO.  
20-4433 (CA)

Appearances:

Leonard Spear, Esquire  
21st Floor, Lewis Tower Building  
Northeast Corner, 15th & Locust Streets  
Philadelphia, Pennsylvania 19102

For the Complainant

Colonel Hugh S. Niles  
Personnel Officer, Pennsylvania National Guard  
Department of Military Affairs  
Adjutant General's Office  
Annville, Pennsylvania 17003

For the Respondent

BEFORE: RHEA M. BURROW  
Administrative Law Judge

REPORT AND RECOMMENDATION

This proceeding arose upon the filing of an unfair labor practice complaint on April 23, 1974, by Thomas J. Owsinski, Chairman Pennsylvania State Council, on behalf of Association of Civilian Technicians, R.D. No. 2, Box 757-A, Pottsville, Pennsylvania 17901 (hereinafter referred to as Complainant and/or Union) against the Pennsylvania Army National Guard (hereinafter referred to as the Respondent) alleging that the Respondent engaged in certain conduct violative of Sections 19(a)(1) and (6) of Executive Order 11491 1/ (hereinafter referred to as the Order). The complaint charges that:

"The Agency implemented a policy which directly affects working condition of employees represented for collective bargaining purposes by the Association of Civilian Technicians, Inc., and have done so without having consulted with said bargaining unit."

The policy referred to was contained in a Bulletin dated January 17, 1974 from the Military Commander of the National Guard, the Adjutant General to all Unit Commanders of the Pennsylvania National Guard, (also referred to herein as PAARNG) directing all PAARNG units to conduct monthly maximum recruiting efforts. Paragraph 2(a) states:

"During the first full working week of each month all excepted technicians 2/ of PAARNG will cease

1/ The Complainant had also alleged violations of Section 19(a)(2) and (5) of the Order but these were withdrawn prior to the hearing and are not considered in this proceeding. Asst. Sec. Exhibit 1-d.

2/ Excepted service was referred to at the hearing as a Civilian member of the National Guard who works at a Guard installation. "The excepted technicians we are [Continued on next page]

their normal activities and devote their full time to recruiting."

Recruiting was of such high priority the Military Commander stated..."I can't remember what the second priority is." Enclosed with the Bulletin were administrative instructions amplying the operation and modifying the procedures in effect during Operations Plus Recruiting Campaign conducted in November 1973.

A hearing was held in the above-captioned matter on July 30, 1974 at Philadelphia, Pennsylvania. The parties through their counsel were afforded the opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues herein and to present oral argument and file briefs in support of their positions. Only the Complainant filed a timely brief for consideration of the undersigned.

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

2/ - continued

talking about are individuals who must be members of the National Guard. So they have a dual function to perform. They must perform their military duties the same as any other member of the National Guard, and then during the week they perform in an employee status those duties which are not carried out during the normal military training period due to the readiness status requirements of the National Guard at this time." Transcript hereinafter shown as Tr pp 19 and 21.

I

Basic Issue Under Sections of the Order Alleged to Have Been Violated

The basic issue presented is:

Whether the Respondent Agency violated Sections 19(a)(1) and (6) of Executive Order 11491, as amended by failure to consult with the Complainant Union about the issuance of the Directive dated January 17, 1974, Subject: Maintenance of Strength - Monthly Recruiting Report; the implementation of the directive and impact on adversely affected employees, brought about by change in employees working conditions.

Section 19(a) of the Order provides that agency management shall not -

- "(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order; . . .
- (6) refuse to consult, confer, or negotiate with a labor organization as required by this Order."

The Complainant urges in effect that the directive issued January 17, 1974 brought about a change in the employees working conditions and thus should have been discussed with the Union particularly the implementation of the directive and its impact on adversely affected employees.

Counsel for the Respondent asserted that the directive was issued to all Unit Commanders of the Pennsylvania National Guard, not to full-time employees; that Commanders are not full-time employees of the National Guard but serve strictly in a military capacity; that the concept of the operation was for technicians to devote the first full working week of each month to recruiting in line with their first duty and responsibility listed in their job description providing; Unit Technicians: "Responsible to the (military) Unit Commander for carrying out the Commander's plans for the accomplishment of unit objectives concerning recruiting programs, procedures and requirements." It was further asserted that if there was

any association between the January 17, 1974 directive and Executive Order 11491, that the Respondent Agency was within the rights recognized by Section 12(b)(1)(4) (5) and (6) of the Order. 3/

II

Background Information and Facts

It was stipulated at the hearing that the Complainant has been the exclusive representative for all civilian employees at Respondent's installations in Pennsylvania that are involved in this proceeding at all times material herein.

The record reflects that sometime about November 1973 the Respondent inaugurated a recruiting campaign known as Operation Keystone Plus and at that time met and conferred with the Complainant regarding changes in the work schedule, hours and requirements of technicians involved in the recruiting drive.

The January 17, 1974 publication was issued by the Respondent Agency without consultation with the Complainant.

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3/ Section 12 of the Order provides: "Each agreement between an agency and labor organization is subject to the following requirements -

(b) management officials of the agency retain the right in accordance with applicable laws and regulations

(1) to direct employees of the agency; . . .

(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

[Continued on next page]

The bulletin directed that all units of PAARNG conduct a maximum recruiting effort and during the first full working week of each month for all excepted technicians to cease their normal activities and devote their full time to recruiting.

Administrative instructions accompanying the directive stated that the purpose of this full scale recruiting effort was to concentrate the entire resources of PAARNG on recruiting during these periods to significantly reduce the aggregate shortage of personnel within the PAARNG and meet the quota which had been assigned to each major command. The concept of the operation was described as requiring among other things that: (a) all excepted technicians devote their maximum efforts to recruiting during the first full working week of each month; (b) for all other officers, NCOs, unit recruiters, and selected, qualified enlisted personnel to assist the technicians in this recruiting effort; and (c) the technicians were to work in a technician status during the week days and any time spent after normal duty hours and on weekdays was to be in an ET status. 4/

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3/ - continued

(6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency;"

4/ Referred to at the hearing as Equivalent Training status for which they received pay and military credit for retirement. Also, there was reference in the Administrative Instructions to "Ltr., TAGPA Subj: Army Maintenance of Unit Strength - Performance of Recruiting Duties, dtd. 12 December 1973. Authorized personnel to perform recruiting duties as a substitute for training at unit training assemblies.

At times material herein Joseph Anistranski is found to have been an Administrative Supply Technician and Union Steward at the Wilkes-Barre, Pennsylvania Army National Guard installation. He was not contacted by the Respondent regarding the recruiting operation referenced in the January 17, 1974 Bulletin; he had been consulted concerning the Operation Keystone Plus recruiting campaign in October 1973. Prior to issuance of the January 17, 1974 bulletin his work hours had been from 8:00 a.m. to 4:30 p.m. but thereafter during the first full working week in each month he drew assignments which resulted in changes in his work schedule, place, and hours. The change resulted in his sometimes beginning work at 12 o'clock noon and ending about 10:00 p.m.; he recruited with others at places designated at and away from the installation; the time spent in recruiting caused his regular administrative work to fall behind. Thomas J. Owsinski, Chairman of Complainant Union's State Council until April 1974, was not contacted by the Respondent prior to issuance of the January 17, 1974 Bulletin but had been for the Operation Keystone Plus Campaign. His work as an Optical Instrument Repairman in the Combined Maintenance Shop, Indiantown Gap was not affected by the January 1974 recruiting effort but some of the Administrative Supply Technicians who were members of the Union had complained to him of the increased burden placed upon them.

Jennings A. Hopkins was an electronic communications repairman at Respondents Indiantown Gap installation. He also served as a part time recruiter 5/ and volunteered

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5/ Referred to as being a recruiter or time other than duty hours and an cross examination he stated it was not done in connection with his work as an electronic communications repairman.

for a recruiting assignment in March 1974 but it was declined because his unit was essentially at full strength and he was told it did not warrant me going out recruiting. Thomas L. Conway is an Aircraft Mechanic work leader at Respondents' New Cumberland, Pennsylvania installation and a shop steward of Complainant union. He was not contacted regarding recruiting prior to the January 17, 1974 Bulletin and stated that he had not been required as a technician to do any recruiting during the period since January 1974. The January 1974 Bulletin had no effect on his working conditions.

At the hearing Counsel for Complainant alluded to several witnesses not having been granted Requests for Appearances by the Assistant Regional Director for Labor Management Relations. 6/

III

Conclusions

A

Respondents' Refusal to Consult,  
Confer, or Negotiate with Complainant

Under Section 11(a) of the Order there is the requirement that an agency and a labor organization, which is accorded exclusive recognition, meet at reasonable times and confer in good faith with respect to personnel policies and practices, as well as matters affecting working conditions of unit employees. This duty is expected of the parties to the extent that it is appropriate under applicable

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6/ This was not an issue certified to me for consideration nor is this the forum for an appeal from the Assistant Regional Director. The record does not reveal that any party granted an appearance has been denied rights under 29 CFR Chapter II 206.7(g).

laws and regulations, policies set forth in the Federal Personnel Manual, agency policies and regulations, a national agreement at a higher level, and the Order itself.

There are certain limitations upon the obligation of an agency to consult with a bargaining representative. Not every matter is bargainable or negotiable on the part of an employer, and even where it is so determined there may be instances where an activity has been relieved of the duty to bargain as required by the Order. In this case the Respondent does not dispute that it issued the January 17, 1974 bulletin or memorandum without notification to the Complainant. Conceding that it did not consult with the Union herein as to issuance of the January 17, 1974 bulletin, the Employer asserts that it was directed to Unit Commanders and not employees and it had been excused from doing so by the Order and its established procedures.

It is expressly provided in Section 11(b) of the Order that the obligation to meet and confer does not include matters in regard to the mission of an agency; its organization; the number of employees, and the numbers, types and grades of positions or employees assigned to a unit work project, or tour of duty; the technology of performing its work or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change. Further, management is accorded the right under Section 12(b)(1)(4)(5) and (6) of the Order to direct employees of the agency; maintain the efficiency of the Government operations entrusted to them; to determine the methods, means and personnel by which such operations are to be conducted; and, to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

It is obvious that recruiting is a most essential mission of PAARNG and its subsidiary installations. In view of its recent recruiting campaign in November 1973 and continued understrength in its units recruiting was

emphasized as the mission having the highest priority in the agency in January 1974. The emergency of the situation is not questioned. The agency policy enunciated in the January 17, 1974 Bulletin by the Military Commander of the Pennsylvania National Guard and directed to all Unit Commanders therein required that "During the first full working week of each month all excepted technicians of PAARNG will cease their normal activities and devote their full time to recruiting" falls within the reserved rights of management. Accordingly, I conclude that under Section 11(b) and (12) of the Order the Agency (PAARNG) was not obliged to consult or confer with the Union regarding its mission in carrying out the recruiting campaign announced in the Bulletin dated January 17, 1974.

B

Obligation of Respondent to Bargain With the Union Regarding Procedures to be Utilized in the Implementation of the Directive

While the employer may be absolved from the duty to consult with the Union regarding its mission in carrying out recruiting, consideration must be given to whether it is required under the Order to bargain as to the procedures to be utilized in implementing the directive by reason of changes brought about in the working conditions of employees.

Despite the retention of rights provided under Section 12 of the Order, management cannot escape an obligation to bargain with a Union as to the procedures to be followed in assigning or transferring employees. The Federal Labor Council stated in Veterans Administration Research Hospital, Chicago, Illinois 71A-31 that the reservation of decision-making and action authority is not intended to bar negotiation of procedure to the extent consonant with law and regulations.<sup>7/</sup> The Assistant Secretary

<sup>7/</sup> See Naval Public Works Center FLRC No. 71A-56.

followed and applied this principle in Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289. 8/ In the latter case reduction in force (RIF) notices had been issued by the agency without notification to the Union. While concluding that the employer was not obliged to consult on the RIF decision, it was held that consultation was mandatory as to the procedures management intended to observe in choosing which employees were to be subject to the RIF action.

In U.S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261, the Union therein was notified of the intended action by the Employer before it unilaterally acted to eliminate a working shift. In that case the failure by the Union to request, bargaining was deemed fatal to finding a violation by the agency. The respondent in the case at bar was never advised of the intended action and that one work week of each month would be devoted to recruiting necessitating realignment of work assignments, change in work hours and change in place of employment when not recruiting at the installation. 9/ There was therefore no opportunity for the Union to seek consultation as to any changes in work hours and conditions for employees assigned to the project or on what basis they would be selected for their various assignments. The Union was deprived of an opportunity to make any suggestions it may have cared to make regarding procedures necessary to implement the changes in employees working conditions wherein their first full working week of each month was to be devoted exclusively to recruiting. The Union has a responsibility to unit employees to bargain with management in this regard and if it cannot have a voice in the process its capacity to act as a bargaining representative is rendered futile and meaningless.

8/ Also See Federal Aviation Administration, National Aviation Facilities, Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329.

9/ In this connection see Complaint Exhibit No. 1 with attachments.

I conclude that the Respondent was under a duty to bargain with the Complainant with respect to procedures to be utilized and observed in implementing the January 17, 1974 directive; there were changes in work hours and conditions necessitated by an excepted employee being required to devote the first full week in each month to recruiting. Thus, the procedures of implementing a privileged decision are subject to negotiation when they affect working conditions such as changes in hours of employment and such are not protected by agency management rights under Section 12(b) of the Order.

C

Obligation of the Respondent to Consult Regarding Impact of the Directive

Section 11(b) of the Order, provides among other things, that the parties are not precluded from:

"...negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change."

The Federal Labor Council also recognized this obligation on the part of management having asserted in Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N.Y., FLRC No. 78-11 that while the agency did not have to consult on the establishment of tours of duty for employees, it would be required to bargain regarding the impact of such action on the employees involved. 10/

10/ See also Naval Public Work Center, Norfolk, Va. FLRC 71A-56.

While recognizing that management must consult as to the impact of a privileged decision, the Assistant Secretary found no violation for failure to consult where the Union had not requested that the activity meet and confer on the impact of such decision. Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, supra.

The Respondent herein never communicated with the Complainant regarding its decision to have its excepted technicians work during other than regular hours or at location other than their base installation during the full scale Recruiting Campaign initiated by Respondents January 17, 1974 Bulletin. The Complainants' officers learned of the January 1974 Recruiting Campaign after publication of the Bulletin and it had become a fait accompli. The collective bargaining representative's status had by then been impaired by Respondents unilateral action.

The factual circumstances in this case appear different than those in the Great Lakes Naval Hospital case where the president of the union, a unit employee, received a RIF notice along with other employees two months before the RIF effective date and made no request to confer on the impact of the RIF decision despite early advanced notification.

In Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329, the Assistant Secretary adopted the Administrative Law Judge's findings regarding 19(a)(1) and (6) allegations that "...the Respondent Activity improperly failed to meet and confer with the Complainant concerning procedures to be followed in selecting employees for reassignment."

The line of demarcation between the facts involved in the transfer, assignment and reassignment cases cited and those involved herein are not clearly drawn. The principles enunciated have also been applied in instances not involving employees transfer, assignment or reassignment. In New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico, A/SLMR No. 362 it was held:

"Contrary to the holding of the Administrative Law Judge, the Assistant Secretary concluded that the parties had not clearly and unequivocally excluded from bargaining the subject of personal grooming. In this connection, he noted that no provision of the negotiated agreement specifically alludes to personal grooming standards, nor was there any indication in the agreement that the phrase 'wearing of the uniform' was intended to encompass grooming standards or to incorporate the AFM regulation which deals with such standards. Further, there was no evidence of bargaining history to show that the parties had intended to waive bargaining on this subject pending the resolution of its negotiability.

"While finding that the parties by contract did not expressly waive as a negotiable item personal grooming standards, the Assistant Secretary found that such subject was, nevertheless, nonnegotiable under the circumstances of this case. In this connection, the Assistant Secretary noted that in a case involving the same parties, NFFE Local 1636 and New Mexico National Guard, FLRC No. 73A-13, the Federal Labor Relations Council (Council) held proper the determination of the agency head that a proposal concerning the wearing of the uniform was nonnegotiable under agency regulations. As personal grooming standards are also established by agency regulations and as such standards are an integral part of the standards of wearing of the uniform, the Assistant Secretary found, in accordance with the Council's rationale, that the Respondent was not obligated to meet and confer on the decision to institute a new policy with respect to the enforcement of personal grooming standards.

"However, the Assistant Secretary noted that in prior decisions it had been found that notwithstanding that a particular subject matter is nonnegotiable, agency or activity management is required under the Order to meet and confer on the procedures management intends



to use in implementing the decision involved, and on the impact of such decision on adversely affected employees. In this regard, the Assistant Secretary found that under the circumstances herein the Respondent's conduct was violative of Section 19(a) (6) of the Order, because it is clear that by its actions it did not afford the Complainant a reasonable opportunity to meet and confer to the extent consonant with law and regulations on the procedures to be utilized in effectuating the Respondent's new policy with respect to the enforcement of grooming standards, and on the impact of such policy on adversely affected employees."

While the decision to initiate the January 1974 Recruiting Campaign is considered to have been a privileged one, I am of opinion that the Respondent should have notified the Complainant of its intention and plans to implement and carry out its decision, particularly with regard to the working conditions of personnel involved, their daily working hours, their location or places of employment while recruiting, the arrangement of transportation of employees when they recruit away from the base installation and the impact on all of those who are adversely affected.

The failure and refusal by Respondent to consult with the Complainant as to the procedures to follow in implementing and carrying out its recruiting decision as well as the impact upon the employees designated to do the recruiting on a daily basis constitute a violation of Section 19(a) (6) of the Order. Further, such refusal to consult with the bargaining representative necessarily has a restraining influence upon the employees, and, also, a concomitant effect upon their right to feel free in joining and assisting labor organizations. I find that the refusal of Respondent to consult with Complainant in regard to procedures and impact of the January 17, 1974 Recruiting Campaign interfered with and restrained employees in the exercise of rights assured by the Order, and thus violated Section 19(a) (1) of the Order. 11/

11/ Federal Aviation Administration, Atlantic Airway Facility, Sector 12 Atlanta, Georgia, A/SLMR No. 287.

Recommendations

Upon the basis of the aforementioned findings, conclusions, and the entire record, I recommend that the Assistant Secretary:

(1) Dismiss the alleged violation by Respondent of Section 19(a) (1) and (6) of the Order by virtue of having issued the January 17, 1974 Recruiting directive without consulting with the Complainant Union.

(2) That in view of the conclusion that Respondent by reason of its failure and refusal to consult and confer with Complainant regarding procedures to be utilized in implementing its January 17, 1974 directive as to changed working conditions and the impact on adversely affected employees, engaged in conduct violative of Sections 19(a) (1) and (6) of the Order, the following order which is designed to effectuate the policies of Executive Order 11491, be adopted.

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 Pennsylvania Army National Guard, Department of Military Affairs, Adjutant General's Office, Annville, Pennsylvania, shall:

(1) Cease and desist from:

Unilaterally implementing its bulletin or memorandum issued January 17, 1974 concerning a recruiting directive causing change in working conditions of excepted technicians represented exclusively by Association of Civilian Technicians, Incorporated, or any other exclusive representative, without notifying the Association of

Civilian Technicians, Incorporated, or any other exclusive representative, and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating its new policy with respect to implementation of its recruiting policy contained in the January 17, 1974 bulletin and the impact such policy will have on the employees adversely affected by such action.

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

(a) Notify the Association of Civilian Technicians, Incorporated, or any other exclusive representative, of any intended change in policy with respect to change in working conditions including change in hours or place of employment, and, upon request meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating its new policy with respect to implementation of its recruiting policy and on the impact such policy will have on the employees adversely affected by such action.

(b) Post at its Army National Guard facility, at Annville, Pennsylvania, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Department of Military Affairs Commanding General and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding General shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

*Rhea M. Burrow*  
 RHEA M. BURROW  
 Administrative Law Judge

DATED: October 18, 1974  
 Washington, D.C.

## N O T I C E   T O   A L L   E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the polices of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith by changing working conditions of employees exclusively represented by Association of Civilian Technicians, Incorporated, or any other exclusive representative, without notifying Association of Civilian Technicians, Incorporated, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing the decision as to change in working conditions of excepted technicians represented by Association of Civilian Technicians, Incorporated, and on the impact the changes will have on the employees adversely affected by such action.

WE WILL notify Association of Civilian Technicians, Incorporated, or any other exclusive representative of any intended changes to be made regarding working conditions and upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to the changes in working conditions to be made and on the impact the change will have on the employees adversely affected by such action.

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

\_\_\_\_\_  
(Agency or Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is Room 3515, 1515 Broadway, New York, New York 10036.

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

DEPARTMENT OF HEALTH, EDUCATION  
 AND WELFARE,  
 REGION VIII, REGIONAL OFFICE  
 A/SLMR No. 476

This case arose as a result of two petitions for clarification of unit - one filed by the American Federation of Government Employees, Local 1802, AFL-CIO (AFGE) and the other by the Department of Health, Education and Welfare, Region VIII, Regional Office (Activity-Petitioner). The AFGE sought to include employees of the newly established Development Center of the Bureau of Hearings and Appeals in its existing exclusively recognized Regional Office unit. The Activity-Petitioner sought to clarify the composition of the same exclusively recognized unit by removing employees of the BHA Denver Field Office.

The Assistant Secretary found that the exclusion of the BHA Denver Field Office employees from the existing unit was unwarranted. He based his findings on the fact that BHA Denver Field Office employees were on the eligibility list and, in fact, voted without challenge by the Activity-Petitioner in the election which resulted in the certification of the AFGE as exclusive representative of the Regional Office unit; the Field Office employees have been considered to be part of the Regional Office unit by the Field Office employees themselves and by the Activity-Petitioner since the issuance of the certification; and there is no indication that the Field Office employees have not been fairly and effectively represented by the AFGE. Accordingly, the Assistant Secretary ordered that the Activity-Petitioner's petition be dismissed.

The Assistant Secretary further found that the employees of the Development Center share a community of interest with and are, in fact, an integral part of, the existing unit which includes the BHA Denver Field Office. He based his findings on the fact that the Development Center was established to ease the work load of the BHA Denver Field Office by handling the initial preparation of case files in the cases scheduled for hearing; the employees of the BHA Denver Field Office and the Development Center work closely together on a day to day basis and perform skills and functions that are similar in nature; the work performed by the Development Center is merely an extension of the file and case preparation functions of the BHA Denver Field Office, which previously was performed by that Office; and the employees of the Development Center share the same personnel policies and practices with the unit employees. Accordingly, the Assistant Secretary ordered that the existing exclusively recognized Regional Office unit should be clarified to include the nonprofessional employees of the BHA Development Center.

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

DEPARTMENT OF HEALTH, EDUCATION  
 AND WELFARE,  
 REGION VIII, REGIONAL OFFICE 1/

Activity

and

Case No. 61-2365(CU)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES (AFGE), LOCAL 1802, AFL-CIO

Petitioner

DEPARTMENT OF HEALTH, EDUCATION  
 AND WELFARE,  
 REGION VIII, REGIONAL OFFICE

Activity-Petitioner

and

Case No. 61-2373(CU)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES (AFGE), LOCAL 1802, AFL-CIO

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

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

Upon the entire record in these cases, including the brief filed by the Activity, the Assistant Secretary finds:

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

In Case No. 61-2365(CU), the Petitioner, American Federation of Government Employees (AFGE), Local 1802, AFL-CIO, herein called AFGE, filed a petition for clarification of unit (CU) seeking to include employees of the newly established Development Center of the Bureau of Hearings and Appeals (BHA) in its existing exclusively recognized Regional Office bargaining unit. In Case No. 61-2373(CU), the Activity-Petitioner, the Department of Health, Education and Welfare, Region VIII, Regional Office, filed a CU petition seeking to clarify the composition of the same exclusively recognized unit by excluding from such unit employees of the BHA Denver Field Office.

On January 22, 1971, the AFGE was certified in a unit consisting of all nonsupervisory employees, excluding professionals, of the Department of Health, Education and Welfare, Region VIII, now located in the Denver, Colorado, metropolitan area which, in part, includes employees assigned to the Social Security Administration Offices in the BHA. 2/

In Case No. 61-2373(CU), the Activity-Petitioner contends that employees of the BHA Denver Field Office should be excluded from the existing Regional Office unit because there is no community of interest between Field Office employees and Regional Office employees in view of the substantial variance in the functions performed by these two groups of employees. It is the contention of the Activity-Petitioner that the Field Office employees mistakenly were included in the Regional Office unit and that, in the interest of establishing effective long-range labor-management relations, this mistake should be recognized and corrective action taken.

The evidence establishes that in the election which took place in January 1971, and which led to the certification of the Regional Office Unit, the field employees of the BHA Denver Field Office were included on the eligibility list and, in fact, voted without challenge. Further, the record reveals that, since the certification, both the Activity-Petitioner and the Field Office employees have considered the latter to be part of the Regional Office unit.

Under all of the circumstances, I find that the exclusion of the BHA Denver Field Office employees from the existing unit is unwarranted. Thus, as noted above, the BHA Denver Field Office employees were on the eligibility list and, in fact, voted without challenge by the Activity-Petitioner in the election which resulted in the certification of the AFGE as exclusive representative of the Regional Office unit, and the Field Office employees have been considered to

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2/ At present, there is in effect a three year negotiated agreement which runs until February 24, 1976. At the time of the certification, the Regional Office of the BHA was located in Kansas City, Missouri. On June 24, 1974, it was moved to Denver, Colorado.

be part of the Regional Office unit since the issuance of the certification. Moreover, there is no indication that the AFGE has failed to represent the Field Office employees in a fair and effective manner. Accordingly, I find that employees of the BHA Denver Field Office continue to remain a part of the certified unit, and, therefore, I shall order that the petition in Case No. 61-2373(CU) be dismissed.

In Case No. 61-2365(CU), the AFGE seeks to add the eligible employees of the Development Center to the certified Regional Office unit, contending that the Center is an addition or accretion to the BHA Denver Field Office which, as found above, has remained part of the existing Regional Office unit. The evidence establishes that the primary mission of the BHA is to provide an avenue for administrative appeals of determinations made by the Social Security Administration. This is carried out through a network of field offices similar to the BHA Denver Field Office. Prior to the establishment of the Development Center in March 1974, the functions of the field offices were to receive, develop, hear and decide requests for hearings flowing from previous denials of Social Security benefits. The complement of the Denver Field Office, which is similar to that of all BHA Field Offices, includes Administrative Law Judges, Hearing Examiners, Professional Assistants, Secretaries and Clerk-Typists.

As a result of the enactment of new legislation which went into effect on January 1, 1974, pertaining to supplemental income, additional tasks and a substantial increase in work load were placed upon the BHA Field Offices. To help overcome the increased work load, a Development Center was established and, in this regard, the initial file preparation function was transferred from the BHA Field Offices to the Development Center. Thus, the Center's employees handle the preliminary development of case files for hearings, including the selection of exhibits and the obtaining of necessary additional data. Upon completion of this function, the case file is returned to the Field Office for further processing and hearing. The complement of the Development Center includes Hearings Analysts, Secretaries, Data Review Clerks and Clerk-Typists, some of whom transferred from the BHA and other components of the Department of Health, Education and Welfare and some of whom are new hires.

The record reveals that although the BHA Denver Field Office has no line authority over the Development Center, the employees of both offices work closely together on a day to day basis in the preparation of files for hearings and that the work performed by the employees in the Development Center closely parallels the work performed by the employees in the BHA Denver Field Office and involves the same skills. Further, the employees of the Development Center share the same personnel policies and practices with other employees in the existing unit and are in the same area of consideration for promotions as are the unit employees.

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

OFFICE OF ECONOMIC OPPORTUNITY,  
 REGION V,  
 CHICAGO, ILLINOIS  
 A/SLMR No. 477

Under the particular circumstances herein, I find that the employees of the Development Center do not have a clear and identifiable community of interest that is separate and distinct from the employees of the BHA Denver Field Office who, as found above, are part of the existing unit. Thus, the record reveals that the Development Center was established to ease the work load of the BHA Denver Field Office by handling the initial preparation of the case files in the cases scheduled for hearing. Further, as noted above, the evidence indicates that the employees of the BHA Denver Field Office and the Development Center work closely together on a day to day basis in the preparation of files for hearing, the skills and functions performed by these employees are similar in nature and that, in fact, the work performed by the Development Center is merely an extension of the file and case preparation functions of the BHA Denver Field Office which previously was performed by that Office. Based on these considerations, and noting also that the employees of the Development Center and unit employees share the same personnel policies and practices and are in the same area of consideration for promotions, I find that the employees of the Development Center share a community of interest with and are, in fact, an integral part of, the existing unit of employees of the BHA Denver Field Office. Accordingly, I shall order that the existing exclusively recognized Regional Office unit should be clarified to include the nonprofessional employees of the BHA Development Center.

## ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which American Federation of Government Employees (AFGE), Local 1802, AFL-CIO was certified on January 22, 1971, be, and herein is, clarified, by including in said unit the nonprofessional employees of the Development Center of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education and Welfare, Region VIII, Denver, Colorado.

IT IS FURTHER ORDERED that the petition in Case No. 61-2373(CU) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
 January 31, 1975

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

This case involved an unfair labor practice complaint filed by Lorelei Rockwell, an individual, and Local 2816, American Federation of Government Employees, AFL-CIO (AFGE), alleging, among other things, that the Respondent Activity violated Section 19(a)(1) and (2) of the Order by its discrimination against Rockwell, as the result of her union activities, by: (a) detailing her out of a permanent job; (b) denying her long-term training; and (c) denying her recognition as the Federal Women's Program Coordinator. Further, it was alleged that the Respondent interrogated Rockwell improperly regarding the preparation and distribution of a union leaflet. The Respondent denied that it had engaged in any discrimination against Rockwell because of her union activities. With respect to its alleged interrogation of Rockwell, the Respondent admitted such conduct, but maintained that it did so properly pursuant to the national agreement between itself and the AFGE on behalf of the National Council of OEO Locals which was entered into on March 31, 1972.

The Administrative Law Judge found that the interrogation of Rockwell concerning her possible role in the preparation and distribution of a union leaflet violated Section 19(a)(1) of the Order.

With respect to the allegation concerning the detailing of Rockwell out of a permanent job as a representative on the Federal Regional Council, the Administrative Law Judge concluded that the evidence established that this conduct by the Respondent was reasonable and consistent with the Respondent's Regional Director's responsibilities and was not motivated by Rockwell's union activities. Therefore, he found no violation of the Order in this regard. With regard to the allegation concerning the failure to choose Rockwell as Federal Women's Program Coordinator, the Administrative Law Judge concluded that such failure was based on Rockwell's union activities, as was the denial of long-term training. Accordingly, he found that the Respondent's conduct in this latter regard violated the Order.

The Assistant Secretary agreed with the Administrative Law Judge that the interrogation of Rockwell was violative of Section 19(a)(1) of the Order because, in effect, it constituted an inquiry by management into Rockwell's union activities. The Assistant Secretary also agreed with the Administrative Law Judge's finding of no violation with respect to the allegation concerning the detailing of Rockwell out of her permanent job as a representative on the Federal Regional Council.

However, contrary to the Administrative Law Judge, the Assistant Secretary found that the Respondent did not violate the Order when it failed to choose Rockwell as Federal Women's Program Coordinator and when it failed to nominate her for long-term training. In this regard, the Assistant Secretary found that there was insufficient evidence to indicate that the non-selection of Rockwell was discriminatorily motivated. With respect to the failure to select Rockwell for the Federal Women's Program Coordinator position, the Assistant Secretary noted that there was uncontradicted testimony by the EEO Advisory Committee Chairman to the effect that he was asked by the Respondent's Regional Director to recommend one of the three candidates selected, and that he did so based on his belief that the candidate chosen, who was a minority member, would represent more adequately the minority members for whose benefit the Coordinator was being appointed.

With respect to the long-term training program, the Assistant Secretary noted that, of two choices submitted, the successful candidate's qualifications were found superior to Rockwell's. He noted also that the evidence established that the Respondent's Regional Director was told that other regions probably were submitting only one name each and that, therefore, pursuant to a suggestion by his Special Assistant, he submitted only one name. The Assistant Secretary concluded that, in sum, the record reflected that the candidate chosen best qualified by a training committee was the candidate submitted by the Region, and that any evidence adduced in the instant case of animus towards Rockwell by the Respondent's Deputy Director for Administration was not sufficient to establish that the Respondent's Regional Director's selection was motivated, in whole or part, by anti-union considerations. Accordingly, the Assistant Secretary ordered the complaint dismissed insofar as it alleged violations of the Order based on the detailing of Rockwell out of her permanent job, the selection of the Federal Women's Program Coordinator, and the failure to nominate Rockwell for long-term training.

Having found that the Respondent violated Section 19(a)(1) of the Order by its improper interrogation of Rockwell, and that such conduct required the issuance of a remedial order, the Assistant Secretary issued such an order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OFFICE OF ECONOMIC OPPORTUNITY,  
REGION V,  
CHICAGO, ILLINOIS

Respondent

and

Case No. 50-8300

LORELEI ROCKWELL, AN INDIVIDUAL,  
AND LOCAL 2816, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO

Complainants

DECISION AND ORDER

On September 30, 1974, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Office of Economic Opportunity (OEO), Region V, Chicago, Illinois, herein called Respondent, had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations, and the Complainant filed an answering brief to the Respondent's exceptions.

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

The complaint in the subject case alleged that the Respondent violated Section 19(a)(1) and (2) of Executive Order 11491, as amended, based on the Respondent's discrimination against Lorelei Rockwell, as a result of her union activities, by: (a) denying her short-term training; (b) detailing her out of a permanent job; (c) denying her long-term training; and (d) denying her recognition as Federal Women's Program Coordinator. Further, it was alleged that the Respondent interrogated Rockwell improperly regarding the preparation and distribution of a union leaflet. <sup>1/</sup>

<sup>1/</sup> A 19(a)(3) allegation was dismissed previously by the Assistant Regional Director. Further, no reasonable basis was found for the allegation that the denial of short-term training violated the Order.

At the hearing, and in its exceptions, the Respondent denied that any discrimination against Rockwell occurred because of her union activities. With respect to its alleged interrogation of Rockwell, the Respondent admitted such conduct, but maintained that it did so properly pursuant to Article 15, Section 3, of the National agreement between itself and the American Federation of Government Employees (AFGE) on behalf of the National Council of OEO Locals, which was entered into on March 31, 1972.

#### BACKGROUND

At all times material herein, the Regional Director of the Chicago Regional Office of OEO was Wendell Verduin, the Deputy Director for Administration was Stanley K. Stern, and Bruce Carroll was Special Assistant to Verduin. Although the parent of AFGE Local 2816 was certified to represent employees in a nationwide OEO unit, Local 2816 has been designated to represent the OEO Chicago Regional Office employees in dealing with management. OEO Instruction 711-1, dated April 1, 1970, set forth, in paragraph 13(a), the conditions established for the use of bulletin boards and for the distribution of materials by unions. 2/

Rockwell has been employed by the Respondent since 1968 and, in July 1971, she was promoted to the GS-14 level as the Government Relations Coordinator in the Governmental and Private Sector Relations Division of the Respondent. In this capacity, she represented Region V in all matters concerning interrelated agency activities and also served as the OEO Regional representative to the Federal Regional Council, whose purpose was to coordinate and integrate grant programs and applications of various Federal agencies. Rockwell also was a charter member of the AFGE Local 2816, serving in various capacities, including union steward, secretary of the Local, and on its Executive Committee. As secretary of the Local, she recorded the minutes of Union meetings and posted them on the bulletin boards. The evidence indicates that, commencing in late 1970, the posting of the minutes of the Union meetings became a source of considerable irritation to management because the minutes contained attacks on certain management representatives. In this connection, on frequent occasions, Verduin spoke to the field representative for the AFGE, who also was chief steward, and requested that such criticism which was reflected in the minutes be toned down so that better relations might result.

2/ Under this paragraph the OEO is to furnish space for posting of notices and literature by unions, and employees who are members of unions are permitted to distribute literature outside of working hours. However, paragraph 13(a)(3)(b) of the Instruction restricts the material posted or circulated to reports of union meetings and other specified union activities, and it declares that such material may not contain attacks upon any person, group, or organization.

#### ALLEGED INTERROGATION

On February 1, 1972, by memorandum, the Respondent prohibited AFGE Local 2816 from distributing, placing or posting literature because of the previous personal attacks upon management which conduct, allegedly, was contrary to OEO Instruction 711-1. On February 23, 1972, an unsigned leaflet on Union letterhead was circulated in the Regional Office attacking the Respondent's February 1 memorandum and accusing Verduin and Carroll of hostility toward unions and minorities as well as depriving employees of free speech. On February 24, 1972, Carroll questioned Rockwell in the presence of a Union representative as to her possible involvement in the preparation of the February 23 leaflet. Rockwell advised Carroll that he should inquire of the Union as to the preparation of the leaflet, not of herself, because it bore the Union letterhead. Carroll, however, continued to interrogate Rockwell as to her possible involvement in the distribution or development of the leaflet and threatened her with discipline if she refused to answer. Under protest, she answered negatively to all of his questions. In March 1972, the right of the Union to post materials was reinstated.

The Administrative Law Judge found, and I agree, that the February 24, 1972, interrogation of Rockwell was violative of Section 19(a)(1) of the Order. Thus, I find that the Respondent's interrogation in this instance constituted an inquiry by management into Rockwell's union activities which, in my view, interfered with, restrained, or coerced her in the exercise of her right to join and assist a labor organization.

#### ALLEGED ASSIGNMENT DISCRIMINATION

A. On January 3, 1972, Stern told Rockwell that she was being reassigned from her job on the Federal Regional Council to the position of Economic Development Specialist. This assignment was classified as a detail and lasted for 90 days during which time Stern took over Rockwell's duties on the Federal Regional Council. During the 90 day period of Rockwell's assignment, a reorganization occurred and her Division was abolished, as well as her temporary assignment as an Economic Development Specialist. Rockwell then was assigned to the position of Senior Citizens Specialist. Although subsequently reassigned to the Federal Regional Council, Rockwell's new duties were not the same and did not carry the same responsibilities as before.

B. In 1968, a program was established by the Civil Service Commission (CSC) whereby each agency would select a Federal Women's Program Coordinator to help enforce the Equal Employment Opportunity (EEO) program on behalf of women. In late 1971, a vote was taken of the women employees at the Regional Office, and a majority voted to select Rockwell for Women's Program Coordinator. The two runner-ups also were AFGE members, and all three names were submitted to Verduin as candidates for the position. The chairman of the EEO Advisory Committee advised Verduin that he felt that a minority member, one of the other names submitted, should be selected. Verduin, thereafter, appointed the candidate recommended by the chairman of the EEO Advisory Committee.



C. In December 1971, an OEO Headquarters' memorandum was received by the Regional Office stating that one candidate could be submitted for a long-term training program established by the CSC in which the agency involved paid both tuition and salary. A selection committee recommended the nomination of Judith Greene and Rockwell who were applying for different programs. 3/ On January 31, 1972, Stern directed that two memoranda for Verduin be prepared, one containing the names of Greene and Rockwell and the other only the name of Greene, with Stern explaining to the Chief of the Metropolitan Branch of the Region that it was unlikely that Verduin would choose Rockwell. Thereafter, Verduin submitted only Greene's name for consideration. 4/

#### THE FINDINGS OF THE ADMINISTRATIVE LAW JUDGE

With respect to the detailing of Rockwell out of her job as OEO representative on the Federal Regional Council, the Administrative Law Judge concluded (and the Complainant did not except to this finding) that the evidence established that this conduct by the Respondent was reasonable and consistent with Verduin's responsibilities as Director and was not motivated by Rockwell's union activities. Therefore, he found no violation of the Order in this regard. Based on the evidence herein, I agree with the Administrative Law Judge's findings and conclusion as to this aspect of the complaint and, accordingly, I shall order that the complaint be dismissed in this regard.

With respect to the failure to choose Rockwell as Federal Women's Program Coordinator, the Administrative Law Judge concluded that such action was based on Rockwell's union activities, and he found also that the denial of long-term training to Rockwell similarly was motivated by discriminatory considerations. In this connection, the Administrative Law Judge concluded that there was "presumptive evidence of discrimination, as established by Complainants' testimony," and that, in the absence of any "rebuttal" by Stern and Verduin (who did not testify), he concluded that the above-noted actions by the Respondent with regard to Rockwell were discriminatorily motivated and, therefore, violated the Order. 5/

In my view, the evidence does not support the conclusion that the failure to appoint Rockwell as Federal Women's Program Coordinator and the failure to nominate Rockwell for a long-term training were violative of the Order. Thus, contrary to the Administrative Law Judge, I find insufficient evidence to indicate, even in the absence of testimony by Verduin or Stern, that the nonselection of Rockwell was discriminatorily motivated. With respect to the reasons for the denial of the Federal

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3/ The selection committee found Greene more qualified than Rockwell.

4/ Greene subsequently was not selected.

5/ The Administrative Law Judge found, in this regard, that the record "is barren as to his [Verduin's] motives in refusing to appoint her Coordinator as well as submit her application for long term training," and that, therefore, in the absence of any explanation for Verduin's actions, certain statements by Stern gave rise to a prima facie case that the rejection of Rockwell was based on her union activities.

Women's Program Coordinator position, the evidence establishes that Verduin consulted with Warren Chapman, Human Rights Officer of the Respondent and Chairman of the EEO Advisory Council, who testified, without contradiction, that Verduin had agreed that the EEO Advisory Committee could submit three names to him from which he would select one. The evidence further establishes that an election was held, that the names of the three persons with the most votes were submitted to Verduin, and that Verduin asked Chapman for a recommendation which Chapman made and which recommendation was followed. Chapman further testified that he advised Verduin of the following reasons for his recommendation of Mrs. Swingler (who was on the Executive Committee of the AFGE as official representative of employees, grades 1 through 6): she was the only black woman of the three; the vast majority of the persons in the Office for whose benefit the Coordinator was being appointed were black women in grades 1 through 6; and she, of the three, would best represent the women in the lower grades. In my judgement, this foregoing uncontradicted testimony by Chapman explains why Swingler rather than Rockwell was chosen as Federal Women's Program Coordinator. Under these circumstances, and noting also the fact that Swingler, like Rockwell, was active in the AFGE, I find that there is insufficient evidence to establish that the failure to select Rockwell was based on discriminatory considerations.

The record also reveals, with respect to the long-term training program, that the training committee established by Verduin selected Judith Greene and Rockwell as its first and second choices, respectively, based on the committee's judgement that Greene's qualifications were superior to Rockwell's. The evidence further indicates that, prior to submitting his recommendations, Verduin was told by Carroll that the other regions probably were submitting only one name each and, therefore, Carroll advised Verduin to submit only one name so as not to dilute his vote. In this regard, the original OEO Headquarters' memorandum, dated December 6, 1971, stated that each Regional Office might submit one request per year (later maximized to two submissions). Thus, in sum, the record reflects merely that the candidate selected by the training committee as best qualified was duly nominated by the Region pursuant to the committee's recommendation. Under these circumstances, in my view, any evidence adduced herein of animus toward Rockwell by Stern was not sufficient to establish that Verduin's selection for this particular program was motivated, in whole or part, by hostility towards Rockwell based on her union activities. Nor, in my judgement, did the failure to nominate Rockwell as a second candidate reflect improper motivation in view of the testimony of Carroll that he recommended such limitation in order not to vitiate the chance for the selection of a candidate of the Region. Accordingly, based on the foregoing considerations, I shall order that the complaint be dismissed insofar as it alleges violations of the Order based on the selection of the Federal Women's Program Coordinator and the failure to nominate Rockwell for long-term training.

THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative actions, as set forth below, designed to effectuate the policies of the Order. Having found that the Respondent did not engage in certain other conduct prohibited by Section 19(a)(2) of the Order, I shall order that the Section 19(a)(2) portion of the complaint be dismissed.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Office of Economic Opportunity, Region V, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Interrogating its employees as to the preparation or distribution of any leaflet, or other written material, issued or published by Local 2816, American Federation of Government Employees, AFL-CIO, or by any other labor organization.

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


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

(a) Post at its facility at the Office of Economic Opportunity, Region V, Chicago, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

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

Dated, Washington, D.C.  
January 31, 1975

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

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

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

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT interrogate our employees as to the preparation or distribution of any leaflet, or other written material, issued or published by Local 2816, American Federation of Government Employees, AFL-CIO, or by any other labor organization.

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

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, 10th floor, Federal Office Building, 230 S. Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



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 In the Matter of :  
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 OFFICE OF ECONOMIC OPPORTUNITY :  
 REGION V, CHICAGO, ILLINOIS :  
 :  
 Respondent :  
 :  
 and : CASE NO. 50-8300  
 :  
 LORELEI ROCKWELL, An Individual, :  
 and LOCAL 2816, AMERICAN FEDERATION :  
 OF GOVERNMENT EMPLOYEES, AFL-CIO :  
 :  
 Complainants :  
 .....

Bruce Carroll, Esq.  
 Assistant General Counsel  
 Office of Economic Opportunity, Region V  
 300 South Wacker Drive  
 Chicago, Illinois 60606  
 For the Respondent

Davis, Miner & Barnhill by  
 Charles Barnhill & George Galland, Esqs.  
 22 East Huron Street  
 Chicago, Illinois  
 For the Complainants

BEFORE: WILLIAM NAIMARK  
 Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

The proceeding herein arose under Executive Order 11491, as amended (herein called the Order), pursuant to

a Notice of Hearing on Complaint issued on May 29, 1974 by the Assistant Regional Director of the United States Department of Labor, Labor-Management Services Administration, Chicago Region.

Lorelei Rockwell (herein called Rockwell) and Local 2816, American Federation of Government Employees, AFL-CIO (herein called the Union), filed a complaint on July 3, 1972 against Office of Economic Opportunity, Region V, Chicago, Illinois, (herein called the Respondent). The Complaint alleged violations by Respondent of 19(a)(1), (2) and (3) of the Order. It was asserted therein that Respondent discriminated against Rockwell, as a result of her union activities, by (a) deying her short term training, (b) detailing her out of a permanent job, (c) denying her long term training, and (d) denying her recognition as Federal Women's Program Coordinator. Further, it was alleged that Respondent interrogated Rockwell unlawfully regarding a Union leaflet, and that Respondent refused to meet with the Union's representative to resolve the unfair labor practice charge.

On November 29, 1973 the Assistant Regional Director, Chicago Region, dismissed all the four allegations, supra, of discrimination against Rockwell and concluded no basis existed for any 19(a)(2) as violation. He also dismissed that portion of the complaint which alleged the unlawful refusal by Respondent to meet with Complaint Rockwell's representative regarding the charges herein. Further, the Assistant Regional Director dismissed the alleged violation of 19(a)(3) in the complaint. The alleged violation by Respondent of 19(a)(1) by interrogating Rockwell in her role in the preparation and distribution of a union leaflet was preserved for hearing.

A request for review was thereafter filed by Respondent. On April 3, 1974 the Assistant Secretary of Labor issued his decision in which he found, in agreement with the Assistant Regional Director, that (a) there was no basis for the allegation that Rockwell was denied short term training based on union activities, (b) no basis existed for finding that Respondent improperly refused to meet with Rockwell's representative, and that (c) no violation of 19(a)(3) by

Respondent has occurred. The Assistant Secretary found that a reasonable basis existed for complaint and hearing in respect to whether Rockwell was discriminated against for union activities by reason of her being (a) detailed out of a permanent job, (b) denied long term training, (c) denied recognition as the elected Federal Union's Program Coordinator. He also concluded that the issue of alleged improper interrogation of Rockwell by Respondent should be explored at the hearing herein.

A hearing was held before the undersigned on July 22 and 23, 1974 at Chicago, Illinois. Both parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Thereafter both parties filed briefs which have been duly considered.

Complainants assert that Rockwell was detailed out of a permanent job, denied long term training, and denied appointment as Federal Women's Program Coordinator - all as a result of her union activities and in violation of 19(a) (2). They seek remedial relief to the extent of requiring Respondent to promote Rockwell to a GS-15 to an available job comparable to the one had by the individual who assumed her job after she returned from the detail. Moreover, Complainants request that the alleged discriminate be afforded a long term training program, and that she be appointed Federal Women's Program Coordinator, displacing the present occupant of this position.

Respondent denies it discriminated against Rockwell by reason of any action taken which affected her employment. It contends that neither the detail of Rockwell nor the selection of other employees for the long term training program and as Federal Women's Coordinator were motivated by anti-union considerations. In respect to its interrogation of Rockwell re her participation in preparing or distributing a union leaflet, Respondent admits such conduct but maintains it did so lawfully pursuant to Article 15, Section 3 of the national agreement between OEO and American Federation of Government Employer, AFL-CIO for the National Council of EOE Locals.

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

#### Findings and Fact

1. The Office of Economic Opportunity (herein called OEO) is responsible for funding local agencies known as Community Action Agencies. Respondent's Region V is located at Chicago, Illinois, covers six midwestern states, and funds approximately 170 agencies. There are some 150 federal employees working out of this region.

2. At all time material herein Wendell Verduin was Regional Director of this region, Stanley K. Stern was its Deputy Director for Administration, and Bruce Carroll was Special Assistant to the Regional Director with special responsibility for labor-management dealings.

3. The Union herein was formed in 1968. Its parent organization was certified on April 28, 1971 as the exclusive bargaining representative in a nationwide unit of general schedule and wage grade nonsupervisory OEO employees. However, the record reveals the local, at all times material herein, represented employees in dealing with management. On March 31, 1972 Respondent and the parent labor organization, on behalf of its locals, entered into a contract providing, inter alia, that an employee may have a representative present at a conference where disciplinary action toward him is contemplated. Furthermore, the employee is required to answer questions thereat relating to his performance of duty and conduct.

4. OEO Instruction No. 711-1, dated April 1, 1970, provides in paragraph 13 a. for the use of bulletin boards and the distribution of materials by the union. Under this proviso the agency is to furnish space for the posting of notices and literature by the union, and

employees who are members of unions are permitted to distribute literature outside working hours. Paragraph 13 a. (3) (b) restricts the material posted or circulated to union meetings and other specified union activities, and it declares that such material may not contain attacks upon any person, group, or organization. In accordance therewith Respondent supplied the use of three bulletin boards to the Union - one for each of its three floors - for the posting of union material.

5. Complainant Rockwell has been employed for Respondent since 1967 where she was hired as a GS-12 field representative. In 1970 she was promoted to GS-13 as Governmental Relations Coordinator in the Governmental and Private Sector Relations Division. This division employed intergovernmental specialists, youth and older workers specialists, as well as health and manpower specialists. In that position Rockwell represented the region in all matters concerning interrelated agency activities, maintaining effective and open liaison with top-level managers administering poverty-related programs. In July, 1971 she was promoted to GS-14.

6. The Federal Regional Council was instituted in 1971 as a body composed of Regional Directors of various socio-economic agencies including OEO who undertake to make grants to communities. Its purpose is to coordinate and integrate grant programs and applications in lieu of each agency acting independently in regard thereto.

While working as Governmental Relations Coordinator Lorelei Rockwell served as regional representative to the Region V Regional Council. Director Verduin acted as Chairman of the Council and Rockwell became chairwoman of the Council's staff. While the job description called for her working part-time on said Council, Rockwell worked full time as staff representative on the Regional Council prior to her reassignment on January 3, 1972. The staff worked with governors and mayors integrating grants and coordinating planning actions, and its members carried out the Council's decisions.

7. Rockwell has been a charter member of the Union herein since 1969. She served as a union steward and was a member of its grievance committee. In November, 1970 Rockwell became secretary of Local 2816 and served on the union Executive Committee. As secretary of the local, she recorded the union meetings, posted them on the bulletin boards and circulated them to the Executive Committee as well as, on occasions, to management itself. Rockwell continued as secretary until about October, 1971 when she was succeeded by Nettie Fisher, although she recorded the minutes of several monthly union meetings until the end of that year.

8. The various minutes of union meeting and other documents posted by the union on the bulletin boards became the source of considerable displeasure to management commencing in late 1970. Respondent objected to the attacks upon Verduin, Carroll and other employer representatives. On frequent occasions Verduin spoke about it to Wayne Kennedy, who was a field representative for OEO and, during such periods, chief steward for the local as well as President of the National Council of OEO locals. Verduin remarked to Kennedy that harmonious relations with the union could not be maintained until the minutes were modified or the union ceased posting its minutes which criticized management so harshly.

9. A discussion ensued between Stern and Rockwell in late 1971 regarding the minutes posted by the Union. The Deputy Director had taken down minutes to read them, and Rockwell objected to his doing so. Whereupon Stern remarked, "you know, if you are really going to get anywhere, you are going to have to tone down the minutes. You can't report union minutes that way. You have got to tone things down." 1/

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1/ Complainant's Exhibits 2-6 are copies of union minutes posted by the Union. Contained therein are running accounts of disputes with management and statements accusing (a) Carroll of violating confidentiality in

10. By memo dated February 1, 1972 Respondent withdrew the privilege accorded the union to post and distribute union material because of the personal attacks previously made in such minutes upon management contrary to OEO Instruction 711-1. This right to so post and distribute literature was reinstated subsequently in an undated stipulation, and it was also agreed therein that the pertinent OEO Instruction 711-1 language in regard to prohibiting personal attacks would be incorporated in the National Agreement with the Union covering Respondent's employees.

11. In December, 1971 Verduin had a conversation with Rockwell in which he commented that she should be defending the Director at the union meetings. When the employee said she did not believe it was part of her job to so defend him, Verduin stated Rockwell was being irresponsible.

12. During 1971 the Union distributed widely a list of 33 charges of mismanagement by Verduin. Thereafter, in the latter part of that year, Stern called Rockwell into his office. He told her that they knew she was involved in developing the charges since they could read her handwriting and she was ruining her career. Rockwell testified without contradiction that on several occasions Stern talked to her and remarked that being involved in the union was ruining her career, and that she was ruining her chances for further promotion.

13. The Union called a press conference on December 10, 1971 at which 42 employees read a statement on the steps of the office calling for the removal of Verduin as Regional Director because of his bad management practices. Rockwell, who participated in the reading of the statement, testified that the Union believed Kennedy had been previously suspended for participation in a prior press

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1/ - continued

grievances and being anti-union, (b) Verduin of getting rid of Kennedy on trumped up charges, (c) Verduin and Stern of promising Indian leader Stewart a grant if he signed an affidavit against Rockwell and Kennedy, (d) Verduin of trying to break the Union.

conference. Thus, it was felt that management would have to take the same action against all others who attended a press conference.

14. On December 13, 1971 Carroll was called into Verduin's office. In addition to the Director there were present James 'White Eagle' Stewart, representing the Indians and several other individuals. Complaints were made by him thereat about Rockwell in that she was allegedly working with another faction of Indians (the Chosa group) and excluding Stewart's group, as a result of which the Indians were falling apart. Further, Rockwell is alleged to have suggested that Stewart's group should arrange a sit-in for Thanksgiving, and to also have advised Stewart he could get 100% funding from OEO for a grant to the Indians. Carroll further testified Verduin spoke to him later that day, or the next, and asked whether these facts, if true, would entitle the Director to discipline Rockwell and remove her from the Council. Verduin remarked, "this is the last straw," that Governor Erbe of the Regional Council and another individual had complained to him re Rockwell's activism - that "because of her outspoken words at the meeting they want me (Verduin) to get somebody else on the staff. This is the last straw." 2/

Carroll's further testimony reflects that Verduin asked him if any of the employees who read the statement on the steps of the office could be disciplined. Although Carroll said he did not think they could be disciplined, Verduin stated he could not function if Rockwell was trying to 'get his head' and 'screwing up' Indian problem.

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2/ The truth or falsity of Rockwell's actions vis a vis the Indians was never put in issue since the testimony in this regard was heresay. However, Complainant testified she did advise the Indians matching grants were not always required and she believed Verduin knew of her identity with the Chosa group.

15. Apart from her activities as a union representative, Rockwell was very active on behalf of women's rights during her employment with Respondent. She was chairwoman of a Federal Women's Program and compiled statistics showing the low ratio of women in high jobs. In addition, she assisted women in preparing EEO complaints, and testified at EEO hearings on their behalf. Management prepared statistics to refute those published by Rockwell.

16. In 1968 a program was established by the Civil Service Commission whereby each agency would select a Federal Women's Program Coordinator to help enforce the EEO program on behalf of women. The Coordinator works to recruit women for high level positions, assists in their training, and makes appropriate recommendations to management. In late 1971 an EEO Advisory Committee was established at the region to select a Coordinator for Respondent. A vote was taken of the women employees and a majority voted to select Rockwell as the Women's Program Coordinator. Runners up were, respectively, Jean Kirby and Arnie Swingler. All 3 were members of the Union herein, and their names were submitted to Verduin as candidates for the position.

Warren Chapman, Chairman of the EEOAC testified that the Director asked him for a recommendation as to which woman should be appointed; that Chapman suggested Arnie Swingler because the agency was in the midst of an affirmative action program and he felt a minority woman (Swingler is black) should be selected to further the career development plan; and, moreover, since Swingler represented grades 1 thru 6, it offered a good opportunity for a representative of the lower grades. Chapman urged these reasons to Verduin in support of his recommendation. Although he gave no basis for his decision, Verduin appointed Swingler as Federal Women's Coordinator for the region.

17. Further uncontradicted testimony by Rockwell, which I credit, reveals that she had another discussion with Verduin on December 29, 1971 in his office. The Director stated that because of her participation in the press conference he knew she was "after his head." 3/

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3/ Rockwell's denial that she ever told Verduin she was "after his head" is credited.

Verduin said he couldn't have her representing him in dealings with other Federal agencies and she could no longer continue the work she was doing for the Regional Council. Further, he remarked that if she did not like the situation at OEO she should try to find another job elsewhere. Rockwell replied that she was committed to carrying out her responsibilities as a Federal employee, and was interested in fulfilling the objectives of the OEO. She told Verduin that she was not interested in another job, but was committed to changing the system from within.

18. Several days later, on January 3, 1972, Stern told Rockwell she was being reassigned from her job to that of Economic Development Specialist. The Deputy said he had gone through her file to see what else they could do with her; that in view of her business background this new job was chosen for her. Stern explained that Rockwell would monitor a contract which EOEO had with a firm providing technical assistance to several Community Action agencies. The employee protested the reassignment but to no avail.

19. The assignment, which, as Rockwell testified, became one for 90 days, did not change her grade classification, but did involve completely new tasks. During the reassignment period Stern, who was a GS-15, took over Rockwell's job as staff representative on the Federal Regional Council, and two other employees worked for him doing the same tasks. Prior to the expiration of the 90 days a reorganization of the Region occurred and Stern was assigned full time as a Council representative. In the reorganization the Governmental and Private Sector Relations Division, of which Rockwell was a part, was abolished, and all its employees were reassigned to a unit known as Resource and Development. Rockwell's new position then was that of Senior Citizens Specialist, and the job of Economic Development Specialist - to which she had been assigned temporarily - was also abolished.

20. In the summer of 1973 Stern left Region V on another assignment and the new Regional Director, 4/

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4/ Verduin also left the region in 1973.

Hector Santa Anna, named Rita Braxton to the Council. In March 1974 the Director changed the staffing of the Council by assigning four persons to it, one of whom was Rockwell. The Council job formerly occupied by Rockwell does not exist in the same respects, and her functions do not carry with them the same singular responsibilities.

21. A long term training program for employees of the various agencies was established by the Civil Service Commission. Employees are encouraged thereunder to apply for such training, the agency paying both tuition and salary. OEO headquarters directed that each of 10 regions and 13 divisions would nominate two persons, and finally OEO would submit 6 names to Civil Service Commission as recommended nominees. <sup>5/</sup>

22. A 3-man committee was set up in Region V to select nominees for the training program. The committee selected Judith Greene and Lorelei Rockwell. Greene was the supervisor of the Ohio-Wisconsin branch, and she applied for training under the program of "Education for Public Management". Rockwell who worked for the Government longer than Greene and had more varied experience, applied for the "Fellowship in Congressional Operations" training program. On January 31, 1972 Stern told John Devine, Chief of the Metropolitan Branch of the region, to prepare 2 memos from the Director, Verduin, to OEO in Washington. One memo had the names of Rockwell and Greene as recommended nominees, while the other memo contained only Greene's name as a nominee. Stern told Devine to prepare two memos as it was unlikely Verduin would choose Rockwell and the memo with Greene's name thereon would be ready for submission. Both memos were

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<sup>5/</sup> An OEO memo from Washington, dated December 6, 1971, states that each Regional office may submit one request per year. The record reflects this was maximized to two submissions, thereafter, but it does not appear whether or not Verduin knew of the change.

given to the Director who sent to Washington the one which recommended Greene for long term training. <sup>6/</sup> The ultimate selection of candidates by Washington for long term training did not include Judy Greene despite the recommendation by Respondent's Director.

23. In February, 1972, subsequent to the memo issued by Respondent on February 1, and referred to in paragraph 10, *supra*, a leaflet on the union stationery was circulated in the office entitled "Banned In Region". This leaflet attacked the February 1 memo, and it accused Verduin and Carroll of hostility toward the Union and minorities, as well as depriving employees of free speech.

24. Respondent concluded that the distribution of the aforementioned leaflet was unlawful, and decided to ascertain who issued and distributed it. On February 24, 1972 Stern called Rockwell into his office. In the presence of Carroll she was told by Stern that she had the right to have a union representative present; that he wanted to talk to her about a leaflet which appeared on the employees' desks.

25. Rockwell was unable to locate her grievance steward. She asked Gloria Butler, present treasurer of the local and former steward thereof, to represent her at the meeting. Accordingly, both women appeared at the office and Carroll commenced to interrogate Rockwell regarding the leaflet which he said was in violation of the February 1 memo and Instruction 711. He asked her if she

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<sup>6/</sup> Verduin did not express to anyone the basis for his selecting Greene as the region's nominee for the training program. While the committee gave Greene's training program priority over Rockwell's, the record does not show this was revealed to the Director. Carroll's testimony reveals that Verduin would not have picked Rockwell as he would not have her representing him.



wrote the document, and Rockwell replied it was unfair to ask that question. Rockwell said Carroll should be inquiring of the Union as to its preparation since it bore the Union letterhead. The Deputy Director continued to query her as to whether she wrote or distributed the leaflet, or whether she knew who did so. The employee persisted in her refusal to answer, whereupon Carroll remarked he had been authorized by Verduin to investigate the source of the circular and thus he ordered her to answer his questions. Carroll told Rockwell if she did not answer, "we will take disciplinary action against you." 7/Rockwell then replied she did not write or distribute the article nor did she know who was responsible for its preparation or distribution. Carroll testified he told Verduin that Rockwell said she had nothing to do with the leaflet.

CONCLUSIONS

A. Interrogation By Respondent  
of Complainant Rockwell

In respect to its questioning of Rockwell on February 24, 1972 regarding the publication and distribution of the leaflet "Banned In Region," Respondent denies that its conduct was violative of the Order. It insists that since the leaflet attacked management in violation of Instruction 711-1, the employer was within its rights in investigating the source of the document. Further, Respondent asserts this interrogation was not designed

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7/ This version of what occurred, as testified to by Rockwell, is credited. Carroll did not specifically deny this threat. Further, he testified that he told Rockwell, by way of an analogy, that if she broke his lamp and were wearing a union hat she could still be "disciplined" for breaking the lamp.

to thwart union organization nor undertaken to pursue illegal action against any individual. It is argued that the questioning was conducted in accord with the National Agreement, and although the contract was not yet in effect, adherence to Article 15, Section 3 thereof - which governs disciplinary investigations - demonstrates Respondent's good faith in this regard.

The doctrine has become well entrenched in the private sector that, absent some legitimate purpose, such as to resolve doubts of union majority or obtain views of a union, an employer must not interrogate his employees regarding their union activities. Forest Park Ambulance 206 NLRB No. 65, William H. Block Co. 150 NLRB 341. In such instances, interrogation constitutes interference with the rights of employees to feel free in joining and assisting labor organizations. The Assistant Secretary has, in Vaudenberg Air Force Base, California, A/SILMR No. 383, concluded that likewise in the federal sector a supervisor's interrogation of employees with respect to their union affiliation was violative of Section 19(a)(1) of the Order.

In the case at bar I am not persuaded that Respondent was entitled to question Rockwell concerning the purported union leaflet even though it may have contained attacks on management contrary to Instruction 711-1. Whatever redress management sought, based on the subject matter of the leaflet, should have been directed to the union itself. Interrogating its employees re the documents authorship and distribution would, in my opinion, flout the very protection afforded such individuals in Section 1 of the Order. See Owens-Corning Fiberglass, 146 NLRB 1492. Further, I do not consider that management's investigation of alleged misconduct which may be subject to discipline warrants an encroachment on rights so afforded employees. It would render meaningless this protection if an employer were permitted, during an investigation of any infraction, to question its workers regarding union matters.

The coercive effect of the interrogation by Carroll of Rockwell on February 24, 1972 is readily apparent. Respondent's official threatened the employee with disciplinary action if she did not respond to his questions as to who wrote and distributed "Banned In Region" which appeared on the union letterhead. Since, on its face, the leaflet purported to be issued by the union herein, I conclude that interrogating Rockwell in the manner indicated in respect thereto constituted interference, restraint or coercion and was violative of 19(a) (1).

B. Alleged Discrimination  
Against Complainant Rockwell

Complainant contend that Respondent discriminated against Rockwell because of her union activities. They assert that, based on such activities, Respondent (a) detailed Rockwell out of a permanent job on January 3, 1972, (b) rejected her for the position of Federal Women's Program Coordinator, (c) denied her application for a long term training program.

Respondent insists that Verduin lost confidence and trust in Rockwell due to her outspoken behavior and Council activism. This conduct, it argues, was referable to her attempts to cause the Director's removal and her divisive tactics in dealing with the Indians. Although some of Rockwell's acts may have involved concerted activities - for which the Order offers no protection, her unionism was not the motivating factor for any action taken against her. In support of an absence of anti-union animus on its part, Respondent cites Office of Economic Opportunity, Region V, Chicago, A/SLMR No. 334 wherein the Administrative Law Judge found that Respondent's conduct in that case was not based on anti-union considerations. 8/

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8/ The Report and Recommendation of the Administrative Law Judge was adopted by the Assistant Secretary.

(1) The Detailing of Rockwell  
By Respondent on January 3, 1972

It is axiomatic that an employer, either in the private or federal sector, may not affect the employment status of its employees because of their union activities. However, the motivation behind an employer's actions toward its employees is not, as here, always easily discernible. Moreover, conflicting motives may be apparent from the record, thus making it difficult to determine whether discrimination exists under the Order.

There is ample evidence herein from which, without more, an inference could be drawn that Rockwell was detailed or assigned by Respondent to the job of Economic Development Specialist by reason of her union activities. The employer demonstrated its hostility toward Rockwell, based on her union involvement, by the following: (a) Stern's comment to Rockwell in late 1971 "if you are really going to get anywhere, you are going to have to tone down the minutes," (b) Stern's further remark to Rockwell in 1971, after the union distributed 33 charges of mismanagement by Verduin, that they knew she was involved in developing the charges, and she was ruining her career, and (c) previous statements from Stern to said employee that she was ruining her career and chances for further promotion as a result of her union adherence. 9/ If no other factors were present or the record did not disclose convincingly justifiable reasons for removing Rockwell from her duties as staff representative on the Regional Council, I would agree with Complainants that the anti-union animus inherent in the Deputy Director's

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9/ Despite their apparent infringement of 19(a) (1), no finding is made that Stern's statements were violative of the Order since they were neither alleged in the complaint nor asserted to be violative thereof.

statements indicated an illegal motive for the assignment or detail. 10/

Light is shed on the reasons for the change in Complainant's functions through the testimony of Carroll and Rockwell. Thus, Carroll testified that during the meeting he attended on December 13, 1971 with the Indian representative Stewart, Verduin received complaints re Rockwell's dealings with the Chosa group of Indians and excluding others. Stewart also mentioned thereat that Rockwell was advising the Indians that they could get complete funding from OEO. Further, the Director spoke to Carroll afterward and said that he also received complaints by Council members of Complainant's being outspoken at the Council meetings - and this was the "last straw". Carroll's testimony reveals that Verduin asked if he could discipline any of the individuals who read the statement on the steps of the office regarding his mismanagement and calling for Verduin's removal. When Carroll replied he did not believe they could be disciplined, Verduin stated he could not function if Rockwell was trying "to get his head" and "screwing up" the Indian problem. In the same vein Verduin spoke to Rockwell on December 29, 1972 just prior to her assignment. The Complainant testified that Verduin spoke to her and said he knew she was "after his head" because of her participation in the press conference on December 10; that the Director told Rockwell he couldn't have her representing him in dealings with other federal agencies, and she could not continue to do work for the Regional Council. When Verduin suggested she might prefer a job elsewhere if she did not like the situation, Rockwell stated she did not desire another job and was committed to changing the system for within.

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10/ I do not deem the finding of the Administrative Law Judge in A/SLMR No. 334, wherein he concluded Respondent had no anti-union animus, binding on my determinations. The facts herein, as well as the individuals involved, are different from the cited case.

A careful evaluation of all the evidence herein impels me to conclude that Rockwell was not detailed or assigned on January 3, 1972 because of her union adherence or activities. While the utterances by Stern regarding Rockwell's unionism may have put her advancement with OEO in jeopardy, I am not persuaded that such threats by the Deputy Director precipitated Verduin's removal of Complainant from the Council. The testimony of both Carroll and Rockwell reveal that Verduin declared he took this action because of the employee's efforts to obtain his removal as well as the difficulties she created with the Indians, and others, through her activism on the Council. At no time did Verduin refer to Rockwell's union duties or activities when he explained the basis for transferring Complainant out of her position.

It is argued that the reasons given by Verduin for his actions were, in truth, a pretext for the real motive, i.e., Rockwell's unionism. In support of this argument Complainants advert to the different reasons assigned by Verduin for his actions when speaking to Carroll and Rockwell. However, I find no inconsistency in this regard, since I believe his dissatisfaction with Complainant embraced both her actions as a representative on the Council and her efforts to obtain Verduin's removal. These reasons, although expressed separately and at different occasions, still were the basic causes given by him for the detail. Moreover, there is no supportive evidence that Rockwell's activities as recording secretary of the union were incompatible with her performing properly as a Council representative, which might have provided the Director with a distinct, albeit illegal, motive for removing Rockwell therefrom.

It is not gainsaid by Complainant that she sought Verduin's removal from office, and, in fact, she communicated to him her feelings in this regard. Thus, it would be presumptuous to expect the Director to retain, as his staff representative, an employee on the Regional Council who labored in opposition to him and sought his downfall. It is well taken that the Director is entitled to expect, at least, personal loyalty from his representative. He could not, as he remarked to Carroll, function

with his Council aide being so diametrically opposed to him. Accordingly, I am convinced Verduin's action on January 3 was, as he stated to both Carroll and Rockwell, reasonable and consistent with his position as Director, and I will not infer that it was motivated by the employee's union activities. Further, I conclude the detail or assignment by Respondent of Rockwell to the job of Economic Development Specialist was not discriminatory and did not violate 19(a)(2) of the Order.

(2) Rejection of Rockwell as Federal Women's Coordinator and (3) Denial To Rockwell of Long Term Training

Although the record reflects Verduin's reasons for detailing Rockwell away from her duties as Council representative, it is barren as to his motives in refusing to appoint her Coordinator as well as submit her application for long term training. Despite the selection by the female employees of Rockwell to be the Women's Program Coordinator, the Director appointed Arnie Swingler who was recommended by the EEOAC chairman, Warren Chapman. However, no testimony was adduced to indicate why Verduin rejected Rockwell nor the basis for his solution. In respect to the training program, the record likewise suffers from a failure to explain the Director's reasons for not submitting Rockwell's application to Washington. The committee selected both Judith Greene and Complainant as prospective trainees for different programs. Nevertheless, Verduin refused to transmit Rockwell's name. In telling Devine, Chief of Metropolitan Branch, to prepare 2 memos of recommendation for Verduin to send to Washington, - on with and one without Rockwell's name thereon - Stern stated to him that it was unlikely the Director would recommend Rockwell.

In this posture the threats by Stern that Rockwell would ruin her career, as well as prospects of promotion, by virtue of her unionism became significant in attempting to discover the cause of Respondent's rejection of Rockwell

for the Coordinator appointment and the training program. Standing alone, with no explanation for Verduin's actions, these threats give rise to a prima facie case that rejection of Rockwell was bottomed on her union activities - that Respondent accomplished its threatened frustration of Complainant's career with the agency. The Employer suggest that Verduin's actions toward Rockwell may have been in conformity with recommendations of Chapman as to selecting the Coordinator, and pursuant to the priority assigned by the committee to Greene's training program over Rockwell's. However, I am not inclined to speculate over Verduin's reasons for refusing to select Complainant in either instance. In the absence of any rebuttal 11/ of the presumptive evidence of discrimination, as established by Complainants' testimony, I am constrained to infer that Verduin's rejection of Rockwell was discriminatorily motivated. Hence, I conclude Respondent violated 19(a)(2) by refusing to appoint Rockwell as Federal Women's Coordinator; and that it violated said section of the Order by rejecting her application for a long term training program - all because of her union activism.

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11/ The failure of either Stern or Verduin to testify, with no explanation offered for such failure, warrants an inference that their testimony in these respects would have been unfavorable to Respondent.

Recommendations

Having found that Respondent has engaged in certain conduct which is violative of Sections 19(a)(1) and (2) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491. In respect to conduct alleging a discriminatory detail or assignment by Respondent of Lorelei Rockwell on January 3, 1972 in violation of 19(a)(2) of the Order, it is recommended that the complaint be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders, that Office of Economic Opportunity, Region V, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Interrogating its employees as to the preparation or distribution of any leaflet, other written material, issued or published by Local 2816, American Federation of Government Employees, AFL-CIO, or by any other labor organization.

(b) Discouraging membership in Local 2816, American Federation of Government Employees, AFL-CIO, or any other labor organization, by refusing to select, appoint, or recommend any employees, for a position or an office, or for a long term training program, or in any other manner discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

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


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

(a) Offer to Lorelei Rockwell immediate appointment or designation as the Federal Women's Program Coordinator for Region V without prejudice to all the rights and privileges attached to said position.

(b) If, or when, a long term training program is in effect for OEO and its regional offices, recommend Lorelei Rockwell for long term training to the Fellowship in Congressional Operations program, or to a substantially equivalent program.

(c) Post at its facility at Office of Economic Opportunity, Region V, Chicago, Illinois, 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 Regional Director, Office of Economic Opportunity, Region V, Chicago, Illinois, 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 Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing, within ten (10) days from the date of this order as to what steps have been taken to comply herewith.

  
WILLIAM NAIMARK  
Administrative Law Judge

DATED: September 30, 1974  
Washington, D. C.

NOTICE TO ALL EMPLOYEES

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.

PURSUANT TO

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director, for Labor-Management Services, U.S. Department of Labor, whose address is 300 S. Wacker Drive, Chicago, Illinois, 60606.

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interrogate our employees as to the preparation or distribution of any leaflet, or other written material, issued or published by Local 2816, American Federation of Government Employees, AFL-CIO, or by any other labor organization.

WE WILL NOT discourage membership in Local 2816, American Federation of Government Employees, AFL-CIO, or any other labor organization, by refusing or failing to select, appoint, designate, or recommend employees for any position or office, or for a long term training program, or in any other manner discriminating against employees in regard to hire or tenure of employment or any other term or condition of employment.

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

\_\_\_\_\_  
Agency or Activity

DATED \_\_\_\_\_ By \_\_\_\_\_  
Title

January 31, 1975

A/SLMR No. 478

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

MILITARY DISTRICT OF WASHINGTON,  
COMMISSARY DIVISION OFFICE,  
CAMERON STATION  
A/SLMR No. 478

This case involved a petition for clarification of unit (CU) filed by the Activity seeking clarification of the status of one employee, an Administrative Service Assistant, GS-7, located in the Administrative Branch of the Activity's Commissary Office. The Activity took the position that the incumbent was a supervisor and, therefore, should be excluded from the unit. The exclusive representative, the National Federation of Federal Employees, Local 1622 (NFFE), contended that the incumbent was not a supervisor within the meaning of Section 2(c) of Executive Order 11491, as amended.

The Assistant Secretary concluded that the incumbent was not a supervisor within the meaning of Section 2(c) of the Order. Thus, he found, among other things, that the incumbent did not hire, transfer, suspend, promote, discharge, or adjust grievances, nor effectively recommend any such action; any direction given to the three employees with whom she works was routine in nature not requiring the use of independent judgement; and such performance evaluations as she may be required to make were routine in nature, did not require the use of independent judgement and were not shown to be effective.

Accordingly, the Assistant Secretary clarified the exclusively recognized unit by including within the unit the position of Administrative Service Assistant, GS-7.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

MILITARY DISTRICT OF WASHINGTON,  
COMMISSARY DIVISION OFFICE,  
CAMERON STATION

Activity-Petitioner

and

Case No. 22-5366(CU)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1622

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 Howard King. 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 Activity-Petitioner filed a petition for clarification of an existing unit of all General Schedule employees of the Military District of Washington, Commissary Division Office, Cameron Station, for which the National Federation of Federal Employees, Local 1622, herein called NFFE, is the exclusively recognized representative. Specifically, the Activity-Petitioner seeks to clarify the status of an employee in the job classification of Administrative Service Assistant, GS-7, who it contends should be excluded from the unit on the basis that such employee is a supervisor within the meaning of Section 2(c) of the Order. On the other hand, the NFFE asserts that the employee in question is not a supervisor within the meaning of Section 2(c) of the Order and, therefore, should be included in the unit. In addition, the NFFE alleges that the Activity should be estopped from raising the issue herein because the incumbent employee's name appeared on an eligibility list in the recent election in which the NFFE was certified as the exclusive

representative and the Activity failed to challenge her when she appeared at the polls to cast her vote. 1/

The record reveals that the position of Administrative Service Assistant, GS-7, is located in the Administrative Branch of the Commissary Office and that the employee occupying this position has held the position for over three years. The incumbent employee has certain responsibilities with respect to central mail control, central publications control, personnel liaison, records and forms control, and the preparation of various administrative reports involving such matters as manpower cost, performance, civilian strength, and overtime. Although the incumbent employee's job description reads that she would direct three to four employees in accomplishing these responsibilities, the record reflects that, except for a brief period when the job description was first drafted, the incumbent has worked directly with only one employee whose classification is Administrative Service Clerk. In addition to the above-noted responsibilities, the record reveals that the incumbent recently has had added certain responsibilities with respect to two key punch operators also located in the Administrative Branch of the Commissary Office.

While the incumbent receives general supervision from the Chief of the Administrative Branch, the evidence establishes that the Chief of the Commissary Division, who has authority over the Chief of the Administrative Branch, on occasion, makes assignments directly to the incumbent or to the Administrative Service Clerk. Moreover, the record reflects that the Branch Chief, who is located in the incumbent's office, also makes assignments, on occasion, directly to the Administrative Service Clerk and to the keypunch operators and that the incumbent does not attend supervisory staff meetings with the Division and Branch Chiefs.

The evidence establishes that the assignment of duties to the Administrative Service Clerk by the incumbent are routine as both the incumbent and the Clerk know their work and perform their functions with little job related communication. In this connection, the record testimony reflects also that the incumbent spends at least ninety percent of her time performing her own work as opposed to assigning work to or checking the work of the Administrative Service Clerk. With respect to the assignment of work to the two keypunch operators, the record reveals that work flows to them automatically and that the incumbent may only check on them once a week, even though they are in the next room.

While the incumbent may interview job applicants, the evidence establishes that she does not have authority to hire, transfer, suspend, promote, or discharge employees, or effectively to recommend such action. With respect to the granting of rewards or the taking of disciplinary action, there was no evidence presented to establish that the incumbent ever exercised any authority in this regard or effectively recommended such action. Further, although the incumbent may be involved in the

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1/ In view of the disposition herein, I find it unnecessary to pass upon the question of estoppel raised by the NFFE.

resolution of problems relating to the Administrative Service Clerk and the two keypunch operators and can approve leave for these employees, with the concurrence of her supervisor, the record does not establish that she can effectively resolve or recommend the adjustment of employee grievances, or that her granting of leave is of such a nature as to require the use of independent judgement, or is exercised under other than well established guidelines.

While the incumbent has prepared an employee appraisal form with respect to Administrative Service Clerk on at least four occasions, and it is indicated that she may perform a similar function in the future for the two keypunch operators, the record reveals that the form involved requires little discretion as only one of three boxes (outstanding, satisfactory, or unsatisfactory) is to be checked off and that the incumbent has never checked other than the satisfactory box for the Administrative Service Clerk. Moreover, the record reflects that the Administrative Service Clerk was told by the incumbent that the form should have been marked outstanding at the time of her last appraisal, but that an outstanding appraisal would never go through the front office. Further, the incumbent's supervisor indicated that he does not consider the appraisal to reflect discretion and there is no evidence that any such appraisals prepared by the incumbent would be effective for promotion or other purposes.

Based on the foregoing circumstances, I find that the evidence is insufficient to establish that the Administrative Service Assistant, GS-7, is a supervisor within the meaning of Section 2(c) of the Order. Thus, with respect to the three employees with whom the incumbent works, she does not hire, transfer, suspend, promote, discharge, or adjust grievances, nor does she effectively recommend any such action, and such direction and assignment of duties as the incumbent does provide these employees is routine in nature not requiring the use of independent judgement. Moreover, such performance evaluations as she may be required to make are routine in nature, do not require the use of independent judgement and are not shown to be effective, and such leave as she approves is done with the concurrence of her supervisor and is not shown to be outside well established guidelines or the result of the exercise of independent judgement. Thus, in sum, I find that the evidence is insufficient to establish that the authority vested in the Administrative Service Assistant, GS-7, is other than routine or clerical in nature and requires the exercise of independent judgement. Accordingly, I find that the Administrative Service Assistant, GS-7, 2/ is not a supervisor within the meaning of 2(c) of the Order, and that the employee in this classification should be included within the unit.

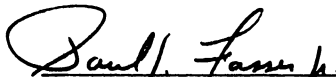
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2/ Although the Activity's petition indicates that it contended also that the incumbent was engaged in Federal personnel work in other than a purely clerical capacity, the Activity did not advance this contention at the hearing or in its post-hearing brief. Under the circumstances, therefore, I find that the evidence is insufficient to establish that the incumbent is engaged in Federal personnel work in other than a purely clerical capacity.



IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which certification as the exclusive representative was granted to the National Federation of Federal Employees, Local 1622, on or about January 25, 1974, for all employees of the Military District of Washington, Commissary Division Office, Cameron Station, be, and it hereby is, clarified by including in said unit the position of Administrative Service Assistant, GS-7.

Dated, Washington, D.C.  
January 31, 1975

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

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

U. S. DEPARTMENT OF AGRICULTURE,  
AGRICULTURAL RESEARCH SERVICE,  
EASTERN REGIONAL RESEARCH CENTER (ERRC),  
PHILADELPHIA, PENNSYLVANIA  
A/SLMR No. 479

This case involves a petition for clarification of unit filed by the American Federation of Government Employees, Local 1331, AFL-CIO, seeking to clarify its existing unit to reflect a change in the designation of the Activity, and to clarify the status of certain employees designated as Project Leaders and of certain named non-Project Leaders, including a Millwright, a Stockhandler, and a Physical Science Administrator. In disagreement with the Petitioner who contended that none of the above were supervisors or management officials, the Activity contends that the Physical Science Administrator, who is Assistant to the Director of the Activity, is a management official, and that the other employees involved are supervisors as they responsibly direct the work of others and evaluate their performance.

The Assistant Secretary found that the employees designated as Project Leaders are supervisors within the meaning of Section 2(c) of the Order. He noted that under the terms of the parties' current negotiated agreement, Project Leaders participate in the first step of the grievance procedure and possess the authority to adjust grievances at that level. In this regard, the Assistant Secretary noted that prior decisions have held that individuals possessing such authority are supervisors within the meaning of the Order. Cf. Department of the Navy, United States Naval Weapons Center, China Lake, California, A/SLMR No. 297, FLRC No. 72A-11, and Department of the Navy, Mare Island Shipyard, Vallejo, California, A/SLMR No. 298, FLRC No. 72A-12.

The Assistant Secretary found that the employees named as non-Project Leaders do not possess the indicia of supervisory authority set forth in Section 2(c) of the Order. In this regard, the Assistant Secretary noted that although the non-Project Leaders are responsible for scientific research in certain scientific areas and have employees or student employees assigned to them, they are under the direction of a Research Leader or a Project Leader, they function merely as team leaders, and they have a senior to junior employee relationship with those employees assigned to them. Further, he noted that although some of the non-Project Leaders have evaluated the performance of employees assigned to them, there was no evidence indicating that the evaluations were effective or required the use of independent judgment.

The Assistant Secretary found that the Millwright and the Stockhandler are work leaders rather than supervisors. With regard to the Millwright, the Assistant Secretary noted that he and the employees assigned to him work as a crew and although the Millwright assigns the crew tasks to be performed on a day-to-day basis, he does not perform any supervisory functions requiring the use of independent judgment. The Assistant Secretary noted that the Stockhandler and the employees assigned to him work as a crew under the supervision of the Activity's Purchasing Agent, and that their work is of a routine nature.

With respect to the Physical Science Administrator, who is Assistant to the Director, the Assistant Secretary noted that he establishes and maintains contact with industrial, farm commodity and consumer organizations to encourage the interchange of scientific knowledge and prepares reports on the results of industrial studies for the Director and his staff for overall planning and direction of research programs. Under the circumstances, the Assistant Secretary found that the Physical Science Administrator is not a management official within the meaning of the Order but, rather, is an employee rendering resource information or recommendations with respect to existing policies.

Accordingly, the Assistant Secretary ordered that the unit be clarified to reflect the requested change in the designation of the Activity, that the named non-Project Leaders, the Millwright, Stockhandler and Physical Science Administrator be included within the unit, and that the named Project Leaders be excluded from the unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF AGRICULTURE,  
AGRICULTURAL RESEARCH SERVICE,  
EASTERN REGIONAL RESEARCH CENTER (ERRC),  
PHILADELPHIA, PENNSYLVANIA

Activity

and

Case No. 20-4432(CU)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1331, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

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

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

The Petitioner, American Federation of Government Employees, Local 1331, AFL-CIO, herein called AFGE, the exclusive representative of employees of the Eastern Regional Research Center (ERRC), 1/ seeks by the instant petition for clarification of unit to clarify the existing exclusively recognized unit to reflect the change in administrative designation resulting from a reorganization. In this regard, the parties stipulated that the unit description should read:

All professional and nonprofessional employees  
of the Eastern Regional Research Center,  
Agricultural Research Service, U.S. Department

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1/ On November 24, 1964, the AFGE was granted exclusive recognition for all employees of the Eastern Utilization Research and Development Division (EURD), Agricultural Research Service (ARS). The record reveals that as a result of subsequent reorganization within the ARS, the EURD was designated as the ERRC.

of Agriculture, excluding management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, and confidential employees. 2/

The parties also stipulated that, by its petition herein, the AFGE seeks to clarify the status of certain employees designated as Project Leaders, certain named non-Project Leader employees classified as Research Chemist, Chemist, Mathematician, Research Physicist, Chemical Engineer, and certain named employees classified as Millwright, Stockhandler, and Physical Science Administrator. In this connection, the Activity contends that the Physical Science Administrator, who is Assistant to the Director of the Activity, is a management official, and that the other employees involved are supervisors within the meaning of Section 2(c) of the Order as they responsibly direct the work of others and evaluate their performance. The AFGE, on the other hand, contends, in essence, that the Physical Science Administrator is not a management official and that the other disputed employees are not supervisors but, rather, are team leaders who are responsible merely for the completion of research assignments and for providing technical assistance to those employees who are assigned to them.

The Activity, headed by a Director, is one of the major research centers of the ARS and is one of five of such Activities responsible to the Northeastern Regional Deputy Administrator. It has approximately 335 employees and its mission essentially is scientific research in agricultural production, marketing, utilization of agricultural products, nutrition and other phases of consumer research. The Activity's research mission is performed in seven laboratories, 3/ and involves the initiation, termination, expansion and contraction of research projects. Also included within the Activity are supportive services furnished by the Offices of the Director, Administrative Management, and Plant Management. The record reveals that each of the Activity's seven laboratories is headed by a Laboratory Chief who reports to the Director and that Laboratory Chiefs have

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2/ The unit inclusions and exclusions appear as amended at the hearing. It was noted that the parties' stipulation did not specifically exclude guards. As there is no evidence as to whether guards are employed at the Activity and, if so, whether they were included within the recognized unit, I will neither include nor exclude guards with respect to the unit sought to be clarified.

3/ Dairy Products; Physical Chemistry; Plant Products; Animal Fat Products; Engineering and Development; Hides and Leather; and Meat.

overall responsibility for the employees in their respective laboratories. Under the Laboratory Chiefs there are Research Leaders 4/ and Project Leaders. 5/

The record reveals that a Project Leader is in charge of a research problem and is responsible for completing the project and submitting a final report to his Research Leader. The evidence establishes that under the terms of the parties' current negotiated agreement a Project Leader is the first level in the administration of the grievance procedure. 6/

Under the circumstances of this case, I find that the designated Project Leaders listed in footnote 5 above are supervisors within the meaning of Section 2(c) of the Order. In prior decisions it has been held that if the evidence is sufficient to establish that the individuals involved possess the authority to adjust grievances, such individuals should be considered as supervisors within the meaning of the Order, irrespective of whether the step of the grievance procedure involved is characterized as an informal stage and irrespective of whether the decision at such step is appealed and reversed. 7/ The evidence herein indicates that under the

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4/ The titles of Laboratory Chief and Research Leader are official working titles for employees classified as Supervisory Research Chemist or Supervisory Research Chemical Engineer, as may be appropriate. The designated working title of Project Leader is an informal one that has been used over the years by the Activity.

5/ The Activity's designated Project Leaders are: (a) Research Chemists H. Susi, O. Parks, A. Tansma, R. Townend, E. Talley, J. Fox, V. Holsinger, E. Heisler, W. Happick, D. Bailey, S. Mozersky, R. Benedict, E. Harris, L. Lakritz, J. Pettinati; (b) Research Chemical Engineers J. Sullivan, M. Komanowsky, E. Schoppet, E. Stolle; (c) Chemical Engineer M. Kozempel; and (d) Microbiologist A. Everett.

6/ The current negotiated agreement, executed by the parties on October 30, 1973, and approved on December 6, 1973, has a term of two years. Article XIX, Section 5 of the agreement designates to the Project Leader the authority to adjust grievances at the first step of the negotiated grievance procedure.

7/ See Department of the Navy, United States Naval Weapons Center, China Lake, California, A/SLMR No. 297, FLRC No. 72A-11, and Department of the Navy, Mare Island Shipyard, Vallejo, California, A/SLMR No. 298, FLRC No. 72A-12.

terms of the parties' negotiated agreement the designated Project Leaders participate in the first step of the grievance procedure and possess the authority to adjust grievances at that level. Under these circumstances, I find that the employees designated as Project Leaders are supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit.

The record reveals that those non-Project Leader employees listed below 8/ are responsible for scientific research in certain scientific areas under the direction of a Research Leader or a Project Leader. In the normal work situation, an employee or employees with expertise within the scope of a particular research problem, or student employees, are assigned to these non-Project Leader employees who act as their leader. When the leader of the group receives an assignment; the problem is discussed within the group to determine the objectives and the direction of the project, and the group members present their views to the Research Leader or Project Leader before a decision is made. During the progress of its research, the group operates informally with its members assisting and consulting with each other, or with others outside the project. The group leader reports the group's normal operations and accomplishments to the Research Leader or Project Leader. If there is a technical disagreement within the group, the opinion or advice of its Research Leader or Project Leader is sought. In this regard, the record indicates that a group leader does not have the authority to change the overall goals of a research problem. Although the record reveals that some of the non-Project Leaders have evaluated the performance of employees assigned to them, there was no evidence to indicate that such evaluations were effective or required the use of independent judgment. 9/

Based on the foregoing, I find that the non-Project Leaders listed in footnote 8 above do not possess the indicia of supervisory authority set forth in Section 2(c) of the Order and, therefore, are not supervisors within the meaning of the Order. In my view, the evidence herein indicates that the non-Project Leaders function merely as team leaders and that their relationship with the employees assigned to them is one of a senior employee

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8/ The non-Project Leader employees in question include:(a) Research Chemists R. Peterson, M. Thompson, M. Groves, E. Bingham, R. Greenberg, R. Barford, R. Carroll, F. Luddy, E. Kalan, J. Weil, T. Foglia, H. Kenney, L. Scroggins, E. Jordan, E. Saggese, F. Smith, W. Pfeffer, A. Bilyk, W. Noble, M. Happich; (b) Chemist T. Pensabene; (c) Mathematician V. Metzger; (d) Research Physicist C. Dooley; and (e) Chemical Engineer C. Panzer.

9/ Although the record also reveals that some of the research group leaders have evaluated the performance of student employees assigned to them, these evaluations were utilized solely for the purpose of grading the student employees for scholastic purposes and were not related to their employment.

to a junior employee. In this regard, it was noted that each team is restricted effectively to conducting research in a particular scientific area, and various aspects of the research are assigned to members of the team, including the team leader. Thus, the evidence overall does not establish that the team leader responsibly directs the activities of his team members or performs any other supervisory functions with respect to such team members which require the use of independent judgment. Accordingly, I find that the above-listed non-Project Leaders should be included within the unit.

#### Millwright and Stockhandler

The record reveals that Lawrence J. Keohane, Millwright GS-11, is under the supervision of the head of the Design and Development Section, Chemical Engineering Division, Engineering and Development Laboratory, and that he has one Millwright, one Maintenance worker, and a student employee assigned to him. As a crew, these employees install and maintain chemical process equipment and Keohane assigns the crew the particular tasks they are to perform on a day-to-day basis, works with them, and gives routine technical guidance as needed. The evidence establishes that Keohane normally is ordered to carry out a particular assignment by his supervisor and that, in case of difficulty, he consults with his supervisor. Keohane testified that while he had been a supervisor from 1964 to 1971 he has not held such title since 1971 and has not been informed that he is a supervisor.

The evidence establishes, in essence, that Keohane currently does not perform any supervisory functions requiring the use of independent judgment. Under these circumstances, I find that he is merely a work leader and is not a supervisor within the meaning of Section 2(c) of the Order. Accordingly, he should be included within the unit.

Samuel F. Staton, Stockhandler, GS-5, is under the supervision of the Activity's Purchasing Agent. He has a Stockhandler WG-4 and a part-time summer employee working with him. Their work consists of receiving, storing and distributing supplies, and the evidence establishes that, for the most part, the work performed is routine. Staton testified that he does not exercise any supervisory authority over the employees working with him but, rather, they work together as a team and that he has never been informed that he is a supervisor. Under these circumstances, I find that Staton is merely a work leader and is not a supervisor within the meaning of the Order. Accordingly, he should be included within the unit.

#### Physical Science Administrator

Robert L. Miller, the Physical Science Administrator, who is the Assistant to the Director for Industrial Development, testified that his duties essentially are of a public relations nature in that he promotes the policies and research development which have been accomplished by the

Activity. The evidence establishes that his responsibilities require that he establish and maintain contacts with industry and industrial organizations, farm commodity and consumer organizations, and others, regarding industrial and development programs in order to encourage the interchange of scientific and technical knowledge. In this regard, he prepares reports on the results of industrial development studies for the Director and the Activity's staff for the overall planning and direction of research programs and attends meetings conducted by the Director of the Activity on general policy matters relating to improvements or changes in the Activity's operations. The record reveals that Physical Science Administrator Miller has no employees under his supervision.

Based on the evidence herein, I find that Physical Science Administrator Miller is not a management official within the meaning of the Order. Thus, he does not participate in the formulation or determination of Activity policy. Rather, the evidence establishes that his various functions are in the nature of an employee rendering resource information or recommendations with respect to existing policy. <sup>10/</sup> Under these circumstances, I find that Physical Science Administrator Miller is not a management official. Further, as the record reveals that Miller has no subordinate employees, I find that he is not a supervisor within the meaning of the Order. Accordingly, Physical Science Administrator Miller should be included within the unit.

ORDER

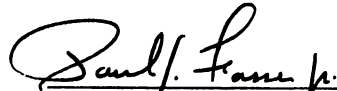
IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the American Federation of Government Employees, Local 1331, AFL-CIO, on November 24, 1964, be, and it hereby is, clarified to read as follows:

All professional and nonprofessional employees of the Eastern Regional Research Center, Agricultural Research Service, U.S. Department of Agriculture, excluding confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

<sup>10/</sup> Cf. United States Department of Health, Education and Welfare, Regional Office VI, A/SLMR No. 266 and Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

IT IS FURTHER ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the American Federation of Government Employees, Local 1331, AFL-CIO, on November 24, 1964, be, and it hereby is, clarified by including in the above-designated unit those employees listed in footnote 8 as non-Project Leaders, Millwright Keohane, Stockhandler Staton and Physical Science Administrator Miller, and by excluding those employees with the designation of Project Leader listed in footnote 5.

Dated, Washington, D.C.  
January 31, 1975

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

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,  
DEPARTMENT OF THE AIR FORCE,  
AIR FORCE RESERVE,  
928th TACTICAL AIRLIFT GROUP (AFRES)  
CHICAGO, ILLINOIS  
A/SLMR No. 480

DEPARTMENT OF DEFENSE,  
DEPARTMENT OF THE AIR FORCE,  
AIR FORCE RESERVE,  
928th TACTICAL AIRLIFT GROUP (AFRES)  
CHICAGO, ILLINOIS 1/

Activity

and

Case No. 50-11113(RO)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 739 2/

Petitioner

DECISION AND ORDER

The Petitioner, National Federation of Federal Employees, Local 739 (NFFE), sought to represent a unit of all General Schedule (GS) and Wage System (WS) employees, including professionals, of the Base Civil Engineering Division of the 928th Tactical Airlift Group, excluding all custodians, firefighters, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors and guards as defined in Executive Order 11491, as amended. The Activity contended that the proposed unit was inappropriate. It asserted that the Civil Engineering Division employees should be part of a broader activity-wide unit and that the claimed unit would be detrimental to effective dealings and efficiency of agency operations.

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

The Civil Engineering Division is one of several divisions of the Activity at the O'Hare International Airport Reserve Facility. It provides a support function to the reserve facility and employs approximately 100 employees.

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

The Assistant Secretary concluded that the claimed unit was not appropriate for the purpose of exclusive recognition under the Order. In this connection, it was noted that certain employees of the Activity, other than those in the claimed unit, have the same job classification as certain of the claimed employees and that all employees of the Activity are covered by the same personnel policies and practices. Moreover, the Assistant Secretary found that a number of employee transfers, details and temporary assignments have occurred involving employees in the unit sought and other Activity employees. Under these circumstances, the Assistant Secretary concluded that the claimed employees do not possess a clear and identifiable community of interest and that to separate such employees from other Activity employees with whom they share a community of interest would effectuate an artificial division among the employees resulting in a fragmented unit which would not promote effective dealings or efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

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

2. The Petitioner, National Federation of Federal Employees, Local 739, herein called NFFE, seeks an election in a unit of all General Schedule (GS) and Wage System (WS) employees, including professionals, of the Base Civil Engineering Division of the 928th Tactical Airlift Group, excluding all custodians, firefighters, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in Executive Order 11491, as amended.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.

The Activity contends that the proposed unit is inappropriate. In this regard, it asserts that the Civil Engineering Division employees should be part of a broader activity-wide unit, and that the claimed unit would be detrimental to effective dealings and efficiency of agency operations.

The 928th Tactical Airlift Group has two significant missions. One mission is to provide dual unit training in tactical aircraft and to achieve a combat-ready capability to provide tactical airlift support for airborne forces, equipment, supplies and aero-medical evacuation within a theater of operation. Of equal importance is its mission to function as a host unit and to operate and maintain the Air Force Complex at O'Hare International Airport in order to provide a facility for the training of Air Force and Air National Guard Reservists in the Chicago, Illinois, area. In addition, it represents the Air Force in the Chicago area and provides logistical support to on and off base tenants.

The record reveals that the Activity is located on the Chicago O'Hare International Airport Reserve Facility and employs approximately 300 employees. It includes several divisions among which are: Security, Transportation, Satellite Supply, Public Information, Flying Safety, Consolidated Base Personnel, Training, Logistics, Aircraft Maintenance, Civilian Personnel, and Civil Engineering. <sup>4/</sup> The record indicates that there are approximately 100 employees in the Civil Engineering Division which provides a support function to the facility. Specifically, it has the responsibility for maintaining the grounds, for providing utilities for host organizations and tenants, and for the building program. Its functions include maintenance, repairs, minor construction, and major construction involving new buildings. The Division has employees in the following classifications: Secretary, Clerical Assistant, Clerk-Typist, Engineering Draftsman, Construction and Maintenance Inspector, Repair and Maintenance Estimator, Production Controller, Realty Specialist, Accounts Maintenance Clerk, Engineering Equipment Operator, Maintenance Mechanic, Motor Vehicle Operator, Laborer, Carpenter, Painter, Plumber, Sheet Metal Mechanic, Electrician, Electrician (High Voltage), Pipefitter, Boiler Plant Operator, Air Conditioning Equipment Mechanic, Boiler Fireman, Fuels Distribution System Mechanic, Programs Planning Technician, and Welder.

The evidence establishes that certain of the above classifications - i.e., Secretary, Motor Vehicle Operator and Painter - also are found at the Activity in positions occupied outside of the proposed unit. Moreover, The record reveals that all of the Activity's employees, including those in the claimed unit, are serviced by the same personnel office and that personnel policies with regard to merit promotions, reductions in force, leave, and appeal and grievance procedures apply to all of the Activity's employees, including those in the Civil Engineering Division. Further, the evidence

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<sup>4/</sup> Exclusive recognition has been granted in three units at the Activity. The International Association of Firefighters represents a unit of firefighters; the International Federation of Federal Police represents a unit of guards; and the NFFE represents a unit of custodial employees.

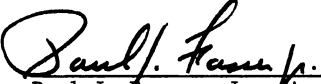
indicates that in the past two years there have been a number of transfers and details between employees of the Civil Engineering Division and employees of other divisions of the Activity. <sup>5/</sup>

Based on the foregoing, I find that the claimed unit is not appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. Thus, as noted above, the record reflects that certain employees of the Activity, other than those in the claimed unit, have the same job classification as certain of the claimed employees, and that all employees of the Activity are covered by the same personnel policies and practices. Moreover, there is evidence that a number of employee transfers, details and temporary assignments have occurred involving employees in the unit sought and other Activity employees. Under these circumstances, I find that the claimed employees do not possess a clear and identifiable community of interest and that to separate such employees from other Activity employees with whom they share a community of interest would effectuate an artificial division among the employees resulting in a fragmented unit which would not promote effective dealings or efficiency of agency operations. Accordingly, I shall order that the NFFE's petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 50-11113(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
January 31, 1975

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

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<sup>5/</sup> With regard to transfers during this period, it appears that seven employees were reassigned from the Civil Engineering Division to other divisions of the Activity and that approximately eight employees were reassigned from other divisions to the Civil Engineering Division. Further, during this period, the record indicates that a number of details and temporary assignments have occurred involving employees of the Civil Engineering Division and other divisions of the Activity.

January 31, 1975

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

U.S. DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,  
NATIONAL AVIATION FACILITIES EXPERIMENTAL CENTER,  
ATLANTIC CITY, NEW JERSEY  
A/SLMR No. 481

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The three cases involved in this proceeding arose subsequent to a reorganization at the National Aviation Facilities Experimental Center (Activity) and affected the exclusively recognized units of guards and firefighters.

By its petition for amendment of recognition, the Activity sought to amend the name of the organizational location of the guard unit to reflect a change precipitated by the reorganization and to amend the terminology used to describe the covered employees. The exclusive representative, the American Federation of Government Employees, AFL-CIO, Local 2335 (AFGE) agreed with the proposed change in the organizational location of the unit and to that portion of the proposed amendment which sought to describe the covered employees as "General Schedule Police"; however, the AFGE objected to the inclusion of the term "Uniformed" in the proposed amendment as unnecessary.

The Assistant Secretary concluded that the Activity's reorganization affected neither the unit's composition or size, nor did it affect the functions or the immediate supervision of the covered employees and, consistent with the parties' agreement, he amended the prior recognition to conform to the existing circumstances resulting from the change in the designation of the exclusively recognized unit's organizational location. In addition, he concluded that the designation of General Schedule Uniformed Police was consistent with the parties' intention as to the scope of the unit when exclusive recognition was accorded, and he amended the recognition accordingly.

By a petition for clarification of unit, the AFGE sought to clarify the guard unit at the Activity to include all sergeants (Supervisory Policeman, GS-5). The Activity maintained that the sergeants were supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit. The record disclosed that the employees in the disputed job classification, Supervisory Policeman, GS-5, had two distinct organizational titles, i.e., shift and desk sergeant, with an accompanying divergence in their respective duties. The Assistant Secretary found that employees bearing the organizational title of shift sergeant within the classification of Supervisory Policeman, GS-5, were supervisors within the meaning of the Order and, therefore, should be

excluded from the unit, but that the desk sergeant did not possess the indicia of supervisory authority as set forth in Section 2(c) of the Order. Accordingly, he ordered that the unit be clarified consistent with these findings.

In the third case, the Activity sought to amend the designation of the organizational location of the unit of firefighters named in the exclusive recognition and to add the designation "General Schedule" to the organizational title used to describe the covered employees. The AFGE agreed with the proposed changes in the designation of both the organizational location and the terminology used to describe the covered employees. As the record reflected that the reorganization had no effect on either the composition or the size of the unit, and that all of the employees in the exclusively recognized unit were, in fact, in the General Schedule series and continued to perform the same functions under the same immediate supervision, the Assistant Secretary amended the exclusive recognition to conform to the existing circumstances.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,  
NATIONAL AVIATION FACILITIES  
EXPERIMENTAL CENTER,  
ATLANTIC CITY, NEW JERSEY

Activity-Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 2335 1/

Labor Organization-Petitioner

Case Nos. 32-3073(AC),  
32-3129(CU),  
32-3074(AC), and  
32-3130(CU)

DECISION AND ORDER AMENDING RECOGNITION AND CLARIFYING UNITS

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Charles L. Smith. 2/ 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 Activity-Petitioner, the Assistant Secretary finds:

The three cases involved in this proceeding affect solely the exclusively recognized units of guards and firefighters at the Activity. As a result of a March 1972, reorganization, the Activity seeks amendments of

1/ During the hearing, the Labor Organization-Petitioner withdrew its petition in Case No. 32-3130(CU) and the withdrawal subsequently was approved by the Assistant Regional Director. Accordingly, I make no findings with respect to the job classification sought to be included in the unit by the petition in Case No. 32-3130(CU).

2/ The subject petitions were consolidated for hearing along with a number of other petitions filed by the parties to this proceeding, as well as by the National Federation of Federal Employees, Local 1340. The petitions in the subject cases subsequently were severed from the consolidated hearing with the approval of the Assistant Regional Director.

recognition in Case Nos. 32-3073(AC) and 3074(AC) to reflect the redesignation of the organizational location of the two exclusively recognized units involved herein, as well as a change in the terminology used to describe the organizational title of the employees in these units. By its petition for clarification of unit in Case No. 32-3129(CU), the American Federation of Government Employees, AFL-CIO, Local 2335, hereinafter called AFGE, seeks to clarify the existing exclusively recognized unit of guards by including all sergeants in the unit.

1. Case No. 32-3073(AC)

In this case, the Activity seeks to amend the designation of the organizational location of the guard unit as set forth in the exclusive recognition and to change the terminology used to describe the organizational title of the employees in the unit. The exclusive recognition involved herein was granted on April 29, 1966, designating the AFGE as the exclusive representative in the following unit:

All non-supervisory Security Guard Personnel,  
Security Guard Section, Compliance and Security Branch, Compliance and Evaluation Staff, NAPEC, Atlantic City, N.J.

By its petition in this case, the Activity proposes that the recognition be amended as follows:

All non-supervisory General Schedule Uniformed Police located in the Air Transportation Security Staff, excluding all other non-supervisory personnel employed at NAPEC, Professionals, Supervisors, Management Officials and personnel engaged in Federal Personnel work in other than a purely clerical capacity.

The parties agree on the appropriateness of the proposed change in the name of the organizational location of the unit in question and to that portion of the proposed amendment which seeks to describe the covered employees as "General Schedule Police"; however, the AFGE objects to the inclusion of the term "Uniformed" as unnecessary in that all of the covered employees allegedly are readily identifiable with the term "Police".

The record reveals that since the date of exclusive recognition, the employees in question have been represented continuously by the AFGE. With respect to the designation of the employees' organizational location, the evidence discloses that the March 1972, reorganization had no effect on either the composition or the size of the unit other than the change in the unit's organizational location within the Activity. 3/ Remaining in the

3/ It was noted in this connection that all of the employees in the unit presently are located in the Internal Security Branch of the Air Transportation Security Staff.

same physical location, the employees in the unit continue to perform the same functions under the same immediate supervision as they did prior to the reorganization. Accordingly, consistent with the parties' agreement, I shall order that the prior recognition be amended to conform to the existing circumstances resulting from the change in the designation of the exclusively recognized unit's organizational location precipitated by the reorganization.

With regard to the Activity's proposed amendment to change the terminology with respect to the organizational title of the employees in the exclusively recognized unit, the record reveals that the official position description of the covered employees classifies them as General Schedule "Policeman". In addition, the evidence discloses that all of the employees in the exclusively recognized unit traditionally have worn uniforms and have continued to do so subsequent to the reorganization. Under these circumstances, I find the designation of General Schedule Uniformed Police to be consistent with the parties' intention with respect to the scope of the unit when exclusive recognition was granted. I, therefore, shall order that the exclusive recognition be amended to conform to the Activity's proposed correction in the terminology of the covered employees' organizational title.

## 2. Case No. 32-3129(CU)

By its petition in this case, the AFGE seeks to clarify the unit described in Case No. 32-3073(AC) above, to include all sergeants (Supervisory Policeman, GS-5). The Activity maintains that the sergeants are supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit.

Within the Air Transportation Security Staff, the record discloses that there are ten employees classified as Policemen and seven employees classified as Supervisory Policemen. In addition, the Air Transportation Security Staff employs a Security Officer, a Security Specialist, a Personnel Security Specialist, a Security Assistant, and a secretary to the Security Officer. <sup>4/</sup>

The four employees in the disputed job classification, Supervisory Policeman, GS-5, have two distinct organizational titles, i.e., shift and desk sergeant, with an accompanying divergence in their respective duties. All of the incumbents report directly to the lieutenants, who are classified as Supervisory Policeman, GS-6. With respect to the shift sergeants, the record reveals that they each are responsible for scheduling, assigning and directing the work of three policemen on one of the three shifts. In addition to having the authority to approve emergency leave and to authorize overtime, the shift sergeants prepare the annual performance evaluation for each policeman on their shift.

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<sup>4/</sup> According to the record, these classifications never have been included, nor are they sought to be included, in the existing unit.

To assist them in the execution of this evaluation function, as well as to aid in the performance of their overall responsibilities, the record discloses that the Activity has sent each shift sergeant to formal supervisory and managerial training programs. The record indicates also that the shift sergeants have the authority to discipline the policemen on their shift, including the authority to give written reprimands, and that they attend staff meetings which are attended solely by supervisors and management officials.

As the record reflects that the shift sergeants possess responsible authority to direct other employees, schedule and assign work and leave, effectively evaluate the performance of others, and make recommendations for discipline up to and including written reprimands, and as they have received supervisory training in order to perform these functions more effectively, I find that employees bearing the organizational title of shift sergeant within the classification of Supervisory Policeman, GS-5, are supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit.

With respect to the second organizational title within the disputed job classification, the record reveals that the desk sergeant works a regular eight-hour day, five days a week, and primarily is assigned the task of handling the office workload, controlling the issuance of keys, handling complaints, and processing visitors. Also, he attends the staff meetings noted above. The evidence discloses further that while the desk sergeant takes over infrequently in the event that the shift sergeant is absent and fills in for the shift sergeants on one or two weekends a month, he does not have any policemen permanently assigned to him during his shift. In addition, the desk sergeant does not participate in the evaluation of the nonsupervisory policemen, does not possess the authority to recommend promotions, nor does he regularly make job assignments to, or direct the work of, these policemen. Although the desk sergeant has the authority to give verbal and written reprimands to the policemen, the evidence establishes that the desk sergeant has given only verbal reprimands limited to telling the policeman in question to "knock it off". While the desk sergeant has been scheduled to attend supervisory and managerial training programs, the record discloses that he has never, in fact, received such training.

Under these circumstances, I find that the desk sergeant does not possess the indicia of supervisory authority as set forth in Section 2(c) of the Order. Thus, the desk sergeant spends the major portion of his time handling office paperwork and the record reveals that while he fills in for the shift sergeants, this occurs only on an intermittent and sporadic basis. Moreover, the record reflects that the desk sergeant neither evaluates nor effectively makes recommendations concerning the performance of the nonsupervisory policemen, and that he has never received any supervisory or managerial training. Accordingly, I find that the employees bearing the organizational title of desk sergeant within the

classification of Supervisory Policeman, GS-5, are not supervisors within the meaning of the Order and, therefore, should be included in the unit. 5/

3. Case No. 32-3074(AC)

By its petition in this case, the Activity seeks to amend the designation of the organizational location of the firefighter unit as set forth in the exclusive recognition and to add the designation "General Schedule" to the organizational title used to describe the employees in the unit. The exclusive recognition involved herein was granted on May 2, 1966, designating the AFGE as the exclusive representative in the following unit:

All non-supervisory Firefighters, Fire/Crash Rescue Section, Plant Services Branch, Plant Facilities Division, NAFEC, Atlantic City, N.J.

By its petition in this case, the Activity proposes that the recognition be amended as follows:

All non-supervisory General Schedule Firefighters, Operations Staff, Aviation Facilities Division, NAFEC, Atlantic City, N.J., excluding all other non-supervisory personnel employed at NAFEC, Professionals, Guards, Supervisors, Managerial Officials, and persons engaged in Federal Personnel work in other than a purely clerical capacity.

The parties agree on the proposed changes in the designation of both the organizational location of the unit in question and the designation of General Schedule to describe the covered employees. The record reveals that the negotiated agreement between the parties, effective September 1, 1972, for a period of two years, describes the organizational location of the unit as the Fire/Crash Rescue Branch, Air Transportation Security Staff, and describes the covered employees as all nonsupervisory firefighters. The evidence discloses further that in October 1972, the firefighters were reassigned to the Operations Staff, Aviation Facilities Division, and that such reassignment, as a part of the March 1972, reorganization of the Activity, had no effect on either the composition or the size of the unit. The record

5/ It was noted in this connection that the Activity's brief in the instant case indicated that the individual who previously performed the desk sergeant's duties has retired and that no individual currently is designated as the desk sergeant. It further was indicated that the Activity contemplates the hiring of a clerical employee to perform the "administrative function previously performed by the Desk Sergeant."

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reflects further that the nonsupervisory employees in the unit, all of whom, in fact, are General Schedule employees, continue to perform the same functions under the same immediate supervision as they did prior to the reorganization and the subsequent reassignment. Accordingly, consistent with the parties' agreement, I shall order that the prior recognition be amended to conform to the existing circumstances resulting from the change in the designation of the exclusively recognized unit's organizational location precipitated by the reorganization and reassignment, as well as to conform to the parties' desire to amend the terminology describing the covered employees to reflect that all employees in the unit are in the General Schedule series.

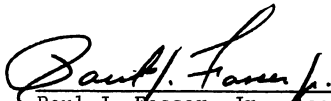
ORDER

IT IS HEREBY ORDERED that the recognition accorded the American Federation of Government Employees, AFL-CIO, Local 2335, on April 29, 1966, at the National Aviation Facilities Experimental Center, be, and it hereby is, amended by substituting therein as the designation of the unit's organizational location, "Air Transportation Security Staff", and by substituting the following terminology to describe the covered employees, "General Schedule Uniformed Police."

IT IS FURTHER ORDERED that the unit sought to be clarified herein, in which the American Federation of Government Employees, AFL-CIO, Local 2335, was granted exclusive recognition on April 29, 1966, at the National Aviation Facilities Experimental Center, be, and it hereby is, clarified by including in said unit the position of Desk Sergeant, Supervisory Policeman, GS-5, and by excluding from said unit the position of Shift Sergeant, Supervisory Policeman, GS-5.

IT IS FURTHER ORDERED that the recognition accorded the American Federation of Government Employees, AFL-CIO, Local 2335, on May 2, 1966, at the National Aviation Facilities Experimental Center, be, and it hereby is, amended by substituting therein as the designation of the unit's organizational location, "Operations Staff, Aviation Facilities Division," and by substituting the following terminology to describe the covered employees, "General Schedule Firefighters."

Dated, Washington, D.C.  
January 31, 1975

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

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January 31, 1975

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

U.S. DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,  
NATIONAL AVIATION FACILITIES EXPERIMENTAL CENTER,  
ATLANTIC CITY, NEW JERSEY  
A/SLMR No. 482

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In this case, the National Aviation Facilities Experimental Center (Activity) filed an RA petition seeking a determination with respect to the effect of a reorganization on the continued appropriateness of some 14 of the 17 exclusively recognized units in existence at the Activity. In addition, the Activity filed certain individual RA petitions covering some of these same units. In its overall RA petition, the Activity took an alternative position wherein it requested that the Assistant Secretary look at each of the recognized or certified units at the Activity and requested that any or all of these units be found inappropriate based upon the reorganization's effect upon their scope and character. In this connection, the Activity maintained that a Center-wide unit of all eligible employees was now the only appropriate unit and requested that the Assistant Secretary direct an election to determine whether the American Federation of Government Employees, AFL-CIO, Local 2335 (AFGE); the National Federation of Federal Employees, Local 1340 (NFFE); or the National Association of Government Employees, Local R2-43 (NAGE) represented the employees in such a Center-wide unit.

In addition, the NFFE sought, by petitions for amendments of certification or recognition in three cases, to amend certain prior recognitions to reflect the redesignation of the organizational locations of three of its exclusively recognized units.

Pursuant to the Activity's alternative position in its overall RA petition, the Assistant Secretary examined the reorganization's effect upon each of the 17 exclusively recognized units and found that, in the circumstances of this case, a Center-wide election was not warranted. With respect to some of the individual recognized units, he found that they were no longer in existence as a result of the reorganization and that the Activity was under no obligation to continue to recognize the exclusive representative involved. Noting that the evidence did not establish that employees of units no longer in existence as a result of the major reorganization had become so integrated with other employees of the Activity so as to create a new organizational entity and an appropriate unit which would warrant an election pursuant to an RA petition, the Assistant Secretary ordered that each of the Activity's RA petitions be dismissed.

While the Assistant Secretary found that the scope and character of other individual recognized units had not been affected by the reorganization in question, he noted that there had been some changes in the

designation of their organizational locations and, in those instances where petitions for amendment of certification or recognition had been filed properly, he amended the prior recognitions in order to reflect such changes.

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## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES, LOCAL 1340

Petitioner

U.S. DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,  
NATIONAL AVIATION FACILITIES EXPERIMENTAL CENTER,  
ATLANTIC CITY, NEW JERSEY

Activity-Petitioner 1/

and

Case Nos. 32-3128(RA),  
32-3160(RA),  
32-3166(CU),  
32-3232(RA),  
32-3248(RA),  
32-3254(RA), and  
32-3548(RA)AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 2335

Intervenor

and

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R2-43

Intervenor

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1340

Intervenor

U.S. DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,  
NATIONAL AVIATION FACILITIES EXPERIMENTAL CENTER,  
ATLANTIC CITY, NEW JERSEY

Activity

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1/ During the hearing, the U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, hereinafter called the Activity-Petitioner or the Center, withdrew its petition in Case No. 32-3166(CU) and the withdrawal subsequently was approved by the Assistant Regional Director. Accordingly, I make no findings with respect to the unit sought to be clarified by the petition in Case No. 32-3166(CU).

## DECISION AND ORDER AMENDING RECOGNITION

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Charles L. Smith. 2/ The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, including the briefs of the Activity-Petitioner and the AFGE 3/, the Assistant Secretary finds:

In Case No. 32-3548(RA), the Activity-Petitioner filed an RA petition seeking a determination by the Assistant Secretary with respect to the effect of a major reorganization on the continued appropriateness of some 14 of the 17 existing exclusively recognized units at the Center. The Activity-Petitioner also filed certain individual RA petitions

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2/ Along with the subject petitions, certain other petitions in Case Nos. 32-3073(AC), 32-3129(CU), 32-3074(AC), and 32-3130(CU), filed by the American Federation of Government Employees, AFL-CIO, Local 2335, hereinafter called AFGE, also were consolidated for hearing. These other petitions subsequently were severed from the consolidated hearing with the approval of the Assistant Regional Director and have been considered separately by the Assistant Secretary. See U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 481.

3/ In its brief, the Activity-Petitioner requested that the brief submitted by the National Federation of Federal Employees, Local 1340, hereinafter called NFFE, not be considered by the Assistant Secretary as the NFFE had failed to serve its brief simultaneously on all parties in violation of Section 202.14 of the Assistant Secretary's Regulations. The record reflects that on July 9, 1974, the NFFE notified the Assistant Regional Director, in writing, that it opposed the Activity-Petitioner's request for an extension of time in which to file its brief and that it would not serve the Activity with a copy of its own brief, already sent to the Assistant Secretary, until informed of the Assistant Regional Director's action. There is no record that at any time subsequent the NFFE served the Activity with a copy of its brief, even after the Assistant Regional Director granted the extension of time requested by the Activity-Petitioner and advised the NFFE of this action. Accordingly, I have not considered the NFFE's brief in reaching the decision herein.

covering some of these same units. 4/ In its overall RA petition, the Activity-Petitioner took an alternative position wherein it requested that the Assistant Secretary consider each of the recognized or certified units and contended that any or all of the units at the Center be found inappropriate based upon the reorganization's effect on their scope and character. According to the Activity-Petitioner's petition in Case No. 32-3548(RA), the only appropriate unit would be one which included, "All non-supervisory General Schedule and Wage Grade, Professional and non-Professional employees of the FAA, National Aviation Facilities Experimental Center, excluding all other employees of the FAA, Supervisors, Managers, confidential employees, Guards, and persons engaged in Federal Personnel work in other than a purely clerical capacity; also, employees covered by contract bar (Wage Grade employees employed in Aircraft Section, Aircraft Maintenance Branch, and Fire-fighters, Operations Staff, Aviation Facilities Division, NAFEC)." In this connection, the Activity-Petitioner requested that an election be ordered to determine whether the AFGE, the NFFE, or the NAGE, represented the employees in the Center-wide unit contended to be appropriate.

By its petitions in Case Nos. 32-2903(AC), 32-2904(AC), and 32-2905(AC), the NFFE sought amendments of certification or recognition to reflect the redesignation of the organizational locations of three of its exclusively recognized units.

#### BACKGROUND

The Center's mission is to operate and administer a national test facility which is responsible for research, development, and implementation of Federal Aviation Administration programs and to conduct tests and evaluation projects relating to aviation concepts, procedures, hardware, and systems.

4/ In Case No. 32-3128(RA), the Activity-Petitioner contested initially the continued majority status of the NFFE, the exclusive representative. However, during the hearing in this matter, the Activity-Petitioner amended its petition in Case No. 32-3128(RA) to delete any reference to its doubt as to the NFFE's continued majority status and stated that the sole basis for such petition was its doubt as to the continued appropriateness of the unit in question. In addition, during the hearing, the NFFE, joined by the AFGE, moved to dismiss the Activity-Petitioner's petition in Case No. 32-3548(RA), and the National Association of Government Employees, Local R2-43, hereinafter called NAGE, moved to dismiss each of the Activity-Petitioner's individual RA petitions on the grounds that all of such petitions failed to meet the requirements of Section 202.2(b) of the Assistant Secretary's Regulations. In this regard, they contended that the RA petitions contained no reference or explanation of reasons in support of a good faith doubt as to the continued majority status of each of the exclusive representatives and, hence, that such petitions were invalid. In view of the disposition herein, I find it unnecessary to pass upon these motions.

In March 1972, the Center reorganized its operations in order to accomplish its mission more effectively and efficiently. While the Center's organizational elements, i.e., staff offices, staff support divisions, line divisions, branches, sections and units, remained similar to those which existed prior to the reorganization, a realignment of certain functions resulted in the elimination of some divisions, the creation of new divisions, and certain internal changes in other divisions. However, the Center's overall mission remained unchanged in the face of the reorganization.

Of approximately 1,170 Center employees eligible to be represented by labor organizations, some 830 are covered by exclusive recognition in 17 individual units. Exclusive recognition has been granted at a Center-wide level to the NFFE for a unit (set forth in 3.a. of this decision) of certain technicians and specialists, and at the division, branch or section level for the remaining 16 units. While certain of the existing exclusively recognized units have been covered by negotiated agreements in the past, only three units are covered currently by separate negotiated agreements, i.e., in units covering guards, firefighters, and Wage Board Mechanics in the Aircraft Maintenance Branch, Aviation Facilities Division.

#### EFFECT OF REORGANIZATION

Pursuant to the Activity-Petitioner's alternative position in its overall RA petition, I have examined the reorganization's effect upon each of the 17 exclusively recognized units including those units covered by a negotiated agreement 5/ and, as discussed below, I find that, in the circumstances of this case, a Center-wide election in a single overall unit is not warranted or appropriate. With respect to certain of the individual units, I find that the reorganization resulted, in effect, in their disappearance as recognizable appropriate units. As to certain other individual units, I find that the scope and character of such units was not materially affected by the reorganization, although there have been some changes in the designation of their organizational locations.

Upon examination of the record in these cases, I make the following findings with respect to each of the exclusively recognized units:

##### 1. AFGE Local 2335 Units

a) On April 29, 1966, the AFGE was granted exclusive recognition in a unit of "All non-supervisory Security Guard personnel permanently assigned in the Security Guard Section, Compliance and Security Branch, Compliance and Evaluation Staff, NAFEC, Atlantic City, New Jersey."

With respect to the designation of the employees' organizational location, the record reveals that the March 1972, reorganization had no

5/ The units covered by negotiated agreements and not included initially in the Activity's overall petition in Case No. 32-3548(RA) are discussed herein in parts 1.a., 1.b., and 3.c. of this decision.

effect on either the composition or the size of the unit other than a change in the unit's organizational location within the Center. In this connection, all of the employees in the unit presently are located in the Internal Security Branch of the Air Transportation Security Staff. Remaining in the same physical location, the employees in the unit continue to perform the same functions under the same immediate supervision as they did prior to the reorganization. The record discloses, further, that the employees in this unit currently are covered by a negotiated agreement with a duration of two years, effective January 31, 1974. 6/

Under these circumstances, and noting particularly that the March 1972, reorganization's sole impact on this unit was to change the designation of its organizational location, I find that such unit remains viable and appropriate for the purpose of exclusive recognition. 7/

b) On May 2, 1966, exclusive recognition was granted to the AFGE as the exclusive representative in the following unit: "All non-supervisory fire fighters permanently assigned to the Fire/Crash Rescue Section, Plant Facilities Division, NAFEC, Atlantic City, New Jersey."

The record reveals that a negotiated agreement between the parties, effective September 1, 1972, for a period of two years, describes the organizational location of this unit as the Fire/Crash Rescue Branch, Air Transportation Security Staff. The evidence discloses further that in October 1972, the firefighters were reassigned to the Operations Staff, Aviation Facilities Division, and that such reassignment, as a part of the March 1972, reorganization of the Activity, had no effect on either the composition or the size of the unit. The record reflects, further, that the nonsupervisory employees in the unit continue to perform the same functions under the same immediate supervision as prior to the reorganization and the subsequent reassignment.

Under these circumstances, and noting particularly that the March 1972, reorganization's sole impact on this unit was to change the designation of its organizational location, I find that such unit remains viable and appropriate for the purpose of exclusive recognition. 8/

c) On December 24, 1968, the AFGE was granted exclusive recognition in a unit of "All non-supervisory wage grade employees in the

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6/ When an RA petition raises the issue whether the exclusively recognized unit(s) remain appropriate because of a substantial change in the unit(s)' character and composition, negotiated agreements do not necessarily constitute bars to such a petition when a substantial change has, in fact, been found to have taken place. Cf. Idaho Panhandle National Forests, United States Department of Agriculture, A/SLMR No. 394.

7/ See A/SLMR No. 481 cited in footnote 2 above, which involved, in part, the same unit.

8/ See footnote 2 above.

Plant Facilities Division, NAFEC, Atlantic City, New Jersey." The record discloses that as a result of the March 1972, reorganization, the Plant Facilities Division was redesignated the Plant Services Branch, and was transferred intact to the Supporting Services Division. Further, while certain functions were added, 9/ employees previously in the exclusively recognized unit continue also to perform the same functions in the same essential locations under the identical immediate and second level supervision as was the case prior to the reorganization.

Under these circumstances, and noting particularly that the March 1972, reorganization's primary impact on this unit was to change the designation of its organizational location, I find that such unit remains identifiable, viable, and appropriate for the purpose of exclusive recognition.

d) On May 20, 1971, the AFGE was certified as the exclusive representative for a unit of "All General Schedule (GS) non-supervisory employees in the Quality Control Branch, Aviation Facilities Division, NAFEC, FAA, Atlantic City, New Jersey."

As a result of the March 1972, reorganization, the Quality Control Branch was redesignated the Quality Control Section, but remained within the Aviation Facilities Division. The record reveals that the covered employees continue to perform essentially the same tasks in the same location and under the identical immediate supervision as they did prior to the reorganization.

Under these circumstances, and noting particularly that the March 1972, reorganization's primary impact upon this unit was to redesignate its organizational location, I find that such unit remains identifiable, viable and appropriate for the purpose of exclusive recognition.

e) On June 18, 1971, the AFGE was certified as the exclusive representative for a unit of "All General Schedule and Wage Grade employees in the Administrative Services Division excluding all employees in the Communication Services Branch, all professionals, guards, firefighters, supervisors and/or managerial employees and personnel employees other than those engaged in purely clerical work as defined in Section 10, Executive Order 11491." The Activity filed an individual RA petition [Case No. 32-3248(RA)] with respect to this unit wherein it sought a determination with respect to the effect of the March 1972, reorganization on its continued appropriateness. In this regard, the Activity contended that the unit was no longer appropriate.

The record discloses that as a result of the March 1972, reorganization, the Administrative Services Division has been abolished, and that the employees previously included within the unit have been assigned to existing organizational entities. Thus, the evidence reveals that approximately 12 General Schedule employees from the unit are now located in the Management Systems Division, while some 10 Wage

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9/ See, in this regard, part 3.g. below.

Grade and 6 General Schedule employees from the unit are now located in the Printing and Distribution Section, Graphic Arts Branch, Supporting Services Division. The record discloses, further, that while the covered employees remain in substantially the same physical location and retain, for the most part, their respective job titles and functions, such employees now have work-related contact with personnel in their newly assigned organizational entities and are subject to new and separate supervision.

In view of the above circumstances, and noting particularly that the organizational entity involved was abolished and that the employees previously in the exclusively recognized unit have been transferred to other organizational entities, have new work-related contacts with employees in these organizational entities, and are subject to new and separate supervision, I find that the reorganization of March 1972, effected substantial changes in both the scope and character of this exclusively recognized unit, and that, in fact, such unit no longer continues to be appropriate for the purpose of exclusive recognition. Accordingly, I find that the Center is no longer under an obligation to continue recognition of the AFGE in such a unit. 10/

f) On May 20, 1971, the AFGE was certified as the exclusive representative for a unit of "All General Schedule (GS) non-supervisory employees in the Internal Security Branch, Investigations and Security Staff, excluding all other non-supervisory employees of NAFEC, professionals, guards, firefighters, supervisors and/or managerial employees and Personnel Division employees other than those engaged in purely clerical work." The Activity filed an individual RA petition [Case No. 32-3232(RA)], with respect to the unit wherein it sought a determination with respect to the effect of the March 1972, reorganization on its continued appropriateness.

As a result of the March 1972, reorganization, the Internal Security Branch, Investigations and Security Staff was abolished. The record indicates that the covered employees, who performed the Activity's emergency dispatch function, initially were transferred to the Operations Staff, Aviation Facilities Division and continued to perform their functions as emergency service dispatchers. However, thereafter, in October 1972, the position of emergency service dispatcher was eliminated and the function was assumed by other employees of the Aviation Facilities Division, on a "duty officer," rather than on a full-time basis.

Under these circumstances, I find that the unit in question is no longer in existence and that the Activity is under no obligation to

10/ The evidence is insufficient to establish that the former unit employees have been added or accreted to any other exclusively recognized unit at the Center or that they, combined with other employees, constitute a new appropriate unit in which an election should be directed pursuant to the RA petition in this case.

continue to recognize the AFGE as the exclusive representative in such a unit. 11/

## 2. NAGE Local R2-43 Unit

a) On January 20, 1966, exclusive recognition was granted to the NAGE for a unit of "All non-supervisory Air Traffic Control Specialists permanently assigned to the Air Traffic Control Laboratory Facilities Branch, Technical Facilities Division, National Aviation Facilities Experimental Center, Atlantic City, New Jersey."

The record reveals that the March 1972, reorganization had no effect on either the composition or the size of this unit other than a change in the unit's organizational location. In this connection, the unit employees were employed, prior to the reorganization, in the Terminal Operations and Enroute Operations Sections of the Air Traffic Control Laboratory Facilities Branch, Technical Facilities Division. As a result of the reorganization, these employees have been transferred intact to the Terminal and Enroute Sections of the Air Traffic Control Services Branch, Simulation and Analysis Division. While there has been a change in the orientation and emphasis of the covered employees' work, the record reflects that these employees have continued to perform essentially the same basic function under the same supervision as they did prior to the reorganization and that they have continued to hold a separate position description from that of other air traffic control specialists at the Activity. Moreover, the parties agreed that in the Air Traffic Control Services Branch of the Simulation and Analysis Division there are no other air traffic control specialists who are currently, or who have been, represented by any other labor organization.

Based on these circumstances, and noting particularly that the March 1972, reorganization's primary impact on this unit was to change the designation of its organizational location, I find that such unit remains viable and appropriate for the purpose of exclusive recognition.

## 3. NFFE Local 1340 Units

a) On January 2, 1971, the NFFE was certified as the exclusive representative for a unit of "All non-supervisory Electronic Technicians, Engineering Technicians, Communications Specialists, Aerospace Engineering Technicians, Equipment Specialists and Engineering Technician Draftsmen of the National Aviation Facilities Experimental Center, excluding all other non-supervisory employees, management officials, employees engaged in Federal Personnel work, Guards, Supervisors, Professionals, Communications Specialists in the Administrative Services Division and other Technicians not specifically identified and included in the unit description."

The evidence reveals that prior to the March 1972, reorganization, this unit was the only exclusively recognized unit at the Center which had been certified on a Center-wide basis, and that the covered employees

11/ See footnote 10 above.



were located primarily in the Technical Facilities Division, but were spread throughout that Division. After the reorganization, the employees were located in all six of the Center's line divisions. However, the record reveals that while some of the subject employees' functions have been altered, all of them have retained the same organizational titles and job classifications as they possessed prior to the reorganization. Further, although there have been some minor difficulties encountered in the coordination among the unit employees of labor-management policy and in identification of the appropriate union officials to consult with concerning organizationally relocated employees, testimony of the management officials, who have the direct responsibility to deal with the NFFE vis-a-vis the unit involved herein, reveals that they do not view such problems as constituting an onerous administrative burden.

Under these circumstances, and noting particularly that the March 1972, reorganization's primary impact on the employees in the subject unit was, in effect, to disperse further throughout the Activity's divisions employees in a unit already certified on a Center-wide basis, I find that the subject unit remains identifiable, viable, and appropriate for the purpose of exclusive recognition.

b) On July 15, 1971, the NFFE was certified as the exclusive representative for a unit of "All non-supervisory classified and wage grade employees in the Materiel and Procurement Division of the National Aviation Facilities Experimental Center (NAFEC) Atlantic City, N.J., excluding all other non-supervisory employees of NAFEC, management officials, employees engaged in Federal personnel work, Guards, Supervisors, and Professionals, and non-supervisory Electronics Technicians, Engineering Technicians, Communications Specialists, Aerospace Engineering Technicians, Equipment Specialists and Engineering Technicians (Drafting) of the National Aviation Facilities Experimental Center as defined in Case Number 32-1833."

The record discloses that the March 1972, reorganization had no effect on either the size or the composition of this unit other than a change in the designation of the unit's organizational location within the Center. In this connection, the Materiel and Procurement Division was renamed the Logistics Division as a result of the reorganization. Remaining in the same physical location, the employees in the unit continue to perform the same functions under the same immediate supervision as they did prior to the reorganization.

Based on the foregoing circumstances, and noting particularly that the March 1972, reorganization's sole impact on this unit was to redesignate its organizational location, I find that such unit remains viable and appropriate for the purpose of exclusive recognition.

c) On April 28, 1971, the NFFE was certified as the exclusive representative for a unit of "All Wage Board employees of the Federal Aviation Administration, National Aviation Facilities Experimental Center, Aviation Facilities Division, Atlantic City, New Jersey, who are employed in the Aircraft Maintenance Section of the Aircraft

Maintenance Branch, excluding all General Schedule employees, professional employees, employees engaged in Federal Personnel work in other than purely clerical capacity, management officials, and supervisors and guards as defined in the Order."

The record reveals that as a result of the March 1972, reorganization, the unit in question is now designated as the Aircraft Maintenance Branch of the Aviation Facilities Division. In this regard, the evidence establishes that this change has affected neither the composition nor the size of the unit. Further, the unit employees are performing the same functions in the same location as they did prior to the reorganization and, currently, there is a negotiated agreement in effect between the parties.

In these circumstances and noting that the unit in question remained intact subsequent to the March 1972, reorganization with the unit employees performing the same functions in the same physical location as before, I find that the unit in question remains identifiable, viable and appropriate for the purpose of exclusive recognition.

d) On October 15, 1970, the NFFE was certified as the exclusive representative for a unit of "All non-supervisory Communications Specialists, General Communications Operators and Telephone Operators in the Administrative Services Division, excluding all other Administrative Services Division personnel, management officials, employees engaged in Federal Personnel work, Guards, Supervisors and Professionals."

The record indicates that as a result of the March 1972, reorganization, the Administrative Services Division has been abolished and that the unit employees now are located in the Communications Services Section, Plant Services Branch, Supporting Services Division. Transferring intact to the new Division, the record reveals that the unit employees continue to perform the same functions under the same immediate supervision as they did prior to the reorganization. Moreover, the evidence establishes that the NFFE filed a petition for amendment of certification (AC) in which it sought to amend the designation of the organizational location of this unit in order to reflect the above-noted change in organizational designation. While the Center maintained, with respect to the AC petition in question, that it would rather substitute the term "General Schedule employees" for the reference to specific classifications in the inclusions of the original unit description, it remained unopposed to the NFFE's proffered amendment regarding the unit's organizational location. On August 24, 1973, the Acting Regional Administrator ordered that the designation of the organizational location of the unit involved herein be amended to reflect the name change resulting from the March 1972, reorganization.

In view of the above circumstances, and noting particularly that the sole impact of the reorganization was to change the designation of the organizational location of the subject unit and that this change already

has been reflected in its amended unit description, I find that the unit involved herein remains identifiable, viable and appropriate for the purpose of exclusive recognition.

e) On June 3, 1969, exclusive recognition was granted to the NFFE for a unit of "All non-supervisory Photographers in the Technical Facilities Division, National Aviation Facilities Experimental Center, Atlantic City, N.J."

Thereafter, on August 21, 1972, the NFFE filed an AC petition with respect to the above unit [Case No. 32-2903(AC)] wherein it sought to amend the designation of the organizational location of the unit in order to reflect a name change brought about by the March 1972, reorganization. In this connection, the NFFE proposed that the unit description be amended to read "All non-supervisory Photographers in the Supporting Services Division." In response to this AC petition, the Activity-Petitioner filed an RA petition in Case No. 32-3128(RA), wherein it sought a determination with respect to the continued appropriateness of the unit in view of the March 1972, reorganization's effect on the unit's scope and character. In this regard, the Activity-Petitioner maintained that the unit in question currently was located in a section where there were unrepresented employees who shared common working conditions and supervision with the unit employees and that there existed interrelated work processes and relationships throughout the organizational element into which the unit had been transferred.

The record reveals that as a result of the reorganization, the subject unit is now located in the Photographic Section, Graphic Arts Branch, Supporting Services Division, and that the unit's employees are the only nonsupervisory photographers in that Division. Transferring intact to this new organizational location without any physical movement, the evidence establishes that the employees in the unit continue to perform the same functions under substantially the same immediate supervision as they did prior to the reorganization.

In these circumstances, and noting particularly that the March 1972, reorganization's sole impact on this unit was to change the designation of its organizational location and that the unit's employees are the only nonsupervisory photographers in the Supporting Services Division, I find that the unit in question remains identifiable, viable and appropriate for the purpose of exclusive recognition. <sup>12/</sup> In addition, for the reasons cited above, I shall order that the prior recognition be amended, consistent with the NFFE's request, as amended by the Center, to conform to the existing circumstances resulting from the change in the designation of the exclusively recognized unit's organizational location precipitated by the reorganization.

<sup>12/</sup> While the Center maintained its position that the unit was no longer appropriate for representation purposes, it proposed the following correction with respect to the language proposed by the NFFE in its AC petition to describe the unit's present organizational location: "All non-supervisory photographers in the Photographic Section, Graphic Arts Branch, Supporting Services Division, NAFEC, Atlantic City, N.J."

f) On April 29, 1968, the NFFE was granted exclusive recognition for a unit of "All non-supervisory Air Traffic Control Specialists permanently assigned to the Test and Evaluation Division, National Aviation Facilities Experimental Center, Atlantic City, N.J."

The record reveals that prior to the March 1972, reorganization, the employees in this unit were employed primarily within the Systems Test and Applications Sections of the Air Traffic Control Systems Branch, Test and Evaluation Division. As a result of the reorganization, the Test and Evaluation Division was abolished and employees in the subject unit were relocated organizationally. Thus, according to the record, the Systems Test Section was elevated to branch level status and was transferred to a new division, the Air Traffic Systems Division. Approximately one-half of the unit's employees who had been in the former Systems Test Section were transferred intact to the new division and continued to perform the same functions within the same job description and under the same immediate supervision as they had prior to the reorganization. With respect to the remaining employees in the unit, the record reveals that they were transferred to another division, the Simulation and Analysis Division, and were dispersed among the Experimentation and Analysis Branches of that Division. The evidence discloses further that while the unit employees who transferred to the Experimentation Branch continued to perform the same essential functions as they did prior to the reorganization, those unit employees who transferred to the Analysis Branch were required to move physically to a new location and were required to perform different functions than they had prior to the reorganization.

Under these circumstances, and noting particularly the extensive fragmentation which occurred with respect to this unit's employees and the physical relocation and assumption of new duties by some of these same employees, I find that the reorganization of March 1972, effected a substantial change in both the scope and character of the exclusively recognized unit involved herein. Thus, I conclude that the employees in question no longer continue to share a clear and identifiable community of interest. Accordingly, I find that the unit in question is no longer in existence and that the Activity is under no obligation to continue to recognize the NFFE with respect to the subject employees. <sup>13/</sup>

g) On May 7, 1969, the NFFE was granted exclusive recognition for a unit of "All non-supervisory Wage Board employees in the Engineering Services Branch, Technical Facilities Division, National Aviation Facilities Experimental Center, Atlantic City, N.J."

The record establishes that as a result of the March 1972, reorganization, the Technical Facilities Division was abolished and the subject unit was split. Thus, approximately 25 percent of the employees in that unit now are located in the Structures Branch of the Aircraft Safety Division ("Aircraft and Airport Safety Division") and the remaining 75 percent are located in the Mechanical Services Unit, Production Section,

<sup>13/</sup> See footnote 10 above.

Plant Services Branch of the Supporting Services Division, whose employees, as noted at l.c. above, continue to be represented by the AFGE. The record discloses further that while the unit employees have continued to perform essentially the same functions as they did prior to the reorganization, they now have work-related contact with non-unit employees in their separate organizational locations in two different divisions. In addition, the evidence indicates that, in coordinating certain labor-management policies affecting these employees, problems have occurred and have resulted in lengthy delays for some, but not all, of the unit's employees.

In these circumstances, noting particularly the fragmentation of the unit's employees and the resultant difficulties which have been experienced in attempting to coordinate policies affecting these employees, I find that the reorganization of March 1972, effected a substantial change in both the character and scope of the exclusively recognized unit involved herein. Thus, I conclude that the employees in question no longer continue to share a clear and identifiable community of interest and that the Center is under no obligation to continue to recognize the NFFE with respect to these employees. 14/

h) On December 31, 1969, the NFFE was granted exclusive recognition for a unit of "All non-supervisory Simulator Operators, Flight Data Operators and Flight Data Processors in the Simulation Facilities Branch, Technical Facilities Division, National Aviation Facilities Experimental Center, Atlantic City, New Jersey." Thereafter, on August 21, 1972, the NFFE filed an AC petition [Case No. 32-2904(AC)] with respect to the subject unit wherein it sought to amend the designation of the organizational location of the unit in order to reflect a name change brought about by the March 1972, reorganization. In this connection, the NFFE proposed that the unit description be amended to read that the employees in the unit are located currently "in the Simulation Operations Section, Air Traffic Control Services Branch, Simulation and Analysis Division." During the hearing, while maintaining its contention that the subject unit was no longer appropriate as a result of the March 1972, reorganization, the Center stated that it would have no objection to a change in designation. Noting, however, that it believed that the proposed unit description was inaccurate, the Center proposed the following amendment to the prior recognition of the subject unit: "All nonsupervisory Simulator Operators, Flight Data Operators, and Flight Data Processors in the Simulation Operations Section and the Data Preparation Section, Air Traffic Control Services Branch, Simulation and Analysis Division, NAFEC, Atlantic City, N.J." In this connection, at the hearing, the NFFE agreed to the Center's proposed amendment of its petition.

The evidence establishes that prior to the reorganization, this unit consisted of Simulator Operators in the Simulation Operation Section and Simulator Flight Data Processors in the Flight Data Processing Unit, Digital Simulation Section, Simulation Facilities Branch, Technical

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14/ See footnote 10 above.

Facilities Division. As a result of the reorganization, the Simulator Operators were reassigned intact to the Simulation Operations Section, Air Traffic Control Services Branch, Simulation and Analysis Division and the Simulator Flight Data Processors were reassigned to the Data Preparation Section of the same Branch and Division as the Simulator Operators. In addition, the record reveals that several mathematic technicians and mathematical aids from the NFFE unit, discussed at 3.j. below, were reassigned also to the Data Preparation Section. However, each of the employees reassigned from the NFFE's unit, discussed at 3.j. below, had their job titles changed to Simulator Flight Data Processors and, according to the evidence, have been integrated thoroughly with the subject unit's employees. With the addition of these other employees, the record indicates that the employees in this unit have continued to perform the same functions, essentially under the same immediate supervision, in the identical physical location as they did prior to the reorganization.

Under these circumstances, and noting particularly that the employees in this unit have experienced primarily a change in the designation of their organizational location as a result of the March 1972, reorganization, I find that the unit in question remains identifiable, viable and appropriate for the purpose of exclusive recognition. Further, consistent with the parties' agreement, I shall order that the prior recognition be amended to conform to the existing circumstances resulting from the change in the designation of the exclusively recognized unit's organizational location precipitated by the reorganization.

i) On June 17, 1970, the NFFE was certified for a unit of "All non-supervisory Computer Operators in the Data Processing Division, National Aviation Facilities Experimental Center, excluding Supervisory Computer Operators, employees engaged in Federal Personnel work, Guards and Supervisors." Thereafter, on August 21, 1972, the NFFE filed an AC petition with respect to the above unit [Case No. 32-2905(AC)] wherein it sought to amend the designation of the organizational location of the unit in order to reflect a change brought about by the reorganization. In this connection, the NFFE proposed that the unit description be amended to read, "All non-supervisory Computer Operators of NAFEC." In response to this proposed amendment, the Center maintained its position that only a Center-wide unit of all eligible NAFEC employees would be appropriate as a result of the March 1972, reorganization. In addition, the Center filed an individual RA petition [Case No. 32-3160(RA)] wherein it sought a determination with respect to the continued appropriateness of the unit in view of the March 1972, reorganization.

The record reveals that prior to the reorganization, the employees in the unit were employed primarily in the General Computer Operations and the National Aerospace System (NAS) Computer Operations Sections of the Computer Facilities Branch, Data Processing Division. As a result of the reorganization, the Data Processing Division was abolished and its employees assigned to other units. According to the record, unit employees of the NAS Computer Operations Section transferred intact to the NAS Computer Operations Section, Laboratory Management Branch, Air

Traffic Systems Division, together with several employees from the NFFE's units, discussed at 3.j. below. In addition, the record indicates that the unit employees of the General Computer Operations Section, with the exception of some seven employees reassigned elsewhere, were transferred to the General Data Operations Section, Data Processing Branch, Supporting Services Division, together with a number of employees from NFFE's unit discussed at 3.j. below. The remaining unit employees were reassigned to the Simulation Facilities Section, Systems Development Branch, Simulation and Analysis Division.

While the record indicates that many of the employees involved continue to perform essentially the same functions as they did prior to the reorganization, those unit employees who transferred to the Simulation and Analysis Division are performing a new function which required additional training with more sophisticated computers and required that their job descriptions be changed. In addition, these employees became subject to different immediate supervision and, like the other former unit employees, are working closely with the employees in the organizational locations to which they were transferred. Further, the evidence establishes that the working conditions in each of the three divisions in which the unit employees now function vary considerably, with those employees in the Air Traffic Systems Division working three shifts, seven days a week. And, according to the testimony of the Center officials responsible for dealing with the NFFE with respect to the subject unit's employees, there have been serious coordination problems with respect to efforts to implement a uniform labor-management policy as it affects these employees.

Based on the above circumstances, and noting particularly the fact that the subject unit's employees have been assigned to units in three of the Center's line divisions, where different working conditions prevail, that certain of these employees, under different immediate supervision, have been assigned new functions requiring additional training and different job descriptions, and that all of the employees involved are working closely with personnel in their reassigned organizational locations, I find that the reorganization of March 1972, effected a substantial change in both the scope and character of the exclusively recognized unit involved herein. Thus, I conclude that the employees in question no longer continue to share a clear and identifiable community of interest and that the Center is under no obligation to continue to recognize the NFFE with respect to these employees. <sup>15/</sup> In view of this finding, I conclude also that the prior recognition may not be amended to reflect the change in the designation of the subject unit's organizational location precipitated by the reorganization inasmuch as the unit involved is no longer in existence.

j) On October 20, 1971, the NFFE was granted exclusive recognition for a unit of "All non-supervisory employees of the Computer Facilities Branch, Data Processing Division, NAFEC, excluding professionals, management officials, supervisors, guards, employees engaged in Federal

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<sup>15/</sup> See footnote 10 above.

Personnel work in other than a purely clerical capacity, all employees of the Computer Facilities Branch currently covered by exclusive recognition and the Secretary to the Branch Chief." With respect to the above unit, the Center filed an individual RA petition [Case No. 32-3254(RA)] wherein it sought a determination with respect to the effect of the March 1972, reorganization on the continued appropriateness of the unit.

The record discloses that as a result of the March 1972, reorganization, the Data Processing Division was abolished and that the unit employees were reassigned. According to the evidence, approximately 49 percent of the unit's employees have been reassigned to the General Data Processing Section, Data Processing Branch, Supporting Services Division, and have joined that portion of the NFFE's unit (discussed at 3.i.) which also has been assigned to this Division. With respect to some 40 percent of this unit's employees, the record reveals that they have been reassigned to the Data Preparation Section, Air Traffic Control Services Branch, Simulation and Analysis Division, have been converted into Simulator Flight Data Processors and, as discussed above at 3.h., have been thoroughly integrated into the existing NFFE unit. The record reveals that the remaining employees of the subject unit have joined that portion of the NFFE's unit (discussed above at 3.i.) in being reassigned to the NAS Computer Operations Section, Laboratory Management Branch, Air Traffic Systems Division. While those unit employees who have retained the same functions as they performed prior to the reorganization are interchangeable with each other with respect to certain skills which they possess, the evidence establishes that each division to which the unit employees were reassigned performs an integrated work function within its own organizational structure which is not related functionally to the others' tasks.

In these circumstances, and noting particularly that the employees have been reassigned to units located in three of the Activity's line divisions wherein separate, integrated work functions are performed and that these employees are working currently in areas which require daily close cooperation with personnel in their new organizational locations, I find that the March 1972, reorganization effected a substantial change in both the scope and character of the exclusively recognized unit involved herein. Thus, I conclude that the employees in question no longer continue to share a clear and identifiable community of interest in the described unit and that the Center is under no obligation to recognize the NFFE as the representative of these employees in the unit so described. <sup>16/</sup>

#### CONCLUSION

As set forth above, each of the 17 exclusively recognized units at the Center have been examined in order to determine the effect of the March 1972, reorganization upon the continued viability of these units. In agreement with the Center, I have found that certain of the units

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<sup>16/</sup> See footnote 10 above.

involved herein are no longer identifiable as a result of the reorganization's impact upon their scope and character. On the other hand, I have found also that, notwithstanding the reorganization, certain of these units remain identifiable, viable and appropriate for the purpose of exclusive representation. In these circumstances, I conclude that an election in an overall Center-wide unit, as petitioned for by the Activity-Petitioner in its RA petition in Case No. 32-3548(RA), is unwarranted inasmuch as certain of the currently recognized units have remained the same except for a redesignation of their organizational locations. Accordingly, such units are not the proper subjects of an RA petition. Moreover, with respect to employees reassigned from units which I have found no longer exist, the evidence is insufficient, in most instances, to establish that, as a result of the reorganization, they have been integrated with other employees of the Center so as to create a new organizational entity and an appropriate unit which would warrant an election pursuant to an RA petition. <sup>17/</sup> Accordingly, I shall order that each of the Activity-Petitioner's RA petitions be dismissed. Further, except for that unit, noted above, in which it was found that an amendment of certification was inappropriate as the unit involved was no longer in existence, I shall order that the prior recognitions, in those units for which an amendment of recognition was sought, be amended to conform to the existing circumstances resulting from the change in the designation of the exclusively recognized units' organizational location precipitated by the reorganization.

ORDER

IT IS HEREBY ORDERED that the petitions in Case Nos. 32-2905(AC), 32-3128(RA), 32-3160(RA), 32-3232(RA), 32-3248(RA), 32-3254(RA), and 32-3548(RA) be, and they hereby are, dismissed.


IT IS FURTHER ORDERED that the recognition accorded the National Federation of Federal Employees, Local 1340, on June 3, 1969, at the National Aviation Facilities Experimental Center, be, and it hereby is,

<sup>17/</sup> While it has been found that certain units are no longer in existence and that, therefore, the Center is under no obligation to recognize the exclusive representatives with respect to the employees formerly in these units, it was noted that this finding would not preclude the exclusive representatives involved herein, or any other exclusive representative, from seeking, through an appropriate clarification of unit petition, a determination as to whether or not any of these employees have accreted to any existing exclusively recognized unit at the Center, or for any labor organization to seek through an appropriate petition a determination as to whether or not a new unit (or units), appropriate for the purpose of exclusive recognition, have been established as a result of the Center's reorganization of March 1972.

amended by substituting therein as the designation of the unit's organizational location, "Photographic Section, Graphic Arts Branch, Supporting Services Division."

IT IS FURTHER ORDERED that the recognition accorded the National Federation of Federal Employees, Local 1340, on December 31, 1969, at the National Aviation Facilities Experimental Center, be, and it hereby is, amended by substituting therein as the designation of the unit's organizational location, "Simulation Operations Section and the Data Preparation Section, Air Traffic Control Services Branch, Simulation and Analysis Division."

Dated, Washington, D.C.  
January 31, 1975

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

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
 AFL-CIO, NATIONAL OFFICE, and AMERICAN  
 FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,  
 LOCAL 2677  
 A/SLMR No. 483

This case involved a complaint filed by an individual (Complainant) against American Federation of Government Employees, AFL-CIO, National Office, and its Local 2677 (Respondents), alleging, in essence, that the Respondent Local 2677, as the exclusive representative of employees in the National Office of the Office of Economic Opportunity (Agency), improperly refused to represent the Complainant in his efforts to obtain reinstatement to employment with the Agency because he was not a member of the Respondent, because of his race, and/or because he had filed complaints of racial discrimination against the Agency and, further, that the Respondent National Office refused to represent him because of his nonmembership.

In recommending that the complaint be dismissed in its entirety for lack of cooperation and lack of prosecution, the Administrative Law Judge noted, among other things, that the orderly conduct of the hearing had been severely impeded due to the Complainant's refusal to accept certified mail despite numerous admonitions and warnings by the Administrative Law Judge that continued refusal to accept certified mail would result in a recommendation that the complaint be dismissed.

In adopting the Administrative Law Judge's findings, conclusions and recommendation, the Assistant Secretary noted that by letter dated August 19, 1974, the Administrative Law Judge indicated to the Complainant that his failure to indicate a willingness to accept and acknowledge the receipt of certified mail would result in a recommendation that the complaint be dismissed for lack of cooperation and prosecution. Although the return receipt of this letter showed delivery to the Complainant on August 31, 1974, the Complainant has failed to communicate with the Administrative Law Judge since that date. He further noted that Section 206.4(a) of the Assistant Secretary's Regulations provides that Notices of Hearing, decisions, orders and other papers may be served personally or by registered or certified mail. Accordingly, and noting also that no exceptions were filed by the Complainant, the Assistant Secretary ordered that the complaint be dismissed.

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, AFL-CIO, NATIONAL OFFICE,  
 and  
 AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, AFL-CIO, LOCAL 2677

Respondents

and

Case No. 22-3702(CO)

EARL ROLAND BREES

Complainant

DECISION AND ORDER

On November 4, 1974, Administrative Law Judge John H. Fenton issued his Report and Recommendation in the above-entitled proceeding recommending that the instant complaint be dismissed in its entirety based on the Complainant's lack of cooperation and lack of prosecution.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting that no exceptions were filed by the Complainant, I hereby adopt the findings,<sup>1/</sup> conclusions<sup>2/</sup> and recommendation of the Administrative Law Judge.

<sup>1/</sup> With respect to the Administrative Law Judge's finding of lack of cooperation and lack of prosecution by the Complainant, it was noted that by letter dated August 19, 1974, the Administrative Law Judge directed the Complainant to communicate with him as to the Complainant's willingness to accept and acknowledge receipt of certified mail. Alternatively, if he did not receive such assurances from the Complainant, the Administrative Law Judge informed the Complainant that he ". . . shall promptly issue a decision recommending that the complaint be dismissed for want of prosecution and failure to cooperate." Although the return receipt of the Administrative Law Judge's letter showed delivery of this letter to the Complainant on August 31, 1974, the evidence establishes that the Complainant has failed to communicate with the Administrative Law Judge since that . . .

<sup>2/</sup> With respect to the Administrative Law Judge's conclusion that the failure of the Complainant to accept certified mail constituted a lack of

(Continued)

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-3702(CO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
February 4, 1975

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

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



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In the matter of	:	
	:	
EARL ROLAND BREES,	:	
Complainant	:	
	:	Case No. 22-3702(CO)
vs.	:	
	:	
AMERICAN FEDERATION OF GOVERNMENT	:	
EMPLOYEES, AFL-CIO, NATIONAL OFFICE,	:	
and	:	
	:	
AMERICAN FEDERATION OF GOVERNMENT	:	
EMPLOYEES, AFL-CIO, LOCAL 2677,	:	
Respondents	:	

.....

Earl Roland Brees  
10103 Towhee Ave.  
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pro se

James Neustadt, Esquire  
Assistant General Counsel  
American Federation of Government  
Employees  
1325 Massachusetts Ave., N. W.  
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For Respondent AFGE

Thomas Jennings, President  
AFGE Local 2677  
Office of Economic Opportunity  
1200 19th St., N. W.  
Washington, D. C. 20505

Before: JOHN H. FENTON  
Administrative Law Judge

2/ cooperation, it was noted that Section 206.4(a) of the Assistant Secretary's Regulations provides, in pertinent part: "Notices of hearing, decisions, orders and other papers may be served personally or by registered or certified mail . . . ."

REPORT AND RECOMMENDATION

This proceeding was initiated upon the filing of a complaint alleging violations of Sections 10(e), 19(b)(1), 19(b)(2), 19(b)(5) and 19(e) of Executive Order 11491, as amended, by Mr. Earl Roland Brees against the American Federation of Government Employees and its Local 2677. In essence, the complaint alleged that Local 2677, as exclusive representative of employees at the national office of the Office of Economic Opportunity, refused to represent Mr. Brees in his efforts to require OEO to reinstate him, because he was not a Union member, because of his race and because he had filed complaints of racial discrimination against that agency. It further alleges that AFGE refused to represent him because of his nonmembership.

Notice of Hearing was issued with reference to the alleged Section 19(b)(1) and 19(c) violations on September 7, 1973, by the Acting Regional Administrator, Labor-Management Services Administration, Philadelphia Region. Pursuant thereto the hearing commenced on November 6, and continued on November 7 and 8. On November 8, Complainant's wife reported to my secretary that he was ill with a sore throat and could not attend the hearing on that or the following day. She asked whether the hearing could be postponed until Mr. Clyde Webber, National President of AFGE and Mr. George Boss, Director of the Labor Management Department would be available as witnesses. On that same morning Complainant caused to be hand-delivered to my office a Motion for Continuance, reciting as reasons therefore the factors noted above, as well as the fact that my own schedule would cause postponement of the hearing after November 9 and the claimed inability of Complainant to obtain necessary documents from Respondents. On November 13, 1973, I set November 26 for resumption of the hearing in a letter addressed to Mr. Brees. That letter recited the need for an expeditious resolution of his apparent interest in seeking the appearance of witnesses and the production of documents. It pointed out that Respondents had made arrangements to make available Messrs. Major Travis, George Koch, Michael Vela and Gary Weissman, all officers or former officers, for examination on Friday, November 9, and that, in the interim, the Motion for Continuance had made known Complainant's desire also to examine Messrs. Webber and Boss, and staff attorney Gary Landsman. Because my experience during the two full days of hearing indicated that Complainant was hostile and belligerent, showing little if any concern for the personal or professional convenience of Union officials whose presence he demanded, I instructed him to make known to Respondents the names of those

persons he wished to call as well as the dates of the desired appearances, and to identify any documents he sought from Respondents. Each party was directed to serve upon me copies of any correspondence concerning such matters and of any documents produced. I expressed the hope that orderly arrangements for the production of documents and the appearance of witnesses could be worked out before the hearing resumed on November 26. At no time did Complainant make a more specific request until the day the hearing resumed, at which time he served upon Respondents a document (Complainant's Exhibit No. 19) requesting much documentary evidence as well as the appearance of Local President Thomas Jennings, Michael Vela, George Koch, Major Travis, Gary Landsman, Clyde Webber and Phillip Kete. When asked why he failed to follow the instructions in my November 13 letter, he replied that illness had prevented it and that he was afraid to request a further postponement. When asked whether he was under a physician's care, he replied he could not afford it. The hearing went forward on that and the following day with the continued examination of Mr. Jennings, as well as some direct testimony by Mr. Brees, under protest. On November 28, Mr. Travis, a National Vice President, and Mr. Weissman and Mr. Koch, former Local officials, testified. On November 29 the examination of Mr. Koch was concluded, and AFGE staff attorney Gary Landsman testified. The hearing was then indefinitely adjourned for purposes of working out a schedule for the appearance of Messrs. Webber, Boss and Vela, who were then unavailable.

On December 21, 1973, I notified all parties by letter that the hearing would resume on January 14, 1974. I expressed my understanding that Respondents would make available Messrs. Vela and Boss, and that they would not comply with the request that Mr. Webber be made available. On January 14 I was incapacitated by back trouble. I had my secretary alert all parties to my absence, and was informed that Complainant was ill and in bed. On the next day, my letter of December 21, sent to complainant by certified mail, was returned by the Post Office marked "unclaimed."

On February 5 I inadvertently sent by regular mail to all parties a letter concerning indefinite postponement of the January 14 hearing because of my back, and asking that the parties supply me with acceptable hearing dates in the week of May 20 or thereafter. Because of what had transpired, I had the following to say.

As all parties but Mr. Brees are aware, my letter of December 21, 1973, not only constituted notice that the hearing would



resume on January 14, but also requested each party to notify me of the number of witnesses it intended to call and the anticipated duration of the examination of such witnesses. It in addition indicated that the Respondents would make Mr. Vela and Mr. Boss, but not Mr. Webber, available for examination by the Complainant. Finally, in the hope of expediting that proceeding, I asked that any party intending to request any witnesses or documents not previously requested do so promptly in writing. (Complainant's failure to claim his mail)...gives rise to serious concern on my part that the parties had prepared for further hearing, and that arrangements had been made for the attendance of witnesses, without Complainant knowing that the hearing was to go forward, and without the cooperation solicited from him. It would appear that Complainant was made aware of certified mail addressed to him but did not pick it up. I request that Complainant advise me of his position on this, as I do not regard it as appropriate to take further steps toward resumption of the hearing unless Complainant is prepared to claim mail and cooperate fully.

On June 5 I wrote Complainant, attaching a copy of the February 5 letter, restating in substance what is quoted above, and pointing out that there had been no response to, or acknowledgment of, that letter. I then added that

it should be self evident that the procedures invoked by you clearly require, for the orderly conduct of this proceeding, that you be prepared to acknowledge receipt of correspondence from me or any party to the case. I am at a loss to understand your failure to reply to my most recent letter. Once again, you are requested to respond to the attached (February 5) letter. Should you fail to respond without unnecessary delay, I shall be forced to give very serious consideration to issuance of a Show Cause Order, calling upon you to state why I should not dismiss the Complaint for lack of prosecution.

This letter was returned by the Post Office as "unclaimed" on June 28, 1974.

On July 11 the following Order to Show Cause was issued:

Complainant is hereby called upon to state why the complaint in this matter should not be dismissed for want of prosecution and for utter failure to cooperate with the undersigned and the other parties to the case, to wit:

1. On February 5, 1974, I sent a letter to Complainant by regular mail concerning his failure to appear at the hearing scheduled for January 14, 1974, and his failure to claim the notice of hearing mailed to him on December 21, 1973. Complainant was advised that he had seriously inconvenienced the Respondents' counsel and representatives as well as witnesses whose attendance had been secured for that day, and that no further steps would be taken toward resumption of the hearing unless he was prepared to claim mail and to cooperate fully. He was specifically directed to contact my secretary with respect to hearing dates. That letter was never returned.
2. On June 5, 1974, not having heard from Complainant, I sent him a letter by certified mail, return receipt requested, together with a copy of the letter of February 5, 1974. Such correspondence was returned, marked "unclaimed," on June 28. It advised Complainant that his failure to respond without unnecessary delay would lead to issuance of this Order, and, furthermore, that the orderly conduct of the proceeding required him to acknowledge receipt of correspondence from me or any party to the case.
3. On June 21, 1974, Respondents moved for dismissal of the complaint on the ground, inter alia, that Complainant has been intentionally uncooperative and has failed to pursue his claim. To date I have not been served with any response from Complainant to that motion.

Complainant is hereby put on notice that failure to respond to this Order by July 26, 1974, will result in my recommendation that the Assistant Secretary of Labor dismiss the complaint for lack of prosecution.

In this instance Complainant signed the return receipt on July 13 and responded on July 26. He requested proof that he had any knowledge of the Notice of Hearing mailed to him on December 21, as well as proof that he ever received notice of the hearing scheduled for January 14 or that such hearing would have been held had he known of it. He further requested copies of the Motion to Dismiss filed by Respondents on June 21 and of my letters of February 5 and June 5.<sup>1/</sup> He asserted that upon receipt of such documents by regular mail he would send a receipt to the Office of Administrative Law Judges. Finally he requested that a hearing be set for a time subsequent to September 15 and promised to file a more detailed answer to the Order to Show Cause upon receipt of the requested information.

On August 19 I wrote Complainant by certified mail as follows:

This responds to your letter of July 26, 1974. In paragraph 3 you clearly express your determination to do business by regular mail, offering to send a receipt. As I have repeatedly told you since my letter of February 5, you must observe the groundrules. The orderly conduct of this case requires that you submit to a method for the exchange of correspondence in which an official record is kept of the time of receipt by each party of all such papers. Your refusal to accept certified mail and your consequent failure to receive essential correspondence is in large measure the uncooperativeness to which I refer. As a result you have greatly inconvenienced the Respondents and me. This course of conduct will not be tolerated. Unless I hear from you by August 30, 1974, that you are prepared to proceed by acknowledging receipt of certified mail, I

<sup>1/</sup> In response to his request, Respondent forwarded to me a photocopy of what is alleged to be the return receipt of the June 21 letter. It show June 22 as the delivery date, and a signature which appears to be that of Earl R. Brees, although it is different from earlier signatures.

shall promptly issue a decision recommending that the complaint be dismissed for want of prosecution and failure to cooperate.

On August 31 Complainant signed the return receipt, which shows the same address used at all material times. To date he has not responded.<sup>2/</sup>

Discussion

From the inception of this proceeding, Complainant has displayed in a clear and completely convincing way his determination to ignore procedures which are binding on all parties and which are preconditions to the orderly and expeditious resolution of legal controversies. Similarly, he has shown little, if any, disposition to observe the amenities which create a civilized courtroom climate, and which are essential if the abuse of legal forums is to be avoided.

I would not be candid if I did not admit that litigation of this case has been very trying for me. I have attempted to assist Complainant in every way I thought proper because he was unrepresented and was opposed by counsel. In my judgement, counsel for Respondents was cooperative and was patient under difficult and sometimes provocative circumstances. The transcript consists of 1307 pages. They are replete with examples of Complainant's hostile and sometime belligerent attitude towards other parties, witnesses and the undersigned. He was admonished on a number of occasions to refrain from insults, particularly from labelling any expression of a viewpoint different from his own as a deliberate lie. While he apologized from time to time, he appeared to be incapable of exercising such self-restraint for any length of time. Regrettably, a transcript cannot preserve tone of voice, gestures or facial expressions. Nevertheless I think this transcript will show that Complainant received from me and from Counsel for Respondents not only forbearance but assistance, and that he responded with suspicion, hostility and insult. Despite a determination to be very patient with Complainant because he was unrepresented and because of a certain sympathy arising from the evident depth of his conviction that he had been wronged by Respondents, on a number of occasions I felt

<sup>2/</sup> For the convenience of all parties, copies of the relevant correspondence have been attached as a packet and labelled Court's Exhibit No. 3. It consists of my letters of 12/21/73, 2/5, 6/5, 7/11 and 8/19/74, Complainant's letter of 7/26/74 and Respondents letter of 6/21/74, showing the return receipt signed by Complainant.

constrained by his persistent and disruptive misconduct to threaten termination of the hearing and issuance of a decision recommending dismissal of the Complaint because he appeared to be incorrigible. However, the events surrounding the effort to resume the hearing after November 28 precluded that likely course of action.

As the recitation of the facts shows, the attempt to resume the hearing and to secure Complainant's assurance that he would observe the rules was, in terms of his response, a recapitulation and extension of his conduct at the hearing. Thus, five letters looking forward to orderly resumption of the hearing were mailed to him. The letter of December 21, setting the matter for hearing and soliciting his cooperation was returned "unclaimed." The letter of February 5, requesting his cooperation in rescheduling the hearing and in agreeing to accept certified mail was sent by regular mail and never returned. There followed a period of four months during which Complainant was not in touch with this Office concerning the prosecution of his Complaint and made no known effort to speed its resolution. On June 5 I again wrote him, requesting his cooperation, demanding that he acknowledge and respond to mail, and threatening to issue an Order to Show Cause as to why his Complaint should not be dismissed for failure of prosecution and lack of cooperation. This letter was returned unclaimed. On July 11 the Order to Show Cause issued, which he did respond to, making clear his insistence on regular mail. On August 19 I again wrote him, stating that I would recommend dismissal of the complaint unless, by August 30, I received his assurance that he was prepared to acknowledge receipt of certified mail. In this instance also, Complainant signed the return receipt. Since doing so on August 31 he has been in no further contact with this Office.

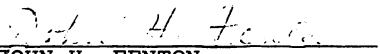
It is now almost one year since the hearing commenced. Complainant has failed for almost two months to respond to my last letter. He must be presumed to have received mail which he has ignored in all but one instance. Were one to indulge in the opposite presumption, his failure to pursue his claim during this period of time would nevertheless be inexcusable. I conclude that Complainant has very deliberately flouted the rules of the system which he has invoked, and that he has been utterly uncooperative in response to my efforts to cause him to take affirmative action on his complaint. His conduct thus goes beyond a failure to prosecute or to be cooperative: he has prevented the utilization of the administrative machinery he invoked. He has furthermore on two occasions failed to attend the hearing, thereby seriously inconveniencing Union officials and former officials who had agreed to submit to examination by him, as well as the other

parties to the case and me. His actions constitute an intolerable abuse of this forum as well as the rights of Respondents in defending against his claim.

I conclude that there is, in these circumstances, no proper alternative to a recommendation that the Complaint be dismissed.

Recommendation

Having found that Complainant has repeatedly refused to respond to my requests for his cooperation, and has failed for months to take any action in prosecution of his claim, I recommend that the complaint be dismissed in its entirety.

  
JOHN H. FENTON  
Administrative Law Judge

Dated: November 4, 1974  
Washington, D. C.

February 4, 1975

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

VETERANS ADMINISTRATION HOSPITAL,  
MONTROSE, NEW YORK  
A/SLMR No.484

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This case arose as a result of a petition filed by the American Federation of Government Employees, Local 2440, AFL-CIO, (AFGE) seeking a unit of all professional and nonprofessional General Schedule employees, including VA canteen service employees of the Veterans Administration Hospital, Montrose, New York. The petitioned for unit was identical, except for the exclusion of guards, with a unit for which the Intervenor, National Federation of Federal Employees, Local 1119, (NFFE) currently is the incumbent exclusive representative. The Activity and the AFGE agreed that the petitioned for unit is appropriate. However, questions were raised as to whether the Activity's Police Officers and Firefighters, who perform certain guard-type functions, are guards within the meaning of Section 2(d) of the Order. The NFFE contended that there was no basis for severing the employees in question from the exclusively recognized unit as they had received adequate representation in the current "mixed" unit and, moreover, it alleged that the questioned employees are not guards within the meaning of the Order. Additionally, the NFFE asserted that the AFGE's petition should be dismissed because of an alleged agreement bar.

The NFFE contended that the controlling date for the purpose of determining the open period for filing an election petition was the date on which its negotiated agreement with the Activity was signed at the local level. The Activity and the AFGE asserted that the "open period" was correctly computed by the AFGE, using the date on which the negotiated agreement was approved by the Chief Medical Director, Department of Medicine and Surgery, VA Central Office, at which time the agreement, by its terms, became effective for a period of two years. The Assistant Secretary concluded that the controlling date in computing the "open" period for the filing of a petition is the terminal date of an agreement and that, accordingly, the petition herein was timely filed as it was filed in the 60-90 day period prior to the terminal date established when the agreement was approved by the Chief Medical Director.

The Assistant Secretary found also that the Activity's Police Officers were guards within the meaning of the Order; that Firefighter Crew Chiefs, who are stationed at a firehouse and whose primary job is to prepare for, and respond to, fires and threats of fires, were not guards within the meaning of the Order; and that insufficient evidence had been adduced with respect to the guard status of the journeymen Firefighters. Further, he found the claimed unit to be appropriate for the purpose of exclusive recognition, as it has been previously held that where, as here, a timely petition seeks to sever a unit of nonguard employees from an existing

mixed unit of guard and nonguard employees, such unit of nonguard employees is appropriate for the purpose of exclusive recognition.

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

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,  
MONTROSE, NEW YORK 1/

Activity

and

Case No. 30-5611(R0)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 2440, AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES, LOCAL 1119

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 Louis A. Schneider. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the brief filed by the National Federation of Federal Employees, Local 1119, herein called NFFE, the Assistant Secretary finds:

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

2. The Petitioner, American Federation of Government Employees, Local 2440, AFL-CIO, herein called AFGE, seeks an election in a unit of all professional and nonprofessional General Schedule (GS) employees of the Veterans Administration Hospital, Montrose, New York, including VA canteen service employees, excluding management officials, supervisors, guards, employees engaged in Federal personnel work in other than a purely clerical capacity and Wage Grade (WG) employees. The petitioned for unit is identical, except for the exclusion of guards,

with the unit for which the NFFE currently is the incumbent exclusive representative. 2/

The Activity and the AFGE take the position that the petitioned for unit is appropriate. However, the Activity questions whether its Police Officers and Firefighters, who perform certain guard-type functions, are guards within the meaning of Section 2(d) of the Order and, therefore, should be excluded from the petitioned for unit. The AFGE also questions the status of the Activity's Police Officers and contends that the Firefighters are not guards within the meaning of the Order. The NFFE asserts that there is no appropriate reason for severing the employees in question as they have received adequate representation in the current "mixed" unit and, moreover, that the questioned employees are not guards within the meaning of the Order. Additionally, the NFFE contends that the AFGE's petition should be dismissed because of an alleged agreement bar.

Alleged Agreement Bar

The NFFE claims that the AFGE's petition was untimely in that it was not filed during the "open period" of the NFFE's negotiated agreement with the Activity as required by Section 202.3(c) of the Assistant Secretary's Regulations. In this regard, the NFFE contends that the date by which the open period should have been computed was July 25, 1974, two years from the date on which the negotiated agreement was executed by the parties at the local level. The AFGE argues, however, that the negotiated agreement provides that it shall be effective upon approval by the Chief Medical Director, Department of Medicine and Surgery, of the Veterans Administration; that it was signed by the Chief Medical Director on September 12, 1972; that it provides that it shall be in effect for two years from its effective date; and that, therefore, the petition in the instant case was timely filed on July 9, 1974. The Activity concurs with the AFGE's position.

The evidence establishes that on July 25, 1972, the Activity and the NFFE executed a negotiated agreement which, by its terms, was to become effective "upon the date of approval by the Chief Medical Director, Department of Medicine and Surgery, VA Central Office, Washington, D.C." The agreement was to remain in effect for two years from its effective date. It was approved by the Chief Medical Director on September 12, 1972.

2/ At the hearing, the NFFE moved to dismiss the instant petition based on a challenge to the validity of the AFGE's showing of interest. The record indicates that the Assistant Regional Director previously had denied a similar motion to dismiss. The renewed motion to dismiss, which the Hearing Officer referred to the Assistant Secretary, is hereby denied. Thus, under Section 202.2(f) of the Assistant Secretary's Regulations, the action by the Assistant Regional Director in this regard was final and was not subject to review by the Assistant Secretary as the petition involved was not dismissed, nor was the intervention denied.

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

I find, based on the foregoing circumstances, that the petition filed in the instant case by the AFGE on July 9, 1974, was timely. Thus, in my view, the controlling date in computing the "open" period for the filing of a petition is the terminal date of an agreement. <sup>3/</sup> As noted above, the effective date of the negotiated agreement was September 12, 1972, and its termination date was two years from its effective date which would be September 11, 1974. Thus, the open period for filing a petition in the instant case would have been 60-90 days prior to September 11, 1974, or during the period June 13, 1974 - July 13, 1974. Therefore, the AFGE's petition herein, filed on July 9, 1974, was concluded to have been timely filed.

#### Eligibility Issues

As indicated above, questions were raised herein concerning whether the Activity's Police Officers and Firefighters are guards within the meaning of the Order.

The record reveals that both the Police Officers and the Firefighters are assigned to the Protective Section of the Engineering Service at the Activity. A supervisory Police Officer, who serves as the Section Chief, is responsible for planning the tours of duty for both the Police Officers and the Firefighters. There are four Sergeants and seven journeymen Police Officers. The evidence establishes that Police Officers wear uniforms, regularly patrol the buildings and grounds of the Activity watching for intruders or potential hazards, are authorized to enforce regulations, and are responsible for the protection and preservation of property on the Activity's premises.

There also are four Firefighter Crew Chiefs and five journeymen Firefighters assigned to the Protective Section under the supervision of the Section Chief. The record reveals that the Crew Chiefs are stationed at the firehouse where they serve as dispatchers besides being primarily responsible for maintaining and driving the fire trucks. The journeymen Firefighters serve interchangeably with the journeymen Police Officers. Thus, the journeymen Firefighters work the same 8-hour shifts as the Police Officers, wear essentially identical uniforms, and spend the preponderance of their time making regular security patrols. <sup>4/</sup>

Based on the foregoing circumstances, I find that the Activity's Police Officers are guards within the meaning of Section 2(d) of the Executive Order and, therefore, should be excluded from the unit found appropriate for the purpose of exclusive recognition. Furthermore, I find that the Firefighter Crew Chiefs, who are stationed at the firehouse and whose primary job function is to prepare for, and respond to, fires and threats of fires, are not guards within the meaning of the Order.

<sup>3/</sup> See U.S. Geological Survey, Department of the Interior, Rolla, Missouri, A/SLMR No. 413.

<sup>4/</sup> No issues were raised by the parties herein concerning the supervisory status of any of the employees in question. Accordingly, I make no findings in this regard.

With respect to the guard status of the journeymen Firefighters, I find insufficient evidence to make a finding in this regard. Thus, no evidence was adduced as to, among other things, the amount of fire-fighting training the journeymen Firefighters receive, their responsibility for maintenance and care of the firefighting equipment, or whether they are housed at the firehouse. <sup>5/</sup>

Further, I find that the claimed unit is appropriate for the purpose of exclusive recognition. In this regard, it has been held previously that where, as here, a timely petition seeks to sever a unit of nonguard employees from an existing mixed unit of guard and nonguard employees, such unit of nonguard employees is appropriate for the purpose of exclusive recognition. <sup>6/</sup>

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

All professional <sup>7/</sup> and nonprofessional General Schedule employees, including General Schedule VA canteen service employees, of the Veterans Administration Hospital, Montrose, New York, excluding all Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

As stated above, the unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires

<sup>5/</sup> Cf. California Air National Guard Headquarters, 163rd Fighter Group, Ontario International Airport, Ontario, California, A/SLMR No. 252; General Services Administration, Region 2, New York, New York, A/SLMR No. 220; California Air National Guard Headquarters, 146th Tactical Airlift Wing, Van Nuys, California, A/SLMR No. 147; and United States Department of the Air Force, 910th Tactical Air Support Group (AFRES), Youngstown Municipal Airport, Vienna, Ohio, A/SLMR No. 12.

<sup>6/</sup> Cf. Defense Supply Agency, Defense Depot, Memphis, Tennessee, A/SLMR No. 107 and General Services Administration, Region 2, New York, New York, cited above.

<sup>7/</sup> At the hearing, the parties stipulated that employees in certain designated job classifications were professional employees within the meaning of the Order. Inasmuch as there is no evidence in the record which indicates that the parties' stipulation in this regard was improper, I find that the employees in such job classifications are professional employees within the meaning of the Order.

of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct that separate elections be conducted in the following voting groups:

Voting Group (a): All professional employees, including professional employees of the VA canteen service, of the Veterans Administration Hospital, Montrose, New York, 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 General Schedule employees, including nonprofessional General Schedule VA canteen service employees, of the Veterans Administration Hospital, Montrose, New York, excluding all Wage Grade and professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order.

Employees in the nonprofessional voting group (b) will be polled whether they desire to be represented for the purpose of exclusive recognition by the AFGE, by 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 or not they wish to be represented for the purpose of exclusive recognition by the AFGE, the NFFE, or neither. In the event that a majority of valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the Area Administrator indicating whether the AFGE, the NFFE, or neither was selected by the professional employees.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

(1) If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following units are appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees, including professional employees of the VA canteen service, of the Veterans Administration Hospital, Montrose, New York, 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.

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(b) All nonprofessional General Schedule employees, including nonprofessional General Schedule VA canteen service employees, of the Veterans Administration Hospital, Montrose, New York, excluding all Wage Grade and professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order.

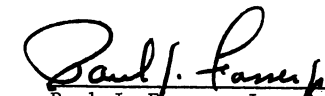
(2) If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional General Schedule employees, including General Schedule VA canteen service employees, of the Veterans Administration Hospital, Montrose, New York, excluding all Wage Grade 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 the 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 American Federation of Government Employees, Local 2440, AFL-CIO; by National Federation of Federal Employees, Local 1119; or by neither.

Dated, Washington, D.C.  
February 4, 1975

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

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

DEPARTMENT OF THE AIR FORCE,  
 BASE PROCUREMENT OFFICE,  
 VANDENBERG AIR FORCE BASE, CALIFORNIA  
 A/SLMR No. 485

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

DEPARTMENT OF THE AIR FORCE,  
 BASE PROCUREMENT OFFICE,  
 VANDENBERG AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. 72-3863

NATIONAL FEDERATION OF FEDERAL  
 EMPLOYEES, LOCAL UNION 1001,  
 VANDENBERG AIR FORCE BASE, CALIFORNIA

Complainant

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1001 (NFFE) alleging that the Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base (Respondent) violated Section 19(a)(1) of the Order by virtue of a statement by a supervisor to the Complainant's President, after receiving complaints from other employees, that she would be assigned a "fair" share of the Respondent's work and would have to gauge her union activities accordingly.

The Administrative Law Judge found that the Respondent's conduct did not violate Section 19(a)(1) of the Order and he recommended that the complaint be dismissed. In this regard, he noted that nothing in the Order or the parties' negotiated agreement created any unlimited right to engage in union activity on official time. The Administrative Law Judge concluded that in insisting that Brogan not appreciably neglect her official duties the Respondent acted in accord with the Order, the parties' negotiated agreement, and applicable regulations. Moreover, he noted that there was no evidence that Brogan ever was denied any necessary time to perform authorized union duties or was, in fact, required to perform an equal share of the work.

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that the Respondent's conduct violated Section 19(a)(1) of the Order. While the Assistant Secretary agreed with the Administrative Law Judge that the use of official time to conduct union business is not an inherent right under the Order, he noted that the Order did not preclude an agency or activity and an exclusive representative from entering into an agreement with respect to the use of official time by union representatives under certain circumstances, and that the parties' negotiated agreement herein permitted use of official time in certain situations. In this connection, the Assistant Secretary concluded that the statement to Brogan clearly implied that she could be penalized if she performed certain of her representational duties during official work time, even though use of such time was permitted by the negotiated agreement, and that such conduct interfered with, restrained, or coerced Brogan in the exercise of her rights assured under the Order, in violation of Section 19(a)(1) of the Order.

DECISION AND ORDER

On September 30, 1974, Administrative Law Judge William B. Devaney issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed in its entirety. Thereafter, both the Respondent and the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendation.

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

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

The Administrative Law Judge found that the Respondent's conduct with respect to Mrs. Marie Brogan, President of Local 1001, National Federation of Federal Employees (NFFE), 1/ did not violate Section 19(a)(1) of the Order.

1/ NFFE Local 1001 is the exclusive representative of certain employees of the Respondent.



In this regard, he noted that nothing in Executive Order 11491 or the negotiated agreement between the parties created any absolute or unlimited right to engage in union activity on official time, and concluded that in insisting that Brogan not appreciably neglect her official duties to engage in union activity, the Respondent acted in accord with the Order, the parties' negotiated agreement, and applicable regulations, and that the assignment of work was fully within the rights of management.

The Complainant alleges, in essence, that the Respondent's conduct set forth in the complaint interfered with, coerced, or restrained Brogan in the exercise of her rights assured by the Order. The amended complaint states, in part:

On or about January 19, 1972, Captain Duncan, Contract Administration, Vandenberg AFB, advised Mrs. Brogan, during a meeting, that he would assign her a 'fair share' of the work in the office for which she would be responsible, thus she would have to gauge her union activities accordingly.

On or about July 12, 1972, Lt. Col. Evans, Chief of the Procurement Division, stated in a letter that his view of Capt. Duncan's reference to 'a fair share of the work' meant that 'each contract administrator...would be assigned a fair share of the total work load in the Contract Administration Branch...an equal work load....'

By the act set forth above, the Activity interfered with, restrained or coerced, this employee in the exercise of her rights assured by the Order.

The record indicates that Captain Duncan, Brogan's supervisor, had received complaints from fellow employees that Brogan was not being assigned a fair share of the work load, and that Duncan was concerned about these complaints. It is undisputed that at a January 19, 1972, meeting between Captain Duncan, Brogan and the Respondent's employee relations specialist, Duncan sought to obtain an estimate of the time Brogan would require for handling union matters and then informed Brogan that he wanted her to perform a fair share of the work load and would assign her a fair share of the work and adjust it later. A letter of July 12, 1972, from Lt. Col. Evans, in reply to the unfair labor practice charge in this matter, amplified Duncan's statement asserting that... "I believe that Capt. Duncan meant that each contract administrator would be assigned a fair share of the total work load in the Contract Administration Branch. Hopefully, each administrator would have an equal work load and if possible an equal number of contracts to administer. He felt it was not fair to give Mrs. Brogan a lighter work load in comparison with other employees of the same GS grade and approximate pay. Mrs. Brogan draws her pay from the Air Force and the Air Force is entitled to first consideration from Mrs. Brogan."

In agreement with the Administrative Law Judge, I find that the use of official time for the conduct of union business is not an inherent matter of right under the Executive Order and, indeed, Section 20 of the Order prohibits the use of official time with respect to the solicitation of membership or dues, and other internal business of a labor organization. However, in my view, the Order does not preclude an agency or activity and an exclusive representative from entering into an agreement with respect to the use of official time by union representatives in certain other situations. In this connection, the parties' negotiated agreement herein permits official time to be utilized for employee representational purposes in certain specified circumstances. 2/ In my judgement, to deprive, or to threaten to deprive, employees or their representatives of the rights accorded them under a negotiated agreement would interfere with, restrain, or coerce employees in the exercise of the rights assured by Section 1(a) of the Order. Based on these considerations, I find that, in the circumstances of this case, Captain Duncan's statement to Brogan that she would be required to perform a fair (equal) share of the work, clearly implied that she could be penalized if she performed certain of her representational duties during official time, even though such use of time was permitted by the negotiated agreement. Such conduct, in my view, interfered with, restrained, or coerced Brogan in the exercise of her rights assured by the Order, 3/ and, therefore, was violative of Section 19(a)(1). 4/

2/ For example, Article IX of the agreement provides, in part, that:

1. Management and the Union recognize that officials and members of the Union may accomplish certain duties in representing employees of the Unit on official duty time. Management agrees that when Union officials or members have been designated as representatives to present a complaint, grievance or appeal under the provisions of AFR 40-771, or as specified in Article VIII, Negotiated Grievance Procedure, they will be afforded reasonable time to present the grievance. In addition, necessary time not to exceed eight hours may be used to prepare for a grievance or appeals hearing.

3/ As noted by the Administrative Law Judge, the evidence does not establish that Captain Duncan's statement to Brogan led to an actual increase in Brogan's work load or a denial of any contractually allowed time to engage in union activities. However, in my view, it is immaterial whether the statement led to any change in Brogan's work load inasmuch as the improper threat of such action is sufficient to constitute a violation of Section 19(a)(1) of the Order. Cf. United States Army Tank Automotive Command, Warren, Michigan, A/SLMR No. 447.

4/ Prior to the hearing, the Assistant Regional Director denied the Respondent's motion to dismiss the complaint, which motion asserted that the matter in dispute essentially was one of contract interpretation

(Continued)

REMEDY

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

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, shall:

1. Cease and desist from:

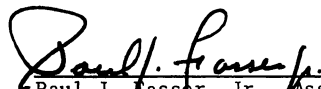
Interfering with, restraining, or coercing Mrs. Marie Brogan, or any other employee, in the exercise of their right assured by Executive Order 11491, as amended, to join and assist a labor organization.

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

(a) Post at its facility at Vandenberg Air Force Base copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C.  
February 4, 1975

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

4/ subject to resolution under the negotiated grievance and arbitration procedure. The Respondent renewed its motion at the hearing and in its exceptions. As the Respondent's conduct herein was found to be violative of employee rights established by the Executive Order i.e., the right to join and assist a labor organization I find that the Respondent's motion to dismiss must be denied.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

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

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce Mrs. Marie Brogan, or any other employee, in the exercise of their right assured by Executive Order 11491, as amended, to join and assist a labor organization.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.



REPORT AND RECOMMENDATION

Statement of the Case

.....  
DEPARTMENT OF THE AIR FORCE :  
BASE PROCUREMENT OFFICE :  
VANDENBERG AFB, CALIFORNIA, :  
Respondent. :  
and :  
NATIONAL FEDERATION OF FEDERAL :  
EMPLOYEES, LOCAL UNION 1001, :  
VANDENBERG AFB, CALIFORNIA, :  
Complainant. :  
.....

Case No. 72-3863

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March AFB, California 92508

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For the Respondent

Mr. Homer R. Hoisington  
Regional Business Agent  
National Federation of Federal  
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5579 Monte Verde Drive  
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For the Complainant

BEFORE: WILLIAM B. DEVANEY  
Administrative Law Judge

This case arises under Executive Order 11491, as amended. It was initiated by a complaint dated October 7, 1972; and filed October 11, 1972, and amended complaint dated October 26, 1973, and filed on or about the same date. The original complaint alleged violations of Sections 19(a)(1), (2), (5) and (6); but the amended complaint narrowed the issue to the single allegation that Respondent violated Section 19(a)(1) of the Executive Order by requiring the President of Local 1001 of the National Federation of Federal Employees, Marie C. Brogan, 1/ to perform work as an employee of Respondent. The following issues are presented:

First, Complainant asserts that by assigning her a fair share of the work load Respondent interfered with and affected her position as President of the Union and affected Complainant's work performance (Tr. 5), all in violation of rights assured by the Executive Order (Tr. 5).

Complainant's position, quite succinctly, is that the Executive Order creates an inherent right to utilize duty time, to whatever extent required by her union duties, for the performance of union activity permitted by the Executive Order (Tr. 8, 9-10).

Second, the Respondent, on or about January 19, 1972, unilaterally imposed on Complainant a "fair share" work standard contrary to the collective bargaining agreement of the Union, and contrary to Air Force Regulation 40-771, in violation of Section 19(a)(1) of the Executive Order.

Third, that Respondent unilaterally changed a contractual allowance of "necessary time not to exceed eight hours" to prepare for a grievance or appeal hearing to "reasonable amount of official time".

1/ Hereinafter, Marie C. Brogan will be referred to as "Complainant" and the National Federation of Federal Employees and its local union 1001 will be referred to as "Union."

Motion to Dismiss for Lack of Jurisdiction

Prior to the hearing, Respondent filed with the Regional Director (now Regional Administrator), Labor-Management Services Administration, a motion to dismiss on the ground that the matter in dispute was essentially a matter of contract interpretation subject to resolution under the negotiated grievance and arbitration procedure. On February 5, 1974, the Regional Director (now Regional Administrator) denied Respondent's motion, stating that the issues in dispute go beyond contract interpretation and Section 19(d) of the amended Order permits an irrevocable election by Complainant precluding arbitral resolution (Tr. 12-13). Respondent renewed its motion to dismiss at the hearing, contending that the decision of the Regional Administrator was erroneous and, in support of its motion, cited various authorities each of which has been carefully considered.

Jurisdiction is governed by the terms of the Executive Order. Section 19(d) of the Executive Order, as amended August 26, 1971, by Executive Order 11616, now provides:

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

2/ There is no contention by Respondent that this case involves the first sentence of Section 19(d), i.e., "Issues which can properly be raised under an appeals procedure may not be raised under this section." Obviously, "appeals procedure" means something other than availability of a remedy under a grievance procedure. It is noted that Section 22 makes reference to "Adverse action appeals" and to 5 U.S.C. §§7511-7512 and 7701. 5 U.S.C. §7511 defines "adverse action" as a "removal, suspension for more than 30 days, furlough

Although the collective bargaining contract (Res. Exh. 1) was signed and became effective prior to the amendment of August 26, 1971, the unfair labor practice asserted herein occurred after the amendment of August 26, 1971, Respondent's contention that, as the contract was entered into prior to the amendment of Section 19(d), at which time an allegation of a violation of 19(a)(1) subject to an established grievance procedure must be resolved under the grievance procedure, the negotiated grievance is the exclusive procedure for resolving the complaint is without merit and must be rejected. The limitation on jurisdiction created by Executive Order 11491 was modified, in turn, by Executive Order 11616 and, by operation of law, granted aggrieved parties the option of raising all unfair labor practice charges, including allegations of violation of paragraphs 19(a)(1),(2) and (4), under the complaint procedures of Executive Order 11491, as amended. Where the events giving rise to the alleged violation arose prior to the amendment of Section 19(d) the provisions of Section 19(d) as it stood prior to amendment governed, United States Postal Service, Berwyn Post Office, Illinois, A/SLMR No. 272 (1973); FLRC No. 73A-27(1973); but where the events giving rise to the alleged violation arose after the date of the amendment, the provisions of Section 19(d), as amended, control. This would be true without regard to the contractual agreement of the parties; however, the instant contract in Art. V specifically provided that the Agreement is governed by existing or future laws, etc.

2/ Continued  
without pay, or reduction in rank or pay." (See, also, Res. Exh. 1, Art. XVII). Complainant instituted no grievance, cf., Internal Revenue Service, Southeast Service Center, Chamblee, Georgia and National Treasury Employees Union and Chapter 070, Case No. 40-4927 (CA) (1974), and Complainant was not removed, suspended for more than 30 days, furloughed without pay, or reduced in rank or pay. Accordingly, jurisdiction to hear and determine the dispute herein is not affected by the first sentence of Section 19(d). It must be expressly noted, however, that nothing contained herein is intended, nor should it be inferred, as a decision in any manner as to the meaning, construction, or definition of "appeal procedure."

Moreover, Art. VIII, entitled "Negotiated Grievance and Arbitration Procedure" does not purport to make this procedure exclusive.

The primary thrust of Respondent's assertion that the Regional Administrator erred in denying its motion to dismiss, and Respondent's principal argument in support of its renewal of its motion to dismiss, is Section 13(a) of the Executive Order and Report No. 49 of the Assistant Secretary of Labor dated February 15, 1972. Section 13(a) of the Executive Order, as amended, in substance was Section 13(a) of Executive Order 11491 as issued October 29, 1969. 3/ The purpose and intent of the amendment to Section 19(d) was stated by the Federal Labor Relations Council in its June, 1971, "Report and Recommendations on the Amendment of Executive Order 11491, as follows:

"Section 19(d) presently requires that complaints under sections 19(a)(1), (2) and (4), i.e., alleged management unfair labor practices against employees, be processed under established grievance or appeals procedures, where applicable, while other unfair labor practice complaints are resolved under machinery established by the Order. This requirement inhibits the development of a single body of unfair labor practice precedents and a single, uniform procedure for processing and resolving unfair labor practice complaints under the Order, since such complaints are today processed under grievance, appeals, and unfair labor practice procedures. The decision as to whether an unfair labor practice has been committed should not be made under grievance and appeals systems which are not under the control of the Assistant Secretary... Therefore, we recommend that all unfair labor practice complaints be processed and decided only under the procedures provided by the Assistant Secretary and the Council.

3/ The amendment, by changing "may" to "shall" made the inclusion of grievance and arbitration procedures in negotiated agreements mandatory. See, Report and Recommendations of the Amendment of Executive Order 11491, Federal Labor Relation Council, June, 1971, Paragraph B.

"Further under Section 19(a) when an alleged unfair labor practice is subject to an agency grievance procedure, agency management is the final judge of its own conduct. We believe there should be an opportunity to seek third party adjudication of any issue involving an alleged unfair labor practice. To provide this opportunity we recommend elimination of the requirement that when the issue in certain unfair labor practice complaints is subject to a grievance procedure, that procedure is the exclusive procedure for resolving the complaint. We purpose, instead, that when an issue may be processed under either a grievance procedure or the unfair labor practice procedure, it be made optional with the aggrieved party whether to seek redress under the grievance procedure or under the unfair labor practice procedure. The selection of one procedure would be binding; the aggrieved party would not be permitted, simultaneously or sequentially, to pursue the issue under the other procedure.

"The existing rule that issues which can properly be raised under established appeals procedures may not be raised under unfair labor practice procedures should be retained. Employees currently have the opportunity to seek third-party review of agency action under appeals procedures established by statute." (Paragraph C). (Emphasis supplied).

The clear and unambiguous language of Section 19(d) grants the aggrieved party the option to raise an unfair labor practice, not subject to statutory appeals procedures, cf., United States Army Tank Automotive Command, Warren, Michigan and Local 1658, American Federation of Government Employees, AFL-CIO, Case No. 52-4956 (Decision of Administrative Law Judge June 29, 1974), under the unfair labor practice procedure of the Executive Order. It is true, as Respondent contends, that Report No. 49 appeared, contrary to clear and unambiguous language of Section 19(d), as amended, and contrary to the Report of the Federal Labor Relations Council, to constrict the option given an aggrieved party to elect the complaint procedures of the Executive Order; however, the Assistant Secretary, in NASA, Kennedy Space Center, Florida, A/SLMR No. 223 (1972), dispelled this impression. There, the Assistant Secretary stated, in part, as follows:

"...By this policy statement, however, no withdrawal of jurisdiction was intended..."  
(Emphasis supplied)

Veterans Administration Center, Bath, New York, A/SLMR No. 335 (1974) is to like effect. There, contrary to the conclusion of the Administrative Law Judge that, "pursuant to the terms of the agreement and Section 13(a) of the Order, [the dispute] must be resolved through the negotiated grievance procedure", the Assistant Secretary did not dismiss for lack of jurisdiction, but, rather, decided the alleged unfair labor practice on its merits.

Moreover, Complainant, in addition to asserting issues which might be raised under a grievance procedure, alleges an unfair labor practice as the result of interference with rights created by the Executive Order and not by contract. Accordingly, in full agreement with the Regional Administrator, I recommend that Respondent's motion to dismiss for lack of jurisdiction be denied.

Findings and Conclusions

1. Pertinent Contract Provisions and Air Force Regulations in effect when Agreement entered into.

The contract entered into by Respondent and the Union, dated February 17, 1971, and approved May 7, 1971 (Res. Exh.1) (hereinafter "Agreement"), was for an initial term of two years from date of approval - or until May 7, 1973. Art. II. "EMPLOYEES RIGHTS" provided, in part as follows:

"2. The foregoing paragraph does not authorize participation in the management of the Union or acting as a representative ... by an employee in the Unit when the participation or activity would ... be incompatible ... with the official duties of the employee." (Res. Exh. 1) (Emphasis supplied).

Art. II of the Agreement in its entirety, including Section 2 set forth, in part, above, derives directly from Section 1 of Executive Order 11491 as issued October 29, 1969, and which was unchanged by the amendments (E.O. 11616) adopted August 26, 1971.

Art. VII of the Agreement provided for designation of stewards by the Union, not to exceed one for each forty employees in the Unit (Sec. 1), the objective being that,

"... Stewards ... service the needs of each employee in the Unit near his work location..." (Sec. 1)

"4.c. An employee may ... request the Steward designated for the particular work area or a Steward from another related work area in the prolonged absence of the assigned Steward to represent the employee in presenting a complaint to his supervisor. When so designated, the Steward is excused from his normal employment duties without charge to leave for the time required to present the complaint..."

Art. IX, of the Agreement, "Use of Official Time", provided, in part, as follows:

"1. Management and the Union recognize that officials and members of the Union may accomplish certain duties in representing employees of the Unit on official duty time. Management agrees that when Union officials or members have been designated as representatives to present a complaint, grievance or appeal under the provisions of AFR 40-771, or as specified in Article VIII, Negotiated Grievance Procedure, they will be afforded reasonable time to present the grievance. In addition, necessary time not to exceed eight hours may be used to prepare for a grievance or appeals hearing..." (Emphasis supplied).

"2. [Union sponsored training sessions] ... Administrative excusal for this purpose will not exceed eight hours for any individual in a 12 months' period." (Emphasis supplied).

"3. From time to time, Management may designate Union representatives to assume responsibility under the Coordinated Federal Wage System. Employees of the Unit will be so designated and will accomplish these assigned duties on official time." (Emphasis supplied).

"4. The Union agrees to advise its officers and members of their prime responsibility as Vandenberg Air Force Base employees in utilizing official time. No Union official, who is a Vandenberg Air Force Base employee, will conduct Union business on official time except as provided herein. The Union agrees that members or officials of Local 1001, who desire to use

official time as prescribed herein or provided in Air Force, Command, base or local management directives, or where requested by a management official to attend meetings and be consulted within their capacity as Union representatives will obtain the express consent of their supervisors prior to leaving their duty stations. ..." (Emphasis supplied).

"5. [Union business] ... Employees will be charged annual leave or leave without pay for... [Union business] unless official duty time is authorized under AFR 40-702."

Art. VI, "CONSULTATION", provided, in part, as follows:

"7. Consultations by supervisors with representatives of the Union will be conducted during regular working hours on official time. The total amount of time allocated for these purposes to any Union representative shall be reasonable. ..."

Art. X of the Agreement, "DOMESTIC ACTION COUNCIL", provided, in part,

"3. The Union agrees to support the activities of the Domestic Action Council by nominating one member of the Council. Upon acceptance and appointment by the Base Commander to the Council, this member will attend meetings as required and will contribute to the activities. ..."

Art. V of the Agreement, "EXISTING OR FUTURE LAWS AND REGULATIONS", provided as follows:

"1. In the administration of all matters covered by this Agreement, Management, the Union 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 Air Force policies and regulations in existence at the time the Agreement is approved; and by subsequently published Air Force 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 Air Force level. ..."

Complainant has asserted that the provisions of AFR 40-771 in effect at the time the Agreement was signed, February 17, 1971, control; however, neither party introduced into evidence any portion of AFR 40-771 as of February 17, 1971. Judicial notice is taken of AFR 40-771 (C4), 18 November 1969, which appears to have been the language, as material, in effect as of February 17, 1971:

"10. Representation Rights:

"a. Employee Rights:

"(1) Every employee has the right to be accompanied, represented, and advised by a representative of his own choosing in presenting his unresolved appeal or grievance ... This right may not be abridged by management action or by negotiation under Executive Order 10988 4/ ... This designation may be made and may be changed at any time. Designations include the representative's name, address, and telephone number and are submitted to the CCPO..."

...

"11. Grants of Official Time Off and Leave"

"a. An employee contesting a matter arising from his Air Force employment is granted time off without charge to leave to present his dissatisfaction. In addition, he is allowed up to 8 hours without charge to leave to prepare for the hearing or inquiry."

<sup>4/</sup> Section 1 of E.O. 10988 is substantially the same as Section 1 of E.O. 11491, and subsection (b) provided substantially in the language of subsection (b) of E.O. 11491 and Art. II, Sec. 2 of the Agreement, that, "The rights described in this section do not extend to participation in the management of an employee organization, or acting as a representative of any such organization, where such participation or activity would ... be incompatible ... with the official duties of an employee." (E.O. 10988, January 17, 1962).

"b. An employee representing a fellow employee of his activity ... is excused with out charge to leave for the time required to present the appeal or grievance. In addition he is allowed up to 8 hours without charge to leave to prepare for the hearing or inquiry."

2. AFR 40-711 15 September 1971.

An all installation letter, 21 April 1971, subject: Revised AFR 40-771, Appeal and Grievance Procedures, was issued prior to approval of the Agreement; but neither party introduced the letter of April 21, 1971, into evidence. AFR 40-771, as revised, was issued 15 September 1971. Relevant portions are set forth hereinafter.

"5. Representation. An employee has the right to present an appeal or grievance without representation. He also has the right to be accompanied, represented, and advised by one representative of his choice at any stage of the proceeding... If the employee chooses another employee of the Air Force as his representative, and that person is willing to represent the employee, he must not be denied permission to do so unless the representation would: (1) contribute appreciably to the neglect of that person's regular duties..."

"6. Use of Official Time:

a. An employee is entitled to a reasonable amount of official time for the preparation and presentation of an appeal or a grievance under the procedures authorized in this regulation, if he is otherwise in an active duty status. The time to be allowed will be determined on the basis of the facts and circumstances in each individual case.

b. If the employee's representative is an Air Force employee in an active duty status, he is also entitled to a reasonable amount of official time to assist or act for the employee in the preparation and presentation of an appeal or grievance.

...

d. Employees, whether principals, representatives, or observers, must make advance arrangements with their supervisors for the use of official time. When there is a disagreement concerning the amount of official time to be granted, the matter will be submitted by the supervisor to the civilian personnel officer for resolution."

3. Testimony.

Complainant, President of Local 1001, from August, 1971, was a GS-9 contract administrator. Complainant in August, 1971, began work under the supervision of Captain Ian J. Duncan. Complaints were received by Captain Duncan from fellow employees that Complainant was not being assigned a fair share of the workload and Captain Duncan was concerned about assignment of work to Complainant. On or about January 19, 1972, Mr. Van Nice, employee relations specialist at the Vandenberg Civilian Personnel Office, Captain Duncan and Complainant met in Captain Duncan's office to discuss the problem. Complainant rebuffed the efforts of Captain Duncan to obtain from Complainant any estimate of the time she would require for handling union cases. Complainant contended that she could not come up with any specific time because of so many unknown factors and/or that this was a matter for negotiation at the bargaining table. Captain Duncan informed Complainant that he wanted her to handle a fair share of the contracts and, under the circumstances, would assign her a fair share of the work and adjust it later. Because of Complainant's frequent absence from the office, she was assigned supply and service contracts rather than construction contracts which often required daily attention. Captain Duncan never assigned Complainant an "equal" share of the work and, because of her absence, contracts assigned to her had to be given to someone else.

Complainant testified that there was no change in the assignment of work after the January 19, 1972, meeting, that she was never precluded from attending to any representation activity; that she was never denied the full eight hours to prepare a grievance; that she was never denied official time for the entire time required for a grievance hearing; and that she never failed to meet a work deadline. Mr. Virgil Prem, Deputy Chief of the Base Procurement Office, testified that Complainant carried a considerably smaller workload than other contract administrators.



CONCLUSIONS

I. Executive Order 11491 Creates no Inherent Right to Unlimited Duty Time for Performance of Union Duties by Union Officials.

As noted above, Section 1(b) of Executive Order 11491 specifically provides that Paragraph (a) does not authorize participation in the management of a labor organization by an employee when the participation or activity would be incompatible with the official duties of the employee. Section 20 of Executive Order 11491, prior to its amendment, provided:

"Use of Official Time. Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employee concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management."

Contrary to the assertion of Complainant, nothing contained in Executive Order 11491 at the time the Agreement was approved (May 7, 1971) created any absolute or unlimited right to engage in union activity on official time. Indeed, the exact opposite is true. Section 20 specifically provided that internal business of a labor organization shall be conducted during non-duty hours and that time spent in contract negotiations shall not be on official time. Section 1(a) granted the protected right to engage in union activity; but Section 1(b) expressly provided, inter alia, that participation in the management of a labor organization by an employee was not authorized when the participation or activity would be incompatible with the official duties of the employee. It is apparant that by wholly excluding internal union business and time spent in contract negotiations from official time and by prohibiting participation in the management of a labor organization or as a representative of such an organization when such participation or activity would be incompatible with the official duties of the employee, the Executive Order created no inherent right in union officers to unlimited official time for the performance of union activity.

The amendment to Executive Order 11491, effective August 26, 1971, made no change in Section 1 and amended Section 20 only to the extent that the negotiating parties may agree to limited official time for time spent in contract negotiations during regular working hours. Executive Order 11491, as amended, also contemplates that each employee will perform his, or her, official duties and prohibits participation as an officer or representative when such union activity is incompatible with the employee's official duties.

Moreover, Section 19(a)(3) provides that:

"(a) Agency management shall not -

...

"(3) sponsor, control, or otherwise assist a labor organization..."

Although this language differs from the provisions of Section 8(a)(2) of the National Labor Relations Act, 5/ and decisions under the NLRA are not, in any event, necessarily applicable hereunder, payment for time spent on union business, except as permitted by the proviso to 8(a)(2), may constitute evidence of unlawful domination or assistance under the NLRA. Schwarzenbach-Huber Co. v. NLRB, 408 F. 2d 236, 70 LRRM 2805 (2nd Cir. 1969), sub nom, Textile Workers, TWVA v. Schwarzenbach-Huber Co., cert. denied, 396 U.S. 960 (1969); NLRB v. Haspel, 228 F. 2d 155, 37 LRRM 248 (2nd Cir. 1955); NLRB v. Summers Fertilizer Co., 251 F. 2d 514, 41 LRRM 2347 (1st Cir. 1958); Versatube Corp., 203 NLRB No. 87, 83 LRRM 1118 (1973); Duquesne University of the Holy Ghost, 198 NLRB No. 117, 81 LRRM 109 (1972); Retail, Wholesale & Dept. Store Union, Local 1199, 193 NLRB No. 149, 78 LRRM 1519 (1971); Carpenter Steel Co. 76 LRRM 670, 21 LRRM 1232 (1948). By like token, payment of union officers by an

5/ "(a) It shall be an unfair labor practice for an employer -

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that ... an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;"

agency for full time union activity might constitute evidence that the agency had, contrary to Section 19(a)(3) of the Executive Order, thereby sponsored, controlled or otherwise assisted a labor organization. As no 19(a)(3) allegation is presented in this case, no determination is made, or is to be inferred, that any such payment would be violative of Section 19(a)(3). Nevertheless, the language of Section 19(a)(3) is a further indication that nothing contained in the Executive Order was intended to create, and no provision of the Executive Order in fact created, any inherent right in union officers to unlimited official time for the performance of union duties.

II. Neither the Agreement nor Applicable Regulations gave Complainant any Unlimited Right to Official Time for the Performance of Union Duties.

Art. II, Sec. 2, of the Agreement set forth the same limitation on participation in management of the Union or activity as a representative of the Union by an employee in the Unit when such participation or activity would "be incompatible with ... the official duties of the employee" as contained in section 1(b) of the Executive Order. Art. VI of the Agreement provided for consultation with representatives of the Union during regular working hours; but in Sec. 7 specifically provided that the total amount of official time allocated for such purpose "to any Union representative shall be reasonable." Art. IX, entitled "Use of Official Time", in Sec. 1 recognized that officials and members of the Union may accomplish certain duties in representing employees on official duty time and provided that an employee designated as a representative to present a complaint, grievance or appeal will be afforded "reasonable time to present the grievance" and, in addition, "necessary time not to exceed eight hours" to prepare for the hearing. Respondent further agreed that a designated Union official may act as an observer at such proceeding subject to the limitation on official duty time as set forth in AFR 40-702 which provided that, in effect, that only the designated representative or the observer - not both - is entitled to official time. Art. IX, Sec. 2, provides for excusal

to attend Union sponsored training sessions but limits the total time allowed for any individual to 8 hours within a 12 months' period. Art. IX, Sec. 3 provides for performance of assigned duties of designated employees under the Coordinated Federal Wage System on official time. Art. IX, Sec. 4 provides that consultation or attendance at meetings as Union representatives be on official time, provided the Union representatives obtain "the express consent of their supervisors prior to leaving their duty stations." Art. IX, Sec. 5 provides that official time will not be allowed for performance of Union business.

Whether the provisions of the Agreement are considered separately or collectively, the use of official time was circumscribed and the overall right of any employee to participate in management of the Union or to act as a representative of the Union was prohibited when such participation or activity was incompatible with the official duties of the employee. In addition, Art. V, Sec. 1 of the Agreement provided, inter alia, that the Agreement was governed by published Air Force policies and regulations in existence at the time the Agreement was approved (May 7, 1971) "and by subsequently published Air Force policies and ... by the regulations of appropriate authorities..." AFR 40-771 was revised September 15, 1971; and states that it "reflects the policies of the Secretary of the Air Force in matters which are discretionary with the Air Force." Section 5 thereof provided, in part, as follows:

"5. Representation. ...  
If the employee choses another employee of the Air Force as his representative ... he must not be denied permission to do so unless the representation would: (1) contribute appreciably to the neglect of that person's regular duties; ..."

The Agreement granted Respondent the discretion to determine when activity as a representative of the Union was "incompatible" with the official duties of the employee. As this was a matter made discretionary with the Air Force under the Agreement; the Agreement expressly provided that administration of all matters covered was governed by existing and subsequently published Air Force policies and regulations of appropriate authorities; and the amendment of Section 5 was both the policy of the Air Force and a duly promulgated regulation of the Air Force of general application, Section 5 of AFR 40-771, as amended September 15, 1971, governed administration of the Agreement. Pursuant to Section 5(1), permission to represent a fellow employee may be denied when such representation would contribute appreciably to the neglect of that person's regular duties.

Nor can it matter that Respondent restricted Complainant's activity by the assignment of work rather than by directly denying permission to act as a representative since, as noted hereinafter, the record is devoid of evidence of discriminatory motivation or disparity of treatment based on union membership considerations.

III. No Discrimination Because of Union Membership

Complainant was never denied permission to engage in authorized union activity and was never denied a full 8 hours of official time to prepare for a hearing as authorized by Art. IX, Sec. 1 of the Agreement. Complainant's contention that promulgation of revised AFR 40-771 unilaterally changed conditions agreed upon by Respondent in the Agreement inasmuch as AFR 40-771, Sec. 6b., provided for "reasonable amount of official time to assist or act for the employee in the preparation and presentation of an appeal or grievance" rather than "reasonable time to present" and "necessary time not to exceed eight hours" to prepare for hearing as set forth in Art. IX, Sec.1 of the Agreement, is not supported by any evidence. As previously noted, amended AFR 40-771 reflects the policy of the Secretary of the Air Force "in matters which are discretionary". Where a contract already contains a provision, such as Art. IX, Sec. 1, that is no longer a matter which is discretionary and the amendment does not purport to effect any change in any negotiated agreement. Respondent is correct that nothing contained in Sec. 6b. of AFR 40-771, as amended, is directory, nor is Art. IX, Sec. 1 of the Agreement in conflict with Sec. 6b, i.e., "necessary time not to exceed eight hours" is consistent with Sec. 6b as the parties' definition of "reasonable time". Respondent has not changed any practice under Art. IX, Sec. 1 and Complainant testified that she had never been denied a full eight hours to prepare for a grievance. In short, the Agreement has been fully and consistently complied with, and, accordingly, there is no evidence that Respondent unilaterally changed any provision of the Agreement. To the extent that Complainant seeks to raise allegations which, if true, might violate Section 19(a)(6), suffice it to say that such allegations are not cognizable in this proceeding where only a 19(a)(1) violation is alleged.

Complainant's further contention that her rights were interfered with in violation of Section 19(a)(1) because: a) she was required to request permission before leaving her duty station and/or b) she was assigned a "fair share" of the work are equally without merit. Art. IX, Sec. 4 of the Agreement expressly provides that,

"members or officials ... who desire to use official time ... will obtain the express consent of their supervisors prior to leaving their duty stations." (Emphasis supplied).

The Agreement requires consent of the employee's "supervisors" - not "her duty station" as contended by Complainant in her Brief. 6/ The Agreement does not specify any particular supervisor, nor does it specify the procedure by which the consent of supervision will be given. Accordingly, Respondent was free to insist upon any reasonable procedure, and Respondent's requirement that the Civilian Personnel Office be notified was both reasonable and consistent with the Agreement. (See, for example, AFR 40-771, 18 November 1969, Sec. 10; AFR 40-771, 15 September 1971, Sec. 5, which provide for designation in the CPO of employee representatives). Obviously, consent for the use of official time requires that Respondent know what activity is involved for which the official time is requested since the Agreement contains various provisions under which official time, subject to various limitations, is allowable as well as provisions (Art. IX, Sec. 5) under which official time is not allowable. Respondent's request for Complainant's estimate of the amount of official time to be required was neither unreasonable nor did it constitute evidence of a violation of Section 19(a)(1) since Claimant testified that she was never denied permission to take official time even when she could not, or would not, give any estimate of the time required; she was never limited to the time estimated; and there was no evidence that any different requirement was applied to Complainant than to any other employee requesting official time. It may be assumed that Respondent insisted on compliance with Art. IX, Sec. 4 as the frequency of Complainant's absences increased; but in doing so Respondent was merely insisting on compliance with the Agreement.

Finally, Complainant asserts that assignment of a "faire share" of the work violated Section 19(a)(1). As stated above, Executive Order 11491 created no right in union officers to the use of unlimited official time for the performance of union activity and the Agreement granted no such right. At the outset, Complainant misconceives

6/ Even if Complainant were correct, her "duty station" was nevertheless, free to designate the person, or office, authorized to act on behalf of the "duty station".

the right to engage in protected activity and her obligations as an employee. An employee's primary obligation is, and remains under the Executive Order, the performance of his, or her, official duties. The right to participate in the management of a labor organization or as its representative is not authorized, either by the Executive Order or by the Agreement, when incompatible with the official duties of the employee, and Section 5(1) of AFR 40-771, 15 September 1971, in further recognition of this basic underlying premise, permits the denial of representation time when the representation would contribute appreciably to the neglect of that person's regular duties. There is no dispute that Complainant's activity had contributed appreciably to the neglect of her regular duties. This alone may affect promotion opportunities or performance appraisal but does not constitute an unfair labor practice where, as here, no anti-union motivation or disparity of treatment based on union membership consideration is shown. United States Army Tank Automotive Command, Warren, Michigan and Local 1659, American Federation of Government Employees, AFL-CIO, No. 52-4956 (July 29, 1974). Respondent might have refused to permit Complainant to represent employees in grievance or appeal proceedings when such representation would contribute appreciably to the neglect of Complainant's regular duties; however, Respondent elected to assign Complainant a fair share of the work when Complainant turned aside Respondent's efforts to reach an agreed accommodation with Complainant. The assignment of work was a determination by Respondent of the level of performance expected of Complainant without appreciable neglect of her regular duties. Complainant, within this framework, could undertake, consistent with her regular duties, any particular representation. In making its assignment of work, Respondent acted reasonably and with full recognition that the Agreement provided for a variety of functions to be performed by Complainant as an officer of the Union; but Respondent is under no obligation, either by virtue of the Executive Order, by Agreement, or by applicable regulations, to permit union activities by an employee when they become incompatible with the official duties of the employer or contribute appreciably to the neglect of the employee's official duties. Parenthetically, Complainant has no right to engage in union activity when that activity becomes incompatible with her official duties or contribute appreciably to the neglect of her official duties.

Not only is the record devoid of any evidence of discriminatory motivation but the record affirmatively shows that Complainant was never assigned an

"equal" share of the work; that work assigned, but not performed, was reassigned to others; that Complainant was assigned principally supply and service contracts, rather than construction contracts, which require less attention and were considered easier; that Complainant testified that there was no increase in the quantum of work assigned; and records showed that Complainant handled far fewer contracts than her fellow contract administrators. When Respondent became aware that a problem existed with Complainant it brought the matter to Complainant's attention in a good faith effort to reach a mutually satisfactory solution, and negates any discriminatory motivation or disparity of treatment based on union membership considerations. In insisting that Complainant not appreciably neglect her official duties, Respondent acted fully in accord with Executive Order 11491, the Agreement and applicable regulations; and Respondent's assignment of work, which was not disproportionate, and which was further subject to adjustment later, was fully within the rights of management as set forth in Art. IV of the Agreement and was not violative of Section 19(a)(1) of the Executive Order.

RECOMMENDATIONS

Upon the basis of the entire record and for the reasons set forth hereinabove I recommend: a) that Respondent's Motion to Dismiss for Lack of Jurisdiction be denied; and b) that, as Respondent has not engaged in conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, the complaint herein be dismissed in its entirety.

*William B. Devaney*  
 WILLIAM B. DEVANEY  
 Administrative Law Judge

Dated: September 30, 1974  
 Washington, D.C.

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

DEPARTMENT OF THE NAVY,  
 NAVAL PLANT REPRESENTATIVE OFFICE,  
 BALTIMORE, MARYLAND  
 A/SLMR No. 486

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

This unfair labor practice proceeding involved a complaint filed by the National Federation of Federal Employees, Local 1624 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to consult, confer or negotiate concerning changes in shift hours of certain employees, and thereby unilaterally changing the terms of an existing negotiated agreement.

The Assistant Secretary adopted the Administrative Law Judge's findings that, although the Respondent was not obligated under the Order to meet and confer with the Complainant regarding the reassignment of 30 employees from the 0730 shift to the 0800 shift, it violated Section 19(a)(1) and (6) by instituting the reassignment without affording the Complainant a reasonable opportunity to meet and confer on the impact of such action on adversely affected unit employees. In this connection, the record reflected that although on November 21, 1973, the Respondent indicated to the Complainant's President that it desired a change in the working hours because of the energy crisis, no further contact took place between the parties until December; that at this time the Complainant's President heard a rumor from a fellow employee that employees would begin the shift change starting December 9; that on December 4, a memorandum to that effect was posted by the Respondent, with the Complainant's President not receiving official notice of such reassignment until December 5, 1973, which notification the Administrative Law Judge concluded did not afford the exclusive representative an opportunity to explore fully the procedures to be followed and the impact of the decision to reassign employees to a different shift prior to the implementation of that decision. In reaching his decision, the Assistant Secretary noted that the record did not indicate that there was an overriding exigency requiring the reassignment of the employees from one shift to another without providing the Complainant with prior reasonable notice so as to afford the latter the opportunity to meet and confer on the procedures to be utilized in implementing the reassignment and on the impact of the reassignment action on adversely affected unit employees.

Respondent

and

Case No. 22-5179(CA)

NATIONAL FEDERATION OF FEDERAL  
 EMPLOYEES, LOCAL 1624

Complainant

## DECISION AND ORDER

On November 21, 1974, Administrative Law Judge Gordon J. Myatt issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices, and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations. 2/

1/ On page 9 of his Report and Recommendations, the Administrative Law Judge inadvertently referred to "Section 19(a)(b) of the Executive Order" instead of Section 19(a)(6) of the Order. This inadvertent error is hereby corrected.

2/ In adopting the recommendations of the Administrative Law Judge, it was noted that the evidence did not establish that there was any overriding exigency requiring that the Respondent reassign unit employees from one shift to another without providing the Complainant with prior reasonable notice so as to afford the latter the opportunity to meet and confer on the procedures to be utilized in implementing the reassignment and on the impact of the reassignment action on adversely affected unit employees.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, shall:

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:

1. Cease and desist from:

(a) Instituting a reassignment to different work shifts of employees represented exclusively by the National Federation of Federal Employees, Local 1624, or any other exclusive representative, without notifying the National Federation of Federal Employees, Local 1624, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

WE WILL NOT institute a reassignment to different work shifts of employees exclusively represented by the National Federation of Federal Employees, Local 1624, or any other exclusive representative, without notifying the National Federation of Federal Employees, Local 1624, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

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

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

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

(a) Notify the National Federation of Federal Employees, Local 1624, or any other exclusive representative, of any intended reassignment of employees to different work shifts and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such reassignment and on the impact the reassignment will have on the employees adversely affected by such action.

WE WILL notify the National Federation of Federal Employees, Local 1624, or any other exclusive representative, of any intended reassignment of employees to different work shifts and, upon request, meet and confer in good faith to the extent consonant with law and regulations, on the procedures which management will observe implementing such reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.


(b) Post at its facility at the Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Officer in Charge of the Naval Plant Representative Office and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Officer in Charge shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

\_\_\_\_\_  
(Agency or Activity)

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

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature)

Dated, Washington, D.C.  
February 28, 1975

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

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

If employees have any questions concerning this notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



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In the Matter of :

DEPARTMENT OF THE NAVY, :  
 NAVAL PLANT REPRESENTATIVE OFFICE :  
 BALTIMORE, MARYLAND :

Respondent :

and : Case No. 22-5179 (CA)

NATIONAL FEDERATION OF FEDERAL :  
 EMPLOYEES, LOCAL 1624 :

Complainant :

.....

Janet Cooper, Esq.  
 Washington, D.C.  
 For the Complainant

Edward T. Borda, Esq.  
 Washington, D.C.  
 For the Respondent

Before: GORDON J. MYATT  
Administrative Law Judge

REPORT AND RECOMMENDATIONS  
Statement of the Case

Pursuant to a Complaint filed on January 16, 1974, under Executive Order 11491, as amended, by National Federation of Federal Employees, Local 1624 (hereinafter called the Complainant) against Department of the Navy, Naval Plant Representative Office (hereinafter called the Respondent) a Notice of Hearing on Complaint was issued by the Assistant Regional Director for Labor-

Management Services on March 26, 1974. The Complaint alleged, among other things that the Respondent violated Section 19(a)(1) and (6) of the Executive Order.

A hearing was held on this matter on May 29, 1974, in Baltimore, Maryland. All parties were represented and afforded opportunity to be heard and to introduce relevant evidence on the issues involved.

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

Findings of Fact

A. Background Facts

The Naval Plant Representative Office is a contract administration activity located on the premises of the Westinghouse Defense and Electronics Systems Center, Baltimore, Maryland. The mission of the Activity is to act as technical representative and contracting officer for government procurement in all matters relating to the field administration of Department of Defense (DOD) contracts held at the Westinghouse Plant.

The Complainant was certified on April 22, 1970, as the exclusive bargaining representative for "all nonsupervisory GS employees and professionals..." employed by the Respondent. The parties negotiated a collective bargaining agreement effective April 30, 1971, through April 30, 1972. The agreement was subsequently extended by the parties and was effective at all times material to the issues involved in this case.

The collective bargaining agreement contained the following provisions which related to hours of work:

Article 15  
Hours of Work

Section 1. The Parties agree that the basic work week shall consist of five-eight hour days scheduled Monday through Friday. The standard work day shall consist of eight hours of work, plus a thirty-minute lunch break.

Section 2. The normal work shift Monday through Friday will be one of the following:

- a. 0730 Hours to 1600 Hours
- b. 0800 Hours to 1630 Hours
- c. 1530 Hours to 2400 Hours

These times include a thirty-minute nonpaid lunch period for each shift. Each Division Director will establish the normal shift for his employees. Deviations from the normal work shift must be approved by the NAVPLANTREP.

B. The Alleged Unlawful Conduct

On November 21, 1973, <sup>1/</sup> the Union President, James Irwin, was called into the office of Captain Winkler, Commanding Officer of the Activity. In addition to Irwin and Winkler, Robert Herbert, Management Liaison Officer for the Respondent was present. There is little dispute in the record as to what transpired during the course of this meeting.

The Captain informed Irwin that the purpose of the meeting was to discuss a change in the working hours. He specifically stated that because of the energy crisis and because of a desire to increase the efficiency of the operation, he was seriously considering establishing a standard or universal shift. The Captain indicated that he was contemplating having all of the employees, with the exception of the night shift, work from 0800 hours to 1630 hours. <sup>2/</sup> While Irwin agreed that the gasoline crisis might result in some change in the future, he took the position that any change in the work shift had to be the subject of negotiations rather

<sup>1/</sup> Unless otherwise indicated all dates herein refer to 1973.

<sup>2/</sup> This change would have affected 30 employees. Approximately 70 employees were currently working the 0800 to 1630 shift and all the supervisors reported at 0800.



than an informal meeting such as was taking place. Irwin also stated that such a change would work a hardship on members in the bargaining unit. He told the Captain that the hours of work had been discussed during prior contract negotiations, and that the Union had been informed by the management representatives that the work schedule would remain as agreed upon.

Captain Winkler took the position that the contemplated change was not negotiable, and stated that it was necessary for the Activity to attempt to achieve greater efficiency in the use of its personnel. He considered one of the means of doing this to be the establishment of a standard or universal day shift. Irwin suggested that it would be better to establish the 0730 shift as the universal shift because many of the employees of Westinghouse Shop reported to work at that time, and such a change would facilitate the prospects of carpooling. Because it would involve shifting a larger number of employees, Winkler did not feel it was feasible to start the standard shift at 0730. He did agree, however, to consider the suggestion offered by Irwin.

Following this meeting, there was no further contact between Irwin and the Respondents until December. Irwin testified, however, that he was informed by a secretary in his section that she'd received a call from Kenneth Heydt, Director of the Quality Division, telling her to notify the employees in the section that effective December 9 the work shift would commence at 0800. Apparently Irwin received this "unofficial" information shortly before December 4. On December 4 an official memo from Heydt was posted stating there would be a shift change from 0730 to 0800. The following day Irwin received a memo from Herbert advising him that the Captain had decided to establish a standard shift from 0800 to 1630 hours. The memo indicated that the change was to become effective on December 9. 3/

3/ There was testimony that the Respondent wanted to change the starting time of the second night shift, but the Complainant refused to consider reopening negotiations on the matter.

C. The History of the Hours-of-Work Provision

Testimony was offered by the parties regarding the negotiation of the hours-of-work provision contained in the bargaining agreement.

Irwin testified that during the negotiations of the current agreement the Union was concerned primarily about wholesale changes in the work shifts. According to Irwin, management agreed during the negotiations that all of the employees would remain on the shifts they were currently working. The only area of concern was to establish a means to have an employee working on the second or night shift. Therefore, according to Irwin, the parties agreed on language allowing for the rotation of an employee, in the event that none volunteered to work the night shift. 4/

Joseph Duncan, a technical adviser to the management negotiating team, testified that during the negotiations of the hours-of-work provision the Union proposed that each division director would establish the normal shift for the employees, and that any change in the shifts would be the subject of negotiation. According to Duncan, the Respondent objected to the idea that changes in the shifts would be subject to negotiation because it would deprive the Activity of the flexibility needed to accomplish its mission. Duncan stated that the Union finally agreed to management's position and deleted this language from its proposal. Duncan further testified that the Respondent never gave any assurances during negotiations that employees would be kept on the shifts which they were currently working.

Concluding Findings

The Union contends that the Respondent failed to consult, confer or negotiate concerning the changes in the shift hours as required by the Executive Order and therefore violated Section 19(a)(6). It further contends

4/ This portion of Article 15 states:  
In the event that a change from day shift to night shift is required, it is the responsibility of the supervisor to deal fairly with all personnel involved, giving due consideration to possible personnel hardships before making the assignment.

\* \* \* \*

In the event there are no volunteers, the night duty will be rotated equally among all section employees....

that when the Respondent changed the work hours of the employees on the 0730 shift to 0800, over the objections of the Union representative, it unilaterally changed the terms of the existing collective bargaining agreement and thereby violated Section 19(a)(1) and (6) of the Executive Order.

The Respondent argues, however, that the Executive Order does not impose an obligation upon it to negotiate with the Union concerning changes in shift hours. But in the event that such an obligation does exist, the meeting on November 21 between Captain Winkler and Irwin satisfied the requirements under the Executive Order.

The foremost issue presented by this case is whether the Respondent had a duty under the Executive Order to meet and confer with the Union regarding changes in the assignment of employees from one of the work shifts to another. It should be noted at this point that the changes involved did not establish new work shifts contrary to the agreement, but rather changed the hours of a group of employees from one of the negotiated shifts to another. This factor is significant in that the dispute here centers essentially on the staffing pattern to be utilized by the Respondent, and does not involve the basic work week or the establishment of a new work shift.

A case involving a similar issue was decided by the Federal Labor Relations Council in Plum Island Animal Disease Laboratory, FLRC No. 71A-11 (July 9, 1971). There management sought to eliminate a shift and to establish two new fixed shifts. The Union claimed that changes in tours of duty and the establishment of new tours were negotiable. In interpreting Section 11(b) 5/ of the Executive Order the Council held that it was plain that the establishment or change of tours of duty were intended to be excluded from the obligation to bargain. In that decision, the Council stated:

5/ Section 11(b) provides in pertinent part:  
...[T]he obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and the grades of position or employees assigned to an organizational unit, work project or tour of duty... This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

...Clearly, the number of its work shifts or tours of duty and the duration of the shifts, comprise an essential and integral part of the "staffing patterns" necessary to perform the work of the agency. Further, the specific right of an agency to determine the "numbers types and grades of positions or employees" assigned to a shift or tour of duty, as provided in section 11(b), obviously subsumes the agency's right to fix or change the number and duration of those shifts or tours.

In a subsequent decision involving negotiability of a basic work week, the Council held that where the proposal was not "integrally related" to the staffing pattern, i.e. the numbers and types of employees to be assigned, 11(b) did not preclude negotiations. 6/

In applying the above principles to the instant case, I find that the Respondent here was under no obligation to bargain with the Union regarding the reassignment of 30 employees from the 0730 shift to the 0800 shift. In my judgment, the reassignment of these employees was directly related to the staffing pattern to be employed by the Respondent for it had a direct bearing on the numbers and types of employees to be assigned to a specific tour of duty or work shift. Accordingly, I find that the Respondent did not violate Section 19(a)(6) of the Executive Order in arriving at its decision to reassign unit employees from one work shift to another without prior negotiations with the Union. Cf. Federal Railroad Administration, A/SLMR No. 418 (July 31, 1974).

However, the determination that the Respondent had no obligation to bargain regarding the decision does not relieve the Respondent from the co-existing duty to bargain with the Union about procedures to be followed, and more important, the impact of that decision on the employees adversely affected. Precedent decisions have held that while there may be no obligation to bargain regarding a management decision of this nature, "the exclusive representative is to be afforded the opportunity to meet and confer, to the extent consonant with law and regulations, as to the procedures management intends to observe in effectuating its decision and as to the impact of such decision on those employees adversely affected." (Emphasis supplied) Federal Railroad Administration, supra; United

6/ U. S. Naval Supply Center, FLRC No. 71A-52 (November 24, 1972).

States Department of Navy Bureau of Medicine and Surgery, A/SLMR No. 289 (July 25, 1973); Federal Aviation Administration, National Aviation Facilities Experimental Center, A/SLMR No. 329 (November 28, 1973); Cf. Naval Public Works Center, FLRC No. 71A-56 (June 29, 1973).

The record in the instant case discloses that the only meeting between management and the Union regarding the contemplated reassignment occurred on November 21. There was no prior notification to the union representatives of management's intentions, nor was there any subsequent meeting to solicit the Union's views on the reassignment issue or its impact on the employees affected. It was not until the Respondent posted a memo on December 4, stating that the reassignment would become effective on December 9, that the union representatives officially knew that management intended to implement its plan.

In these circumstances it cannot be said that the Respondent met and conferred in good faith with the exclusive representative regarding the impact of the decision of the employees adversely affected. In the Federal Railroad Administration case, supra, the Assistant Secretary stated that "the right to engage in a dialogue with respect to matters for which there is an obligation to meet and confer becomes meaningful only when agency management has afforded the exclusive representative reasonable notification and an ample opportunity to explore fully the matters involved prior to taking action." In my judgment, no such meaningful exploration regarding the impact of the decision occurred in this case. The matter of primary concern to the Union was the effect upon the employees who would have to change their shift hours. Beyond the mere mention of consideration of an earlier standard shift on November 21, there was no meaningful discussion with the union president regarding the adverse impact of the shift change on the unit employees. Since the energy crisis was one of the reasons advanced for precipitating the change, it is clear that the Union should have been afforded an opportunity to fully explore carpooling arrangements, or lack thereof, in addition to any other matters impacting in an adverse way on the employees subject to the change.

In these circumstances I find that the Respondent failed to meet and confer with the Union as required by the Executive Order in that it failed to afford the Union an opportunity to fully explore the impact of the decision to reassign employees to a different shift prior to the implementation of that decision. Accordingly, I find that by this conduct the Respondent has violated Section 19(a)(b) of the Executive Order.

The Respondent's failure to meet and confer had a restraining influence on the employees in the bargaining unit and a concomitant coercive effect upon their rights assured by the Executive Order. By this conduct Respondent has also violated Section 19(a)(1) of the Executive Order. Federal Railroad Administration, supra.

Recommendations

Having found that the Respondent has engaged in conduct which violates Section 19(a)(1) and (6) of the Executive Order, I shall recommend that the Assistant Secretary adopt the following recommended Order designed to effectuate the policies of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of the Executive Order 11491, as amended, and Section 203.25(b) of the Regulations the Assistant Secretary for Labor-Management Relations hereby orders that the Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, shall:

1. Cease and desist from:

- (a) Implementing a decision to reassign to a different work shift employees represented by National Federation of Federal Employees, Local 1624, or any other exclusive representative, without affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, as to the impact of the reassignment on the employees adversely affected by such action.

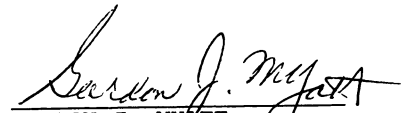
(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights assured them by the Executive Order.

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

(a) Notify National Federation of Federal Employees, Local 1624, or any other exclusive representative, of any intended decision to reassign the shift hours of employees in the bargaining unit, and upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures management will follow in implementing the decision and as to the impact the reassignment will have on the employees adversely affected by such action.

(b) Post at its Facility at the Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, copies of the attached notice marked "Appendix" on forms to be furnished the the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Officer in charge of the Naval Plant Representative Office and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered or defaced or covered by any other material.

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

  
GORDON J. MYATT  
Administrative Law Judge

Dated: November 21, 1974  
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT implement any decision to reassign the shift hours of employees exclusively represented by National Federation of Federal Employees, Local 1624, or any other exclusive representative, without notifying such exclusive representative and affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, upon the procedures management will observe and as to the impact of the reassignment on employees who will be adversely affected by such action.

WE WILL notify National Federation of Federal Employees, Local 1624, or any other exclusive representative, of any intended reassignment of shift hours of employees, and upon request, meet and confer in good faith, to the extent consonant with law and regulations, upon the procedures to be observed and as to the impact the reassignment will have on employees adversely affected by such action.

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

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_

This notice must remain posted for sixty (60) consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor Management Services Administration, U.S. Department of Labor whose address is 3535 Market Street, Gateway Building, Room 14120, Philadelphia, Pennsylvania 19104.

February 28, 1975

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

NATIONAL SCIENCE FOUNDATION  
A/SLMR No. 487

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The subject case involved 16 challenged ballots which were sufficient in number to affect the results of a self-determination election for professional employees. The 16 ballots were challenged on the grounds that the individuals involved were management officials and supervisors, or were not employees of the Activity.

Following a hearing in the matter, an Administrative Law Judge issued a Report and Recommendations on Challenged Ballots in which he sustained the challenges as to 3 employees and overruled the challenges as to 13 employees. The Activity filed exceptions with regard to 13 of these employees who were found to be neither management officials nor supervisors and to 1 employee who was found to be a supervisor but not a management official.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the evidence did not establish that the Program Managers, or their equivalent, were management officials within the meaning of the Order. The Assistant Secretary, however, rejected the Administrative Law Judge's rationale that the Program Managers, or their equivalent, were not supervisors based on the view that supervisory status for a professional employee must flow from something more than the relationship between the professional and the professional's secretary or other standard or normal support person. In this regard, the Administrative Law Judge reasoned that to make professional employees supervisors based on their relationship with secretarial or other support persons would totally frustrate the determination of allowing professionals to vote. In rejecting the Administrative Law Judge's rationale in this regard, the Assistant Secretary noted the Federal Labor Relations Council's decision in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, FLRC No. 72A-4, which held that supervisory status was intended to be determined on the basis of the authority of the individual, not on the basis of the precise number of subordinates. He noted also that there was no indication in the Council's decision that a different test would be applicable to professional employees in the Federal sector. Therefore, the Assistant Secretary considered the supervisory status of the Program Managers, or their equivalent, on an individual basis.

The Assistant Secretary found that nine of the Program Managers, or their equivalent, were not supervisors within the meaning of Section 2(c) of the Order. In this regard, he noted particularly that such direction as they may give the secretaries was routine in nature and that the evidence was insufficient to establish that they effectively evaluated the performance of other employees or effectively recommended hiring.

The Assistant Secretary found that four of the Program Managers, or their equivalent, were supervisors within the meaning of Section 2(c) of the Order as they either prepared and signed their secretary's annual performance evaluation or effectively recommended their secretary for promotion. Accordingly, he sustained the challenges to their ballots.

Accordingly, the Assistant Secretary directed, as to those challenges which were overruled, that the ballots of these individuals be opened and counted and that the appropriate Assistant Regional Director issue and serve on the parties a Revised Tally of Ballots.

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL SCIENCE FOUNDATION

Activity

and

Case No. 22-3870(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 3403

Petitioner

## DECISION ON CHALLENGED BALLOTS

On October 31, 1974, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations on Challenged Ballots in the above-entitled proceeding. He recommended that the challenges to the ballots of Howard Moraff, Val Tareski and Charles Dickens be sustained. He recommended further that the challenges to the ballots of William A. Adams, Kathryn S. Arnow, Lynn P. Dolins, David Richtmann, Gregg Edwards, Gerald Edwards, Emmanuel Haynes, John Lehman, Royal E. Rostenbach, John L. Snyder, Bernard P. Stein, Alice P. Withrow and James Zwolenik be overruled and that their ballots be opened and counted. Thereafter, the Activity filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations on Challenged Ballots.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations on Challenged Ballots and the entire record in this case, including the exceptions and supporting brief filed by the Activity, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge, only to the extent consistent herewith.

In its exceptions, the Activity contends that 14 of the challenged individuals, who are classified as Program Managers, or their equivalent, 1/

1/ The titles, "Program Manager" and "Program Director", are used interchangeably in several of the Activity's Directorates. The Activity's Administration Directorate utilizes several other titles; however, the work performed in the latter Directorate is equivalent to that performed by the Program Managers or Program Directors.

are management officials and supervisors as defined by the Order and that, accordingly, their ballots should not be opened and counted. 2/

In agreement with the Administrative Law Judge, I find that the evidence does not establish that the Program Managers, or their equivalent, are management officials within the meaning of the Order. 3/

In finding that the Program Managers, or their equivalent, were not supervisors within the meaning of the Order, the Administrative Law Judge noted that, in each instance, the professional individuals involved allegedly supervised only his or her own secretary or another support person needed for the fulfillment of the professional's assigned function. The Administrative Law Judge concluded that, under these circumstances, "supervisory status must flow from something more than the relationship between the professional and the professional's secretary or other standard or normal support person." He noted, in this regard, that to make these professional employees supervisors based on their relationships with secretarial or other support persons would totally frustrate the determination of allowing professionals to vote.

Based on the existing precedent under the Order, I am constrained to reject the Administrative Law Judge's attempt to formulate a different standard in determining whether a professional employee is a supervisor within the meaning of the Order. Thus, as stated by the Federal Labor Relations Council in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, FLRC No. 72A-4, "supervisory status was intended to be determined on the basis of the authority of the individual, not on the basis of the precise number of subordinates. In other words, the nature of an individual's supervisory duties and responsibilities is intended to be the basis for determining his supervisory status notwithstanding the number of persons supervised. . . ." Nor is there any indication in the Council's decision that a different test than the one set forth above would be applicable to professional employees in the Federal sector. Accordingly, I reject the Administrative Law

2/ No exceptions were filed with respect to the Administrative Law Judge's finding that Howard Moraff and Val Tareski were not employees of the Activity and, thus, were not eligible to vote. Although the Administrative Law Judge found that Charles Dickens was a supervisor within the meaning of the Order and ineligible to vote, the Activity excepted to the Administrative Law Judge's finding that Dickens was not a management official.

3/ Although discussing the alleged management official status of the individuals by name, the Administrative Law Judge, in finding that such individuals were not management officials, inadvertently excluded the name of Gerald Edwards, who previously had been discussed in his Report and Recommendations. This inadvertence is hereby corrected.

Judge's rationale, noted above, and will consider the supervisory status of each of the Program Managers, or their equivalent, on an individual basis.

William A. Adams, Kathryn S. Arnow, Gregg Edwards, Gerald Edwards, John L. Snyder, Alice P. Withrow and James Zwolenik

The above-named employees are Program Managers or Program Directors in the Activity's Education Directorate. As is the common practice in their Directorate, two Program Managers or Directors share the services of a secretary to whom they assign work on a routine basis. When there is a secretarial vacancy in a section, the Program Managers may interview the applicants for the job and they would be consulted before the Section Head makes the final decision. The Section Head is responsible for approving a secretary's annual and sick leave requests and has authority also with respect to other personnel actions, such as evaluating a secretary's work and signing an evaluation form. Although the Section Head may discuss the performance of a secretary with a Program Manager or a Program Director to whom she is assigned, there is no indication in the record as to how much weight is given to a Program Manager's or Director's appraisal of his or her secretary's performance.

Based on the foregoing circumstances, I find that none of the employees set forth above are supervisors within the meaning of Section 2(c) of the Order in that such direction as they may give the secretaries is routine in nature and the evidence is insufficient to establish that they effectively evaluate the performance of other employees or effectively recommend hiring. Accordingly, I find that William A. Adams, Kathryn S. Arnow, Gregg Edwards, Gerald Edwards, John L. Snyder, Alice P. Withrow and James Zwolenik were eligible to vote in the election and I hereby direct that their ballots be opened and counted.

John Lehman and Royal E. Rostenbach

The above-named employees are Program Directors in the Activity's Research Directorate. Each of these individuals has his own secretary to whom he assigns work. Further, each individual appraises the work of his secretary and prepares and signs an annual performance evaluation.

Under these circumstances, and noting also the fact that the parties herein agree that the above named individuals are supervisors within the meaning of the Order, I find that John Lehman and Royal E. Rostenbach are supervisors who were ineligible to vote in the election. Accordingly, the challenges to the ballots of John Lehman and Royal E. Rostenbach are sustained and their ballots will not be opened and counted.

Lynn P. Dolins and David Richtmann

The above-named employees are Program Managers in the Activity's Research Application Directorate and each shares a secretary with another Program Manager. The evidence establishes that Dolins, together with the Program Manager with whom she shares a secretary, approves the secretary's annual and sick leave and has effectively recommended the secretary for promotion. Further, Richtmann, together with the Program Manager with whom he shares a secretary's services, signs the secretary's performance evaluation and approves her leave.

Based on these circumstances, which indicate that Dolins has effectively recommended the promotion of an employee and Richtmann has effectively evaluated the performance of an employee, I find that both are supervisors within the meaning of Section 2(c) of the Executive Order and, therefore, were ineligible to vote in the election. Accordingly, the challenges to the ballots of Lynn P. Dolins and David Richtmann are sustained and their ballots will not be opened and counted.

Bernard P. Stein and Emmanuel Haynes

The above-named employees are the equivalent of Program Directors in the Activity's Administration Directorate and both share a secretary with another staff member. Each assigns work to his secretary and furnishes an evaluation of her performance to the head of his office, but does not sign the evaluation. <sup>4/</sup> Although both men assign work to their respective secretaries, the evidence establishes that such assignments are routine in nature.

Based on the foregoing, I find that Bernard P. Stein and Emmanuel Haynes are not supervisors within the meaning of the Order. Thus, the evidence does not establish that any direction as they may give the secretaries is other than routine in nature and the evidence is insufficient to establish that they effectively evaluate the performance of other employees. Accordingly, I find that Bernard P. Stein and Emmanuel Haynes were eligible to vote in the election and I hereby direct that their ballots be opened and counted.

DIRECTION TO OPEN AND COUNT BALLOTS

IT IS HEREBY DIRECTED that the ballots of William A. Adams, Kathryn S. Arnow, Gregg Edwards, Gerald Edwards, Emmanuel Haynes, John L. Snyder, Bernard P. Stein, Alice P. Withrow and James Zwolenik

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<sup>4/</sup> There was insufficient record evidence to indicate how much weight is given by the head of the office to such evaluations.

be opened and counted at a time and place to be determined by the appropriate Assistant Regional Director. The Assistant Regional Director shall have a Revised Tally of Ballots served on the parties and take such additional action as required by the Regulations of the Assistant Secretary.

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



Dated, Washington, D. C.  
February 28, 1975

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

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In the Matter of :  
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NATIONAL SCIENCE FOUNDATION :  
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Activity :  
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Case No. 22-3870 (RO)  
AMERICAN FEDERATION OF GOVERNMENT :  
EMPLOYEES, LOCAL 3403 :  
 :  
Petitioner :  
 :  
..... :

Mr. Lewis E. Grotke  
Counsel to National Science Foundation

Mr. Robert Preston  
Personnel Officer  
National Science Foundation

and

Mr. Herbert Harrington  
Deputy Personnel Officer  
National Science Foundation

For the Activity

Mr. Rickman V. Seidel  
National Representative  
American Federation of Government Employees

and

Mr. Joseph P. Gannon  
President, Local 3403  
American Federation of Government Employees

For the Petitioner

Before: SAMUEL A. CHAITOVITZ  
Administrative Law Judge



REPORT AND RECOMMENDATIONS

ON CHALLENGED BALLOTS

Statement of the Case

This proceeding arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing on Challenged Ballots issued on February 11, 1974, by the Assistant Regional Director for Labor Management Services, Philadelphia Region.

The issues herein concern the challenged ballots cast by William H. Adams, Kathryn S. Arnow, Lynn P. Dolins, David Richtmann, Gregg Edwards, Gerald Edwards, Emmanuel Haynes, John Lehman, Royal E. Rostenbach, John L. Snyder, Bernard P. Stein, Alice P. Withrow, James Zwolenik, Charles Dickens, Howard Moraff and Val Tareski, in an election held on December 5, 1974, among a unit of employees of the National Science Foundation (herein called the NSF). American Federation of Government Employees Local 3403 (herein called AFGE or Petitioner) is the Petitioner in the case and participated in the election.

Both parties were represented by Counsel or other representatives at the hearing which was held in Washington, D.C., on April 10 and 11, 1974, before the undersigned duly designated Administrative Law Judge. The parties were afforded full opportunity to be heard, to adduce evidence and to examine as well as cross-examine witnesses. Both parties filed briefs by May 20, 1974, which have been duly considered by the undersigned.

Upon the entire record in this matter, 1/ from his observation of the witnesses and their demeanor and from

1/ At the close of the hearing NSF indicated it would submit a statement of staffing strength of its subdivisions during the Fall of 1973 which would be made a part of the record. Such a statement was submitted by NSF and received by me on May 1, 1974, and a copy was served on AFGE, with a request that it be added to the record herein as Activity Exhibit No. 6. AFGE having filed no objection the statement of staffing strength is hereby made a part of the record herein as Activity Exhibit No.6 and attached hereto as Appendix.

all of the testimony and evidence adduced at the hearing, the undersigned makes the following findings of fact, conclusions and recommendations.

Findings of Fact

Background

Pursuant to the provisions of an Agreement for Consent or Directed Election approved on November 6, 1974, an election by secret ballot was conducted under the supervision of the Area Administrator, Washington, D.C., on December 5, 1973.

The unit set for in the agreement for Consent or Directed Elections reads in part as follows:

Voting Group (a)

All professional General Schedule, Wage Grade and excepted service employees, employed by the National Science Foundation in the Washington, D.C. Metropolitan Area; excluding nonprofessional employees, confidential employees, temporary employees of less than 90 days, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (b)

All nonprofessional General Schedule, Wage Grade and excepted service employees employed by the National Science Foundation in the Washington, D.C. Metropolitan Area; excluding professional employees, confidential employees, temporary employees of less than 90 days, 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 results of the election as set forth in the Tally of Ballots for Professional Employees were as follows:

Approximate number of eligible Voters	30
Voice Ballots	<u>0</u>
Votes Cast for inclusion in non-professional unit	9
Votes cast for a separate professional unit	<u>2</u>
Valid votes counted	<u>11</u>
Challenged ballots	<u>16</u>
Valid votes counted plus challenged ballots	<u>27</u>

The challenged ballots are sufficient in number to affect the results of the election. The election involving the unit of professional employees (Voting Group (a)) has therefore affected the results of the election among the nonprofessional employees (Voting Group (b)).

In accordance with Section 202.20 of the Regulations of the Assistant Secretary, the Area Administrator investigated the sixteen challenged ballots. 2/ The Acting Assistant Regional Director for Labor Management Services issued his Report and Findings on Challenged Ballots on February 11, 1974. He concluded that relevant issues of fact exist concerning the aforementioned sixteen challenged ballots and accordingly issued a Notice of Hearing on Challenged Ballots.

The Challenged Ballots

A. The NSF

1. The NSF is established by statute (Public Law 507-81st Congress, 64 Stat. 149 as amended) "to promote the progress of science; to advance health, prosperity, and welfare; to secure national defense ...." It is administered by the National Science Board and its chief executive officials

2/ The ballots past by sixteen individuals were challenged by the Activity as "management officials" and "supervisors." The sixteen are William H. Adams, Kathryn S. Arnow, Lynn P. Dolins, David Richtmann, Gregg Edwards, Gerald Edwards, Emmanuel Haynes, John Lehman, Royal E. Rostenbach, John L. Snyder, Bernard P. Stein, Alice P. Withrow, James Zwolenik, Charles Dickens, Howard Moraff and Val Tareski.

are the Director and Deputy Director. The NSF is divided into five operating branches or directorates, the Education Directorate, the Administration Directorate, Research Applications Directorate, Research Directorate, and National International Programs Directorate. Each is headed by an Assistant Director for that Directorate. Also each directorate is subdivided into a number of divisions 3/ each of which is headed by a division head. Each of these divisions is in turn subdivided into sections, each of which is headed by a section head. The National Science Board 4/ determines the "broad policies" of the NSF. It will also consider individual grants or contracts if they are for relatively large sums of money or involves important policy aspects. Further after the Board authorizes a new program it typically requires that it review all of the initial grants until it is satisfied that the program is being administered as it wishes. The Board will then delegate authority to approve grants to the Director of the NSF who in turn, delegates the approval to authority to the five Assistant Directors who head up the five major subdivisions described above.

B. Education Directorate

2. John L. Snyder, Alice P. Withrow, Gregg Edwards, Williams Adams, and Gerald Edwards were each Program Managers in the Education Directorate. 5/ Program Managers in the Education Directorate are

3/ Some of these subdivisions are called offices rather than divisions but they are equivalent.

4/ The National Science Board consists of the NSF Director and 24 other individuals appointed by the President of the United States, with the consent of the Senate. It usually meets once a month for two or three days. The members, other than the Director, are not employees of NSF but are usually eminent and outstanding individuals including college presidents, distinguished people from industry, etc.

5/ Program Managers or their equivalents are required to have Doctoral Degrees or equivalent degrees or experience.

expected to keep abreast of problems in science education at the college level and above and to make recommendations for NSF programs to alleviate those problems, including modification or elimination of some existing NSF programs. They participate in planning their programs. These planned programs of an individual Program Manager are described in fairly general terms and are submitted and approved by his section head and Assistant Director of the Education Directorate. The Program Manager is then directed to implement the program in order to accomplish its ends. He is expected to write a public announcement describing the program in general terms which is then submitted to his supervisors, including ultimately the Assistant Director for Education, for their approval, changes, etc. After approval the public announcement is published and, subsequently, proposals are received in response to it. The Program Manager reviews the proposals and decides whether they would accomplish program purposes. He may decide to have various proposals evaluated by peer review groups. <sup>6/</sup> He may then decide, based on his own evaluation or that of the peer review group, that certain adjustments should be made. In that event he can contact the proposing institution and negotiate changes in the proposal. After the Program Manager determines which proposals should receive support and which should be declined, he would make appropriate recommendations. These recommendations for awarding a grant are received by the section head and the Special Advisor to the Assistant Director for Education, who had authority to approve grants in the Education Directorate. <sup>7/</sup>

<sup>6/</sup> The Program Manager would select the appropriate reviewers.

<sup>7/</sup> It is not common for the Special Advisor to deny such award recommendation but he "quite frequently" did have a question concerning the recommendation.

3. Following approval by the Special Advisor to the Assistant Director for Education the proposal is referred for financial consideration and statutory compliance to the Grants and Contracts Officer who signs all grants and contracts.

4. Program Managers in the Education Directorate also act as official representatives of NSF at professional meetings and are expected to seek advice and suggestions concerning NSF Programs and to answer questions concerning interpreting the policies of their own programs.

5. In the Education Directorate two Program Directors<sup>8/</sup> share the services of one secretary and they apparently assign the work to their secretary. With respect to hiring a secretary each member of the section might interview her and they would all consult, but the section head would make the final decision. Similarly although the two Program Managers might discuss the work performance with their secretary, and advise the section head of their opinions, the section head would be responsible for appraising and signing the secretary's appraisal <sup>9/</sup> and passing it up to the division head. Similarly the section head approved the secretary's annual and sick leave requests.

6. Kathryn Arnow was a Program Manager in the Education Directorate who was temporarily detailed as a Staff Associate to Dr. Charles A. Falik, Director of the Division of Science Resources Studies in the Education Directorate, at the time of the subject representation election. At the time she was temporarily detailed as a staff associate Ms. Arnow was not expected to return to her old position; she was expected to leave NSF. She subsequently did leave and is no longer employed by NSF.

<sup>8/</sup> The title Program Director is equivalent and apparently interchangeable with that of Program Manager.

<sup>9/</sup> According to Activity witness Dr. Kelson the section head was the "responsible supervisor."

7. Kathryn Arnow, in her position of Program Manager, functioned somewhat differently than the description of functions of other Program Managers in the Education Directorate as described above in paragraphs 1 through 6. Ms. Arnow was a professional level employee with the Division of Science Resource Studies of the Education Directorate. The function of this Division is to do or support studies concerning the production, utilization, and development of scientific and technical manpower, and to track down the economics of the scientific activity of the country. Because the number of such projects could be very large, prior to the beginning of any operation year, the Division laid out an annual program of studies, most of which are identified as very specific projects. Some of these studies are actually done by the Division's staff, like Ms. Arnow, and others are done by grantees and contractors, who are monitored by the Division's staff, again like Ms. Arnow. In monitoring such studies Ms. Arnow would advise the contractor as to how to proceed, etc. A Program Manager performing these functions needs a considerable amount of technical skill in data analysis and understanding of the types of activities being studied in order to design the necessary study instruments and questionnaires for those studies being performed by the Division's staff. Similar technical skill and understanding by Program Managers is necessary for those studies being performed by the grantees and contractors, which the Division is monitoring.

8. Mrs. Arnow normally shared secretarial help in the same manner as did the other Program Managers in the Education Directorate. <sup>10/</sup>

9. James Zwolenik, was a Staff Associate in the Division of Science Resources Studies of the Education Directorate. His duties and responsibilities were substantially similar to those of Ms. Arnow described above in paragraph 7, in part

<sup>10/</sup> For a period of about 6 months, about 2 years ago she had a secretary assigned only to her and on that occasion she signed that secretary's appraisal.

performing studies himself and in part acting as a Program Manager with respect to those studies were contracted out.

10. Mr. Zwolenik shared a secretary as described above but he did not formally evaluate her performance or supervise her.

11. Charles Dickens was a Study Director in the Division of Science Resources Studies of the Education Directorate. He was in charge of a small group consisting of two professionals (one presumably being himself) and one secretary who are concerned primarily with "the statistics, educational statistics, enrollments, degrees granted, etc...." Mr. Dickens participates in developing the program plan 2 years prior to the year of implementation. He would contact certain potential users of the statistics and determine what statistics they might find useful, as would also the Division Director, and he would make some recommendations. The Division Director would confer with his staff and "user groups" and decide which program plan and studies are to be carried out. Mr. Dickens was then responsible for carrying out the studies and determining which method and procedure would be used in accomplishing the studies. He had very little latitude in determining which studies would be undertaken.

12. With respect to the one professional and one secretary he directed, Mr. Dickens was responsible for and did evaluate their performances, approve their leave, interview and effectively recommend new hires, and effectively recommend promotion.

13. As of September 20, 1973, the Education Directorate had 159 employees including 65 whom the NSF contends to have been management officials. These 65 include those individuals whose challenged ballots were discussed above.

#### C. Research Directorate

14. John Lehman and Royal E. Rostenbach were Program Directors in the Research Directorate. A decision is made by the Assistant Director, with the aid and advise of the division heads, section

heads and Program Directors, as to how much money is to be allocated to support research in the various disciplines (e.g. biology and chemistry) and subdisciplines (e.g. analytical chemistry). The Program Director in charge of a subdiscipline is thus allocated a specific sum of money and has very broad guidelines to be used in receiving reviewing and evaluating research proposals. He then, based on his knowledge, sense of priorities, and contact with the scientific community, prepares recommendations as to which specific research programs should be supported by the NSF. He may advise and assist a proposer in changing his proposal in order to get his, the Program Director's support. However, within the Research Directorate, no Program Director's recommendation becomes NSF action without at least one, and preferably two levels of review by the science administration in the chain of command (i.e. section head, division head, and Assistant Director of the Research Directorate). The Program Director must defend and support his recommendations using his scientific and technical knowledge of the scientific discipline involved and his appraisal of the areas and directions in which research should be encouraged. A Program Director's recommendation as to whether to grant an award, although reviewed, is approved in about 99 percent of the time.

15. In the broader level of his entire program the Program Director submits guidelines he has prepared as to the important opportunities and trends in his discipline to the Assistant Director, after it has been reviewed by his section head and division director. The Assistant Director then meets with the Program Director, section head and division director and discusses these broad guidelines. Finally the Assistant Director decides on the precise guidelines. 11/

11/ A Program Director is given an opportunity to question such guidelines and suggest revisions but again the Assistant Director makes the final decision.

16. Program Directors Lehman and Rostenbach each supervised one secretary including the responsibility to sign the secretary's job evaluation, etc.

17. Howard Moraff was an employee of Cornell University on temporary detail to NSF and was not an employee of NSF.

18. Val Tareski was an employee of North Dakota State University on temporary detail to NSF and was not an employee of NSF.

19. The Research Directorate, on September 30, 1973, had 237 employees, including 113 whom the NSF contends to have been management officials. These 113 include individuals whose challenged ballots were discussed above.

D. Research Applications Directorate

20. Lynn P. Dolins and David B. Richtmann are Program Managers in the Research Applications Directorate. They perform "quite the same" duties and have "quite the same" responsibilities as those described for the Program Managers in Research Directorate in paragraphs 14 and 15, except that there is an additional step for consideration of proposals recommended by the Program Director, in which the proposals recommended by the Program Director are submitted to a board for final evaluation and approval. 12/ The Program Director appears before the appropriate board presents the proposal, explains it, and answers questions.

12/ Unsolicited proposals are considered by the Review Board consisting of the Deputy Assistant Directors, Director of the Office of Programs and Resources, a representative of the Office of the General Counsel, a representative of the Grants and Contracts Office, and others who may be called to participate.

Solicited proposals are considered by the Science Selection Board consisting of the Deputy Assistant Directors and a member of the Office of Programs and Resources, acting as Secretary.

21. In addition to the above duties and responsibilities Mr. Richtmann worked closely with Program Managers in one or two Divisions outside of the Office of Intergovernmental Science and Resource Utilization, Mr. Richtmann's own office, to help them develop utilization programs in each of their projects.

22. Mr. Richtmann participated in or was authorized to convene a nationwide meeting of both researchers and users to consider a particular topic. He acts as the head of the Office of Intergovernmental Science and Research Utilization in the absence of its Director and Deputy Director and when they are both unavailable he attends the Management Board 13/ as their representative.

23. Lynn P. Dolins and David B. Richtmann each shared a secretary with another Program Manager. Ms. Dolins was consulted as to her secretary's performance evaluation, but she did not sign it jointly with the other Program Manager with whom she shared the secretary; she recommended promotion and approval of leave. Mr. Richtmann together with the Program Manager who shares the secretary's services, signs the secretary's performance evaluation and approves leave.

24. On September 20, 1973, there were 121 employees in the Research Application Directorate including 58 whom the NSF considered to be management officials. These 59 management officials include Ms. Dolins and Mr. Richtmann.

13/ The Management Board consists of the Assistant Director for Research Applications, his Deputies and the heads of each of the divisions and offices of the Research Applications Directorate and is designed to exchange information on current status and problems and to develop plans for the effective administration of the programs of the Research Application Directorate.

E. Administration Directorate

25. Bernard Stein was a Staff Associate in the Planning and Policy Analysis Office, a subdivision of the Office of Budgeting, Programming and Planning Analysis of the Administration Directorate. He served as a program officer administering program money and making grants and contracts to provide issue analyses and evaluation relevant to NSF planning activities to be used by the Assistant Director for Administration and ultimately the National Science Board and Director in determining NSF policy. Mr. Stein was primarily involved in grants and contracts designed to assist the NSF in its planning for the future. He met with the top management of NSF who were responsible for making policy. 14/

26. Mr. Stein also served as one of the NSF representatives to the Organization for Economic Cooperation and Development (OECD) 15/ providing it with information and assisting in the preparation of a report on science policy in the United States. Mr. Stein also represented NSF at professional meetings with authority to discuss the types of activities needed for planning NSF activities.

27. Mr. Stein shared a secretary with another staff associate assigned a portion of her work and furnished an evaluation of her performance to the head of his office, but did not sign performance ratings.

28. Emanuel Haynes was a Staff Evaluation Analyst on the Evaluation Staff of the Office of Budget, Programs and Planning Analysis of the Administration Directorate. He had substantially the same duties and responsibilities as Mr. Stein,

14/ According to the NSF witness all of the professional employees (approximately 21) of the Office of Budgeting, Programming and Planning Analysis met with top management officials and are therefore managerial officials. There was a total of approximately 34 employees in the office.

15/ OECD is a multinational agency.

described above in paragraphs 25, 26, and 27 except the studies and planning Mr. Haynes was involved in related to evaluation of whether or how well existing NSF programs are accomplishing NSF objectives and he was not an NSF representative to the OECD.

29. On September 30, 1973, there were 371 employees in the Administration Directorate and the Activity contends that 46 of these were management officials, including Mr. Stein and Mr. Haynes.

Position of the Parties

The Activity takes the position that all 16 individuals whose ballots were challenged were "management officials" and addition supervisors, and therefore ineligible to vote in the subject election. Further the NSF contends that two individuals Howard Moraff and Val Tareski, were not employees of NSF and were by virtue of this ineligible to vote.

AFGE takes the position that none of the 16 individuals were "management officials." AFGE agrees, however, that John R. Lehman, Charles H. Dickens and Royal E. Rostenbach were supervisors and were therefore ineligible to vote and that Howard Moraff and Val G. Tareski were not employees of NSF and were also ineligible to vote.

Conclusions of Law

A. The challenged ballots of Val Tareski and Howard Moraff

The record is silent as to precisely the nature of their work at the NSF and whether they should be considered to be either "management officials" or "supervisors" within the meaning of the Order. On the other hand the record does establish that they were on temporary detail to the NSF, were not employees of NSF and had remained employees of their respective universities. In these circumstances it is concluded that since they were not employees of the NSF they were not included in the collective bargaining unit and were ineligible to vote in the election. Therefore the challenges to their ballots should be sustained.

B. The challenged ballots of William H. Adams, Kathryn S. Arnow, Gregg Edwards, Emmanuel Haynes, John Lehman, Gerald Edwards, David Richtmann, Royal Rostenbach, John L. Snyder, Bernard P. Stein, Alice Withdraw, James Zwolenik and Charles Dickens:

The question of whether individuals are "management officials" has been considered on a number of times by the Assistant Secretary. 16/

The Assistant Secretary held in Veterans Administration Hospital, Augusta, supra, that a clinical coordinator was a "management official" within the meaning of the Order and was excluded from the unit because the interests of the clinical coordinator were more closely aligned with personnel who formulate, determine and oversee hospital policy than with personnel in the proposed unit who carry out the resultant policy." With respect to the Assistant Secretary in, Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, supra defined "management official" as follows:

"When used in connection with the Executive Order the term 'management official' means an employee having authority to make, or influence effectively the making of, policy necessary to the agency or activity with respect to personnel, procedures, or program. In determining whether a given individual influences effectively policy decisions in this

16/ e.g. Veterans Administration Hospital, Augusta, GA, A/SLMR No. 3; Veterans Administration, Regional Office, Newark, N.J., A/SLMR No. 38; Virginia National Guard Headquarters, 4th Bn 111th Arty., A/SLMR No. 69; Department of the Army Materiel Command, Automatic Logistics Management Systems Agency, A/SLMR No. 113; Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135; Federal Aviation Administration A/SLMR No. 173; Department of Transportation National Highway Traffic Safety Administration, A/SLMR No. 193; Department of Transportation, Federal Aviation Administration Airway Facilities Sector, Fortworth Texas, A/SLMR No. 230; 936th Tactical Airlift Group, U.S. Air Force Reserve, Naval Air Station, Belle Chasse, La., A/SLMR No. 221.

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 will be."

With respect to William, H. Adams, Kathryn S. Arnow, Lynn P. Dolins, Gregg Edwards, Emmanuel Haynes, John Lehman, David Richtmann, Royal Rostenbach, John L. Snyder, Bernard P. Stein, Alice Withdraw, James Zwolenik, and Charles Dickens, their duties and responsibilities, although somewhat different are in many fundamental areas very similar. The record establishes that they are highly trained and skilled professional employees who in performing their duties, necessarily exercise a great deal of discretion and independent judgement. Further, the importance of their work and the influence that it may have on the scientific community is very great. Nevertheless, noting the peculiar nature and mission of the NSF <sup>17/</sup> and that it operates to a large extent through research grants, studies and evaluations, the above named individuals would not appear to be "management officials" within the meaning of the Order. Rather they are, in effect, the individuals who solicit, evaluate and consider programs and grants or consider and plan studies and evaluations at the first or primary level and then, using their professional expertise, advise their superiors of the course they recommend should be followed, i.e., to turn down or make a grant, to compile certain statistics, to perform a certain study, etc. Their supervisors decide finally what course of action should be followed. That these individuals' recommendations are followed in the vast bulk of the cases is a tribute to their professional competence and understanding of the mission and aims of the NSF. The basic policy and management decisions,

<sup>17/</sup> As stated in the preamble of the National Science Foundation Act of 1950, Public Law 407-81st Congress, 64 Stat. 149, as amended, the NSF is established "To promote the progress of science; to advance health, prosperity, and welfare, to secure the National defense, ..."

however, are really made by the National Science Board, NSF Director, NSF Deputy Director, the five Assistant Directors and their Deputies, and in some instances, even by the division and section heads. However, to hold that all the program managers, program directors and other similar professionals are also "management officials" would frustrate the very purpose of the Order and in effect rewrite and the unit to exclude professional employees. These are the very persons who, with various clerical and other support, are the individuals who actually perform the day to day operational work of the NSF. Further, to disenfranchise them would be to determine that a disproportionately large numerical portion of NSF's work force are "management officials."

In light of all the foregoing, although the very nature of the NSF and its high percentage of professional employees, makes a determination less than perfectly clear, it is concluded that the above named individuals are not "management officials" as defined by the Order as interpreted by the Assistant Secretary, but rather they are professionals of a very high quality whose advise is usually heeded. <sup>18/</sup> Further their community interest seems more aligned with other employees who carry out the day to day tasks of the NSF rather than with those who formulate and determine policy, recognizing, of course, that as professionals their interests are somewhat special. <sup>19/</sup>

With respect to whether these individuals are supervisors, the alleged supervisory status rests on their relationship with their secretaries. <sup>20/</sup>

<sup>18/</sup> With respect to David P. Richtmann the fact that he acts as the head of the Office of Intergovernmental Science and Research Utilization in the absence of its Director and Deputy Director, would not be sufficient to convert him to a management official because this apparently occurred infrequently.

<sup>19/</sup> This of course was recognized and provided for in the election procedure.

<sup>20/</sup> Except for Mr. Charles Dickens, who will be discussed below.



In this regard, whether they share a secretary or have one assigned on a one to one basis, or sign the evaluation or advise their supervisor of their conclusions, these individuals would appear to possess many of the requirements establishing supervisory status, 21/ i.e. They assign work, evaluate performance and can effectively recommend some promotions or discipline. However, when considering a professional employee, I am constrained to conclude that supervisory status must flow from something more than the relationship between the professional and the professional's secretary or other standard or normal support of person. In as much as all of the Program Managers, Program Directors, and other similar employees required and needed secretarial support, to conclude that this would make them supervisors and exclude them from the unit, would totally frustrate the determination of allowing professionals to vote. Further it must be recognized that the professionals, be they attorney, doctor, or engineer, have historically needed the aid and support of various employees, i.e., secretarial, nurses, etc., over whom they have much control. However, when there is such a relationship, it is submitted that the professional employee is not a supervisor within the meaning of the Order. To hold otherwise would be to virtually exclude professionals from the coverage of the Order, something the Order specifically does not do. Therefore, I conclude that William A. Adams, Kathryn S. Arnow, Lynn P. Dolins, David Richtmann, Gregg Edwards, Gerald Edwards, Emannual Haynes, John Lehman, Royal E. Rostenbach, John L. Snyder, Bernard P. Stein, Alice P. Withrow, and James Zwolenik are not supervisors within the meaning of the Order and the challenges to their ballots should be overruled.

With respect to Mr. Dickens the record establishes that he had supervisory responsibility over another professional employee and a secretary and therefore it is concluded that he was a supervisor and the challenged to his ballot should be sustained.

21/ Section 2(c) of the Order states:  
 "Supervisor" means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively 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 judgement.

Recommendation

Based on all of the foregoing it is recommended that the Assistant Secretary sustain the challenges to the ballots of Mr. Tareski, Mr. Moraff, and Mr. Dickens. It is further recommended that the challenges to the ballots of William A. Adams, Kathryn S. Arnow, Lynn P. Dolins, David Richtmann, Gregg Edwards, Gerald Edwards, Emmanual Haynes, John Lehman, Royal E. Rostenbach, John L. Snyder, Bernard P. Stein, Alice P. Withrow, and James Zwolenik be over ruled and that, accordingly, their ballots be opened and counted.

  
 SAMUEL A. CHAITOVITZ  
 Administrative Law Judge

Dated: October 31, 1974  
 Washington, D.C.

February 28, 1975

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

U. S. ARMY CIVILIAN APPELLATE  
REVIEW AGENCY,  
DEPARTMENT OF THE ARMY,  
SACRAMENTO, CALIFORNIA  
A/SLMR No. 488

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This case arose as a result of an unfair labor practice complaint filed by Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, (Complainant) against the U. S. Army Civilian Appellate Review Agency, Department of the Army, Sacramento, California, (Respondent). The complaint alleged a violation of Section 19(a)(1) of the Order based on the refusal of a grievance examiner of the Respondent to afford the Complainant the opportunity to be present and represent a unit employee during an interview of such employee as part of the processing of a grievance against the Tooele Army Depot, Tooele, Utah, (Activity). The Respondent contended, among other things, that it was not an appropriate respondent because it is not an "Agency" or "Agency management" within the meaning of the Order.

In finding a violation of Section 19(a)(1) of the Order, the Administrative Law Judge found, and the Assistant Secretary adopted the findings that the interviews conducted by the Respondent's grievance examiner were "formal discussions" within the meaning of Section 10(e) of the Order; that the Respondent is chargeable for any unfair labor practice engaged in while acting in furtherance of its delegated functions in the processing of grievances on behalf of the Activity; that the subject matter of the inquiry herein concerned a grievance, personnel policy or practice affecting working conditions of unit employees within the meaning of Section 10(e) of the Order; that the record failed to show that the Complainant had waived any of its rights relative to being represented at "formal discussions"; and that the Respondent, by its refusal to permit and failure to afford the Complainant an opportunity to be represented during interviews of unit employees concerning the processing of a grievance, violated Section 19(a)(1) of the Order.

Further, the Assistant Secretary found that the Respondent's denial of an employee's request for union representation made during the formal discussion herein constituted an independent violation of Section 19(a)(1). In this regard, the Assistant Secretary noted that it has been held previously that agency management conduct denying the right of unit employees to be represented by their exclusive representative in the context of a formal discussion within the meaning of Section 10(e) was inconsistent with rights assured to unit employees under the Order.

The Assistant Secretary specifically rejected the Respondent's contention that it was not an appropriate respondent because it was not "Agency management" within the meaning of Section 2(f) of the Order. In the Assistant Secretary's view, the Respondent and its grievance examiners, when engaged in processing grievances, met the definition of "Agency management" and "representatives of management" respectively because both the Respondent and the Activity are under the jurisdiction and authority of the Department of the Army. Further, the Respondent is a necessary and integral part of the labor-management relations program of the Department of the Army and has, by regulation, certain authority to act for the Department of the Army and to assist the Commanding Officer of the Activity in the implementation of such program.

Accordingly, the Respondent was ordered by the Assistant Secretary to cease and desist from the actions found violative of the Order and to take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. ARMY CIVILIAN APPELLATE  
REVIEW AGENCY,  
DEPARTMENT OF THE ARMY,  
SACRAMENTO, CALIFORNIA

Respondent

and

Case No. 61-2169(CA)

LODGE 2261, INTERNATIONAL ASSOCIATION  
OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Complainant

DECISION AND ORDER

On October 4, 1974, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, and recommending that the Respondent take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

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

In reaching the determination herein, I reject the contention of the Respondent that it is not an appropriate respondent because it is not "Agency management" within the meaning of Section 2(f) of the Order. 1/ In my view, the evidence establishes that the Respondent and

1/ Section 2(f) provides: "'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." (emphasis supplied)

its grievance examiners, when engaged in the processing of employee grievances, are, in fact, "Agency management" and "representatives of management" respectively within the meaning of the Order. Thus, as found by the Administrative Law Judge, the Respondent is under the jurisdiction and authority of the Department of the Army, as is the Tooele Army Depot. Further, it is clear that the Respondent is a necessary and integral part of the labor-management relations program of the Department of the Army and has, by regulation, certain authority to act for the Department of the Army and to assist the Commanding Officer of the Tooele Army Depot in the implementation of such program. 2/

In agreement with the Administrative Law Judge, I conclude that the interviews conducted in the instant case by the Respondent's grievance examiner were formal discussions concerning grievances within the meaning of Section 10(e) of the Order to which the Complainant was entitled to be afforded the opportunity to be represented. 3/ Accordingly, I find that the refusal of the Respondent's grievance examiner to allow the Complainant to be represented during the interview of employee Wilhite, and his failure to afford the Complainant the opportunity to be represented during the interviews of employees Fonger and Critchlow, was in derogation of the Complainant's rights under the Order and had the concomitant effect of indicating to unit employees that the Respondent could by-pass their exclusive representative and deal directly with them concerning grievances. In my view, such an effect on unit employees necessarily tended to interfere with, restrain, or coerce them in the exercise of their rights assured under the Order in violation of Section 19(a)(1). 4/

Further, I find that the Respondent's grievance examiner's denial of employee Wilhite's request for union representation made during his formal discussion with the grievance examiner also violated Section 19(a)(1). Thus, it has been found previously that agency management conduct denying the right of unit employees to be

2/ Cf. United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400 and Department of the Navy, Office of the Secretary, Washington, D. C., A/SLMR No. 393.

3/ Section 10(e) states, in pertinent part: "When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit . . . . The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances . . . ." (emphasis supplied)

4/ Cf. National Aeronautics and Space Administration (NASA), Washington, D. C., A/SLMR No. 457.

represented by their exclusive representative in the context of a formal discussion within the meaning of Section 10(e) is inconsistent with the rights assured to unit employees under the Order. See U. S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278. Accordingly, I find that the Respondent's grievance examiner, in refusing employee Wilhite's request for representation by the Complainant during a formal discussion concerning a grievance, interfered with, restrained, or coerced Wilhite in the exercise of his rights assured under the Order in violation of Section 19(a)(1).

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that U. S. Army Civilian Appellate Review Agency (USACARA), Department of the Army, Sacramento, California, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees of the Tooele Army Depot, Tooele, Utah, by failing to afford Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at formal discussions between any USACARA Grievance Examiner and Tooele Army Depot unit employees or employee representatives concerning grievances.

(b) Refusing the request made by Mr. Frank Wilhite, or any other employee in the bargaining unit, to be represented by the president of Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, or any other designated representative, at formal discussions between any USACARA Grievance Examiner and Mr. Frank Wilhite, or any other employee in the bargaining unit, concerning pending grievances.

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

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


(a) Upon request of Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, rescind Grievance Examiner Honkamp's report and recommendations relative to Paul Grange's grievance and proceed with an inquiry under the formal administrative grievance procedure as though Grievance Examiner Honkamp had not yet conducted his inquiry.

(b) Notify Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, of, and afford it the opportunity to be represented at, formal discussions between any USACARA Grievance Examiner selected and Tooele Army Depot unit employees or employee representatives concerning grievances.

(c) Post at the Tooele Army Depot, Tooele, Utah, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chief U. S. Army Civilian Appellate Review Officer, Sacramento, California, and they shall be posted and maintained by the Commanding Officer of the Tooele Army Depot, Tooele, Utah, for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D. C.  
February 28, 1975



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

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between any USACARA Grievance Examiner and unit employees of Tooele Army Depot, Tooele, Utah, or employee representatives, concerning grievances without affording Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT refuse the request made by Mr. Frank Wilhite, or any other employee in the bargaining unit, to be represented by the president of Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, or any other designated representative, at formal discussions between any USACARA Grievance Examiner and Mr. Frank Wilhite, or any other employee in the bargaining unit, concerning pending grievances.

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

(Cont'd)

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

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

WE WILL, upon request of Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, rescind Grievance Examiner Honkamp's report and recommendations relative to employee Paul Grange's grievance and will proceed with an inquiry into the matter under the formal administrative grievance procedure as though Grievance Examiner Honkamp had not yet conducted his inquiry.

WE WILL notify Lodge 2261, International Association of Aerospace Workers, AFL-CIO, of, and afford it the opportunity to be represented at, formal discussions between any USACARA Grievance Examiner selected and Tooele Army Depot unit employees or employee representatives concerning grievances.



.....  
In the Matter of

U. S. ARMY CIVILIAN APPELLATE  
REVIEW AGENCY, DEPARTMENT OF THE ARMY  
SACRAMENTO, CALIFORNIA

Respondent

and

LODGE 2261, INTERNATIONAL ASSOCIATION  
OF MACHINISTS AND AEROSPACE WORKERS,  
AFL-CIO

Complainant  
.....

Case No. 61-2169 (CA)

.....  
In the Matter of

U. S. ARMY CIVILIAN APPELLATE  
REVIEW AGENCY, DEPARTMENT OF THE ARMY  
SACRAMENTO, CALIFORNIA

Respondent

and

LODGE 2261, INTERNATIONAL ASSOCIATION  
OF MACHINISTS AND AEROSPACE WORKERS,  
AFL-CIO

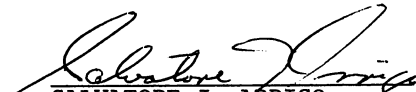
Complainant  
.....

Case No. 61-2169 (CA)

ERRATA

The first sentence of the first paragraph on Page 2  
of my Report and Recommendations issued on October 4, 1974,  
is corrected to read as follows:

"This proceeding heard in Salt Lake City, Utah,  
on June 7, 1974, arises under Executive Order 11491,  
as amended (hereinafter called the Order)."

  
SALVATORE J. ARRIGO  
Administrative Law Judge

Dated: October 9, 1974  
Washington, D.C.

Walter F. O'Brien, Esq.  
Chief Counsel  
Sacramento Army Depot  
Fruitridge Road  
Sacramento, California 95813  
For Respondent

Richard M. Russell  
Grand Lodge Representative  
International Association of Machinists  
and Aerospace Workers, AFL-CIO  
24632 S. E. 165th Street  
Issaquak, Washington, 98027  
For Complainant

Before: SALVATORE J. ARRIGO  
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Preliminary Statement

This proceeding heard in Sacramento, California, on June 7, 1974, arises under Executive Order 11491, as amended (hereinafter called the Order). Pursuant to the Regulations of the Assistant Secretary for Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint issued on May 9, 1974, with reference to an alleged violation of Section 19(a)(1) of the Order. The amended complaint filed by Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter called the Union or Complainant) alleged that the U. S. Army Civilian Appellate Review Agency, Department of the Army, Sacramento, California, (hereinafter called USACARA or Respondent) violated Section 19(a)(1) of the Order "...by refusing to permit Edwin St. Clair, President of IAM Lodge 2261 to be present and represent Frank Wilhite during the course of an interview of the latter by (a) grievance examiner designated by the Respondent Agency, in direct contravention with (sic) the terms and provisions set forth in Section 10(e) of the Order."

At the hearing the parties were represented and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both parties.

Upon the entire record in this matter, from my reading of the briefs and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

At all times material herein the Union has been the exclusive collective bargaining representative of various Wage Grade employees employed by the Tooele Army Depot, Tooele, Utah (hereinafter called the Depot). Sometime in March 1973, Paul Grange, a member of the collective bargaining unit, was absent from work and was placed on "away without leave" (AWOL) status by the Depot. 1/ Mr. Grange objected to having been put on AWOL status since he was under the impression that annual leave was automatically deducted when an employee did not report for

1/ Subsequently, Grange received a formal written reprimand relative to his absence without leave.

work at the facility. Grange sought the Union's assistance in representing him and on or about March 28, 1973, the Union filed a grievance on Grange's behalf utilizing the Department of the Army's administrative grievance procedures 2/. The grievance was not resolved at the third step before the Commanding Officer and pursuant to the terms of the grievance procedure the matter was then referred to USACARA for inquiry by an Examiner.

Although Tooele Army Depot and USACARA are both within the jurisdiction of the Department of the Army, they are nevertheless organizationally independent from one another. USACARA is composed of seven Appellate Review Offices, including one at Sacramento (Respondent herein) which report directly to the Administrator of the organization in Washington, D.C. The Administrator in turn reports to the Deputy Chief of Staff for Personnel, Department of the Army. According to the Department of the Army's General Orders which implemented the establishment of USACARA in 1970, 3/ its mission was to "(c)onduct investigations of civilian employee complaints of discrimination and conduct investigations and hearings on employee grievances and adverse action appeals Army-wide." The General Orders also provided that "(p)reparation of reports of findings and recommendations, including corrective action are to comply with regulations and standards of the Department of the Army and the U. S. Civil Service Commission." By Department of the Army regulations, 4/ when at the third step of the administrative grievance procedure the activity commander is unable to resolve a "formal" grievance in a manner acceptable to the employee, he is obligated to refer the grievance to the appropriate USACARA Office which maintains a corps of full-time Department of the Army Examiners "(t)o assist commanders responsible for deciding grievances and appeals." Thereupon USACARA appoints one of its Examiners to conduct "such investigations as is necessary to develop the facts of the case." The regulations further provide, in relevant part:

2/ The collective bargaining agreement between the Union and the Depot contains a grievance procedure. However, the agreement provides that matters such as the "application of personnel policies" are to be presented under the Department of the Army grievance procedure. (Article XXVI, Section 2.)

3/ Enclosure 2 of Respondent Exhibit No. 1

4/ CPR 700 (Ch. 8), Joint Exhibit 9.

"(2) The USACARA Examiner will prepare a memorandum report of his inquiry, including his findings and his recommendations and submit it to the Commanding Officer. The Commander will accept the USACARA Examiner's recommendation and notify the employee of this decision (this decision will be final and the employee may not request a further review of the same grievance within the Department of the Army) except that:

"(a) If the Commander decides to grant the relief sought by the employee, he shall issue the decision accordingly without regard to the examiner's recommendations. This decision will be final and the employee may not request a further review of the same grievance within the Department of the Army.

"(b) If the Commander determines that the examiner's recommendations are unacceptable, he shall transmit the grievance file with a specific statement of the basis for that determination to the Major Commander for decision. The Commander shall also furnish the employee and his representative a copy of that statement.

"h. Action by the major commander. The Major Commander will review the file and may request such additional information or investigation as appears necessary for a decision. The Major Commander's decision will be rendered to the employee transmitting a copy of the USACARA Examiner's report. This decision will be final and the employee may not request a further review of the same grievance within the Department of the Army."

USACARA assigned Examiner Norbert Honkamp to conduct the inquiry into Grange's grievance. Examiner Honkamp chose to pursue his inquiry through individual interviews of witnesses.<sup>5/</sup> On or about June 12, 1973, he met with

<sup>5/</sup> Under FPM regulations, the examiner has the discretion of conducting his inquiry through securing documentary evidence; personal interviews; a group meeting; a hearing; or any combination of the foregoing.

grievant Grange who had requested the Union to represent him. Accordingly, Edwin St. Clair, the Union's President accompanied Grange to the meeting, identified himself to Examiner Honkamp and informed Honkamp that he was representing Grange. <sup>6/</sup> During the interview Examiner Honkamp asked Grange and St. Clair if they had any witness they wished him to interview on behalf of Grange and thereupon was given the names of three unit employees: Wilhite, Critchlow and Fonger. Wilhite was the grievant's shop steward. Fonger and Critchlow were employees whom the Union alleged had been involved in similar absences and had not received as severe disciplinary action. The Union was attempting to prove that the Depot was not issuing comparable disciplinary actions for similar infractions and Grange's penalty was, in reality, a reprisal by management for a previous grievance action he allegedly "won." <sup>7/</sup>

Shortly thereafter Examiner Honkamp had Wilhite summoned for an interview. Wilhite asked St. Clair to represent him and they both then met with Honkamp. St. Clair announced to Honkamp that he was Wilhite's representative but Honkamp refused to permit St. Clair to remain during the interview stating that he would not take Wilhite's testimony if St. Clair remained in the room. Honkamp took the position that since St. Clair was the grievant's representative, his presence would inhibit the interview of Wilhite. St. Clair objected to Honkamp's decision contending that as the Union President he had a right to be there and charged that Honkamp was running a "kangaroo court." Nevertheless St. Clair left and Honkamp thereupon interviewed Wilhite.

Subsequently, Examiner Honkamp privately interviewed employees Fonger and Critchlow without notifying the Union in advance of such interviews. St. Clair was unaware of the interviews until after they had taken place.

<sup>6/</sup> Section 5 of the collective bargaining agreement provides:

"The Union has the right to represent employees who file grievances under the Department of the Army Grievance Procedure if requested by the employee. If an employee(s) elects to handle his own grievance under the DA Procedure, the Union will be afforded the opportunity to be present at formal discussions between Management and the employee(s) concerning such grievances. The Union's right to be present will not extend to informal discussions between an employee and a supervisor. At the time of adjustment of such grievances, the Union may make its views known to Management."

<sup>7/</sup> Joint Exhibit No. 3.



Respondent's Motions to Dismiss

At the hearing Respondent moved that the Complaint be dismissed on various grounds. At that time I reserved ruling on the motions indicating that I would treat the matter in my decision. In its first motion to dismiss Respondent contends that the Assistant Secretary is "without jurisdiction" to decide this case in that USACARA has as its primary function the investigation of employees of an agency and therefore is an entity within the meaning of Sections 3(b)(3) and (4) of the Order. 8/

It is clear from the express language of Sections 3(b)(3) and (4) and decisions of the Federal Labor Relations Council and the Assistant Secretary that only "the head of the agency" can determine that the function of the activity in question is within the definition of Section 3(b)(3) and (4) and thereby exclude those employees from the coverage of the Order. While the reviewability of such a determination varies depending upon whether it is made under Section 3(b)(3) or 3(b)(4) of the Order, 9/ in either case the initial

8/ Section 3(b)(3) and (4) of the Order provide:

"Sec. 3. Application. (a) This Order applies to all employees and agencies in the executive branch, except as provided in paragraphs (b), (c) and (d) of this section.

(b) This Order (except section 22 does not apply to--

(3) 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 judgement, that the Order cannot be applied in a manner consistent with national security requirements and considerations; or

(4) 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 judgement, that the Order cannot be applied in a manner consistent with the internal security of the agency."

9/ See Naval Electronics Systems Command Activity, Boston Mass., FLRC No. 71A-2; and Audit Division (Code DU), National Aeronautics and Space Agency, FLRC No. 70A-7.

determination must be specific and made personally and explicitly by "the head of the agency." 10/ The record herein contains no evidence that such a determination has ever been made and accordingly in the absences of such evidence Respondent's contention must be rejected.

Respondent also contends that in the circumstances herein, USACARA is not an "Agency" or "agency management" within the meaning of the Order and therefore is not an appropriate Respondent in this case. While it is true that the Union is the exclusive representative of the Depot's employees and the collective bargaining agreement is between it and the Depot, USACARA is not merely a detached, disinterested third party. Both USACARA and the Depot are under the jurisdiction and authority of the Department of the Army and the Department of Defense and are tied to one another in specified employee relations matters by agency regulations. USACARA performs a substantial and significant role in processing grievances under the administrative grievance procedure and its assigned function is, by Department of the Army regulation, "to assist commanders...." The Assistant Secretary has previously held that a grievance examiner with relatively the same relationship to an activity as USACARA Examiners have with the Depot was a representative or agent of the charged activity while conducting his investigation of an employee's grievance. 11/ Moreover, I find that in fulfilling its role as a necessary and integral component in the administration of the agency grievance procedure, USACARA became an alter ego or extension of the Depot. Accordingly, USACARA placed itself open to be both jointly and severably chargeable for any unfair labor practice conduct it may have engaged in while acting in furtherance of its delegated functions on behalf of the Depot.

Lastly, Respondent urges that the complaint be dismissed in that Complainant failed to exhaust administrative remedies available to it. Respondent relies on a Department of Defense (DOD) regulation 12/ which provides: "Questions as to

10/ Naval Electronics Systems Command Activity, ibid. and United States Department of the Treasury, Office of the Regional Counsel, Western Region, A/SLMR No. 161.

11/ United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400.

12/ CPR 700 (Ch. 9), Section VII B 3 c. (Joint Exhibit No. 14).

interpretation of published policies or regulations of the DOD component concerned or of the DOD, provisions of law, or regulations of appropriate authorities outside the DOD shall not be subject to grievance procedures or arbitration." The regulation further sets forth procedures for the "authoritative interpretation" and resolution of these matters by the Department of Defense. As Respondent sees it "...the basis for this complaint is not an unfair labor practice, but rather a question of regulatory interpretation regarding the scope of representation...."

I find Respondent's argument to be without merit. The question to be resolved herein is whether Section 10(e) of the Order was violated by Respondent's refusal to allow the Union's attendance at the interviews as discussed above. The extent of a Union's rights under Section 10(e) of the Order is clearly left to determination by the Assistant Secretary and the Federal Labor Regulations Council and the appropriate administrative process to be used in resolving such a matter is through the complaint procedure which was followed herein.

Conclusions

Based upon the foregoing I find and conclude that:

- (1) Grievance Examiner Honkamp's interviews of Depot employees were formal discussions within the meaning of Section 10(e) of the Order;
- (2) USACARA, though the action of its employee Grievance Examiner Honkamp, is chargeable for any unfair labor practice engaged in while acting in furtherance of its delegated functions on behalf of the Depot;
- (3) The subject matter of this inquiry, a grievance over the uniform application of rules relative to employee work attendance and discipline for alleged breach of such rules, concerned a grievance, personnel policy or practice affecting working conditions of unit employees within the meaning of Section 10(e) of the Order;
- (4) The negotiated agreement between the Union and the Depot nowhere expressly states or indicates that the Union was foregoing or waiving any rights relative to being represented at the "formal discussion" within the meaning of Section 10(e) of the Order;

(5) Respondent, by its refusal to permit and failure to afford the Union an opportunity to be represented when Examiner Honkamp was interviewing Depot employee witnesses violated Section 19(a)(1) of the Order, as alleged. 13/

Respondent's reliance on the decisions of the Assistant Secretary and the Federal Labor Relations Council in the Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, FLRC No. 74A-3, is misplaced. In that case it was held that since an agency grievance procedure does not result from any rights accorded to individual employees or to labor organizations under the Order, an agency's failure to process a grievance according to the terms of a non-negotiated agency grievance procedure, standing alone, is not violative of Section 19(a)(1) of the Order. It was further held that such a failure does not become a violation of Section 19(a)(1) merely by reason of a labor organization's representation of a particular grievant. However, the violation found in the case herein is not grounded upon an agency's failure to follow its own grievance procedure, but rather is based upon a refusal to accord a labor organization its rights specifically assured under Section 10(e) of the Order.

Recommendations

Having found that Respondent has engaged in conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order. I also recommend that Respondent's motions to dismiss the complaint be denied.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that U. S. Army Civilian Appellate Review Agency, (USACARA) Department of the Army, Sacramento, California shall:

- 1. Cease and desist from:
  - (a) Interfering with, restraining, or coercing employees of Tooele Army Depot, Tooele, Utah, by

13/ United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, (supar).

failing to provide Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, the employees exclusive representative, the opportunity to be represented at formal discussions between any USACARA Grievance Examiner and Tooele Army Depot employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

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

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

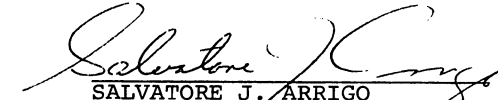
a. Upon request of Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, rescind Grievance Examiner Honkamp's report and recommendations relative to Paul Grange's grievance and proceed with an inquiry under the formal administrative grievance procedure as though Grievance Examiner Honkamp had not yet conducted his inquiry.

b. Notify Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, of and give it the opportunity to be represented at formal discussions between any USACARA Grievance Examiner selected and employees or employee-representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

c. Post at its facility at Sacramento, California, and the Tooele Army Depot, Tooele, Utah, the Depot willing, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chief U. S. Army Appellate Review Officer, Sacramento, California, and they shall be posted and maintained by him for 60 consecutive days thereafter,

in conspicuous places, including all places where notices to employees are customarily posted. The Chief shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

  
SALVATORE J. ARRIGO  
Administrative Law Judge

Dated: October 4, 1974  
Washington, D.C.

## N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees and the employees of Tooele Army Depot, Tooele, Utah that:

WE WILL NOT conduct formal discussions between any USACARA Grievance Examiner and employees of Tooele Army Depot, Tooele Utah or employee-representatives concerning grievances, personnel policies and practices or other matters affecting general working conditions regarding employees in the unit without giving Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

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

WE WILL, upon request of Lodge 2261, International Association of Machinists and Aerospace Workers, AFL-CIO, rescind Grievance Examiner Honkamp's report and recommendations relative to employee Paul Grange's grievance and will proceed with an inquiry into the matter under the formal administrative grievance procedure as though Grievance Examiner Honkamp had not yet conducted his inquiry.

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 (Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_

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

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

GPO 886-564

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

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

INTERNAL REVENUE SERVICE,  
 FRESNO SERVICE CENTER  
 A/SLMR No. 489

INTERNAL REVENUE SERVICE,  
 FRESNO SERVICE CENTER

Respondent

and

Case No. 70-4034

NATIONAL TREASURY EMPLOYEES UNION

and

CHAPTER 097, NATIONAL TREASURY  
 EMPLOYEES UNION

Complainants

DECISION AND ORDER

On October 7, 1974, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainants filed exceptions and a supporting brief, only with regard to the Administrative Law Judge's recommendation that dismissal was warranted with respect to the aspect of the instant complaint alleging a violation of Section 19(a)(1) and (6) based on the failure to afford the Complainants an opportunity to be represented at certain "diagonal slice" meetings. The Respondent filed an answering brief with respect to the Complainants' exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the Complainants' exceptions and supporting brief and the Respondent's answering brief, I hereby adopt the Administrative Law Judge's recommendation that dismissal of the instant complaint is warranted.

In adopting the Administrative Law Judge's recommendation that the complaint be dismissed with regard to the allegation relating to the alleged failure of the Respondent to consult or negotiate with the Complainants concerning the implementation and impact of certain intended changes in

This case involved an unfair labor practice complaint filed by National Treasury Employees Union and Chapter 097 of the National Treasury Employees Union (Complainants) alleging that the Respondent violated Section 19(a)(1) and (6) of the Executive Order by: (1) its refusal to invite union representatives to "diagonal slice" meetings, which meetings were alleged to involve formal discussions of personnel policies and practices and other matters affecting general working conditions, and (2) its failure to negotiate regarding the impact and implementation of a change in tours of duty.

The Assistant Secretary adopted the Administrative Law Judge's recommendation that the complaint should be dismissed in its entirety. In this connection, the Assistant Secretary adopted the Administrative Law Judge's findings with regard to the second allegation, noting particularly that it was not excepted to by the Complainants. Thus, the Assistant Secretary agreed that the Respondent met its obligation to meet and confer regarding the impact and implementation of the change in tours of duty instituted at the Respondent. However, the Assistant Secretary did not pass upon the Administrative Law Judge's additional conclusion that the Respondent was obligated to meet and confer regarding the actual change in tours of duty because, as noted by the Administrative Law Judge, the negotiability of the decision to change was not an issue raised by the complaint.

With regard to the second allegation, the Assistant Secretary agreed with the Administrative Law Judge's recommended dismissal of the complaint. However, in this regard, he found it unnecessary to pass upon whether the "diagonal slice" meetings herein constituted "formal discussions" within the meaning of Section 10(e) of the Executive Order because there was no testimony or other evidence admitted into the record concerning the nature of any "diagonal slice" meeting held during the nine-month period preceding the filing of the instant unfair labor practice complaint. In this regard, the Assistant Secretary noted that no evidence was presented that the Respondent failed to comply with a Request for Appearance of Witness or obstructed its service on a witness whose appearance had been approved by the Assistant Regional Director, and who purportedly would testify on "diagonal slice" meetings. He noted also that the Complainants failed to renew their offer of proof made at the commencement of the hearing concerning the testimony of the witness sought.

Accordingly, the Assistant Secretary ordered that the unfair labor practice complaint be dismissed.

employee tours of duty, it was noted particularly that the Administrative Law Judge found that the Respondent met its obligation to meet and confer regarding the impact and implementation of the change in tours of duty instituted at the Respondent Activity and that his finding was not excepted to by the Complainants. 1/

With regard to the allegation that the Respondent improperly refused to invite the Complainants' representatives to certain "diagonal slice" meetings arranged by the Respondent, I agree with the Administrative Law Judge's ultimate determination that this aspect of the complaint, alleging violations of Section 19(a)(1) and (6) of the Order, should be dismissed. However, in reaching this disposition, contrary to the Administrative Law Judge, I find it unnecessary to pass upon whether the "diagonal slice" meetings herein constituted "formal discussions" within the meaning of Section 10(e) of the Executive Order. In this regard, it was noted that there was no testimony or other evidence admitted into the record concerning the nature of any "diagonal slice" meeting held by the Respondent during the nine-month period preceding the filing of the complaint in this matter.

Thus, in effect, there was no evidence that any meetings held within the prescribed period involved "formal discussions" of personnel policies and practices or other matters affecting general working conditions within the meaning of Section 10(e) of the Order. 2/ Accordingly, with respect to this aspect of the complaint, I conclude that the Complainants have not met

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1/ In this connection, I find it unnecessary to pass upon the Administrative Law Judge's additional conclusion that, under the circumstances herein, the Respondent was obligated to meet and confer regarding the actual change in tours of duty. In this regard, as noted by the Administrative Law Judge, the Complainants did not allege in the complaint that the Respondent's conduct was inconsistent with any obligation to meet and confer on the decision to make a change in the tours of duty. Thus, in my view, the negotiability of the decision to change any tour of duty was not an issue raised by the complaint.

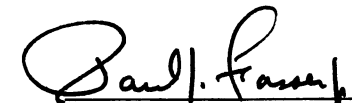
2/ With regard to the lack of evidence concerning "diagonal slice" meetings within the nine-month period preceding the complaint, the Complainants asserted in their exceptions that it reasonably should be inferred that the Respondent obstructed the appearance of a witness who was to testify regarding "diagonal slice" meetings, and whose appearance had been approved by the Assistant Regional Director pursuant to Section 206.7 of the Assistant Secretary's Regulations. However, in this regard, it was noted that there is no evidence that the Respondent failed to comply with the Request for Appearance of Witness or that it obstructed service of such Request and the Complainants did not renew their offer of proof made at the commencement of the hearing concerning what the witness sought would purportedly have testified to.

their burden of proof as required by Section 203.5(c) of the Assistant Secretary's Regulations, and that, therefore, dismissal is warranted.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-4034 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
February 28, 1975



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



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For the Respondent

BEFORE: MILTON KRAMER  
 Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated August 17, 1973 and filed August 20, 1973 alleging violations by the Respondent of Sections 19(a)(1), (2), (3), and (6) of the Executive Order. An amended complaint dated March 12, 1974 was filed March 14, 1974 alleging violations only of Sections 19(a)(1) and (6) of the Executive Order. The violations were alleged to consist of two separate and unrelated unfair labor practices by the Respondent: (a) refusing to invite union representatives of the Complainants to "diagonal slice" meetings of samples of employees with management which meetings involved personnel policies and practices and other matters affecting working conditions; and (b) failing to consult or negotiate with the Complainants concerning the implementation and impact of intended changes in tours of duty.

On October 9, 1973 the Respondent filed an answer to the complaint, dated October 2, 1973, denying all allegations of the complaint.

The Area Administrator investigated the complaint and reported to the Assistant Regional Director. Pursuant to a Notice of Hearing issued by the Assistant Regional Director on April 3, 1974, hearings were held on June 4, 1974 in Fresno, California. Both parties were represented by counsel. The Complainants presented two witnesses and offered in evidence five exhibits two of which were received. The Respondent offered no witnesses or exhibits but cross-examined Complainant's witnesses. It takes the position that the Complainant failed to sustain its burden of proof.

At the conclusion of the hearing the time for filing briefs was extended to July 9, 1974. Pursuant to a Motion of the Complainant and with the concurrence of the Respondent, the time for filing briefs was further extended to August 12, 1974. Both parties filed briefs.

Facts

The Fresno Service Center was newly opened in the latter part of 1971. In June 1972 the National Treasury

Employees Union 1/ was given exclusive recognition of certain employees of the Service Center. Chapter 097 was a chapter of the National newly organized shortly after the new Service Center opened. In May 1973 the parties negotiated and executed an agreement effective in July 1973. Chapter 093 had an organization, including area representatives, before the agreement was executed.

The "Diagonal Slice" Meetings

Shortly after the Respondent opened, it began a series of meetings of management officials in various levels with groups of employees chosen more or less at random from various employee levels. There was no prepared agenda and no minutes were kept. After a while the higher officials gradually stopped attending the meetings. The meetings had no fixed periodicity.

The matters discussed were whatever the employees brought up. Many of the employees had come from other Service Centers, and each Center varied from others in the way certain operations were performed or in giving different training to employees. So far as the evidence shows, the only matters discussed were criticisms of the way certain operations were performed where it was different from the way it had been performed at the Service Centers where the employee had formerly been employed, inability of some employees to get along with others, and dislike of some employees for their supervisors. The summary of the only witness who testified on the subject of the content of these "diagonal slice" meetings is shown in the margin. 2/

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1/ Its name at the time was National Association of Internal Revenue Employees.

2/ "It was really a gripe session. You walked in. The division chief was in charge. And he said: What's bugging you? And the things were: Some didn't like their co-workers. Some didn't like their supervisors. They didn't like the way work was being done. It was different. Like I said, it was a new service center. [Contd on next page.]



When these meetings were first held representatives of the Union were not invited except as they might be included among the employees invited. The President of Chapter 097, Paul Wood, wanted representatives of the Union to be present, and spoke to management about it. The Respondent said that thereafter they would notify the Union's area representatives of the employees invited to be at a particular meeting, and did so, but Wood wanted the President or Vice President of Chapter 097 invited to all meetings, and this was discussed from time to time but never resolved. Mr. Wood attended some of these meetings before he became President of the Chapter, but never attended any after he became President although he was invited to a few because he was the President.

#### The Changes in the Tours of Duty

In late March or very early April 1973 rumors were circulating about a possible change in tours of duty in the Taxpayer Relations Branch and the Adjustment Branch of the Respondent. Some employees in those Branches were disturbed about those rumors and spoke to Wood, the Chapter President, about the rumors, and some area representatives told Wood other employees were disturbed. Wood called Juda Levy in the Employee Relations Branch on April 4 or 5 and suggested consultation on the subject. Levy said he knew nothing about it but would inquire and call back. On April 6, 1973 Levy called Wood and told him that Blaine Watkins, Chief of the Taxpayer Relations Branch, wanted to have a meeting with the Union on Monday, April 9, about the change.

Wood designated Frank Barner, Vice President of the Chapter, and Sue Pollett, Building Director for the Chapter in the building in which the two branches were housed, to attend the meeting. Several division and section chiefs were present as were Watkins and Richard Marsh, Chief

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2/ - continued

The work was being done different than the way it was at Austin Service Center or Ogden Service Center. It was really just a gripe session." Tr. 100.

of the Adjustments Branch. Unit chiefs from both Branches were present. Watkins said that Marsh was present because he also was contemplating a change in tours of duty in his Branch.

The Union representatives were given a copy of a memorandum dated April 6, 1973 from the Chief of the Taxpayer Relations Branch to all supervisors. It listed a number of changes in tours of duty to be effective April 16. The purpose was to maximize the use of terminal time on the computers that operated the "IDRS", the Integrated Data Retrieval System. Among other changes, two units were to be changed from a starting time of 7:30 a.m. to a starting time of 6:30 a.m.

The Union representatives made some suggestions about some of the changes. The principal problem raised by the Union representatives was with respect to the tours that were to start at 6:30 a.m. Some of the women who worked in those units had young children they left in nursery schools while at work, and the nursery schools did not open until 7:00 a.m. Management stated that it thought that problem could be worked out in the remaining week and that employees who could not work it out should take up the problem with the individual's supervisor who would resolve it on a case-by-case basis. This was done in the case of some employees. Also, the Respondent agreed to some modifications suggested by the Union representatives in the changes of tours of duty. In both the Taxpayer Relations Branch and the Adjustment Branch, some changes were made on April 16, and at the suggestions of the Union representatives, although management made no commitment at the meeting, some changes were postponed, some had not yet been made at the time of the hearing, and some were made applicable to an employee only on a voluntary basis.

The Complainant did not seek any further meeting after the meeting of April 9, 1973. Both parties assumed that the Respondent had no obligation to negotiate on whether changes in the tours of duty should be made and was obligated to consult only on the impact of the changes.

Wood testified that the reason the Complainant did not ask for further meetings was that Barner, the Chapter's Vice-President who attended the meeting on April 9, told him that everything to be discussed had been discussed. Pollett testified that she did not suggest further meetings because she thought the Respondent had come to the meeting on April 9 with a closed mind and was going to put its plan into effect on April 16 regardless of anything the Complainant might say and was having the meeting only as a formality. Any such belief of Pollett was obviously mistaken; the Respondent did comply with several of the suggestions made by the Complainant at the meeting. I find that the Complainant did not ask for further meetings because it had exhausted all it cared to discuss about the planned changes in tours of duty.

#### Discussion and Conclusions

##### The "Diagonal Slice" Meetings

The last sentence of Section 10(e) of the Executive Order provides that when a labor organization has been accorded exclusive recognition it "shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." The issues here are thus whether the diagonal slice meetings were such formal discussions and, if they were, whether the Complainant was given an opportunity to be present.

There is no clearcut exposition of the line of demarcation between a "formal discussion" and one that is not formal, and it is doubtful that there could be. See Department of Health, Education, and Welfare, Social Security Administration, Great Lakes Program Center, A/SLMR No. 419. Although these meetings had no agenda and minutes were not kept, in this case the presence of several facility officials points toward the meeting being considered formal. But the emphasis in the meagre testimony on the nature of these meetings was on their informality and casualness.

But we need not decide whether these meetings were "formal discussions" or were informal. Assuming they were "formal discussions", it is not at all "formal discussions" between management and employees that the union is entitled, by Section 10(e), to an opportunity to be represented. It is only at those that concern "grievances, personnel policies and practices, or other matters affecting general working conditions".

It is only in the loosest sense, and not in the sense in which I believe the word is used in the Executive Order, that the meetings could be characterized as including discussions of "grievances". The matters discussed at these meetings are described in footnote 2. These were not "grievances" in the normal sense of specific complaints of inequities calling for a specific remedy, but simply the venting of "gripes", for whatever wholesome effect venting them might have. Nor could they be considered to be discussions of personnel policies and practices in any formal or realistic sense. They were more in the nature of "bull sessions" about "what's bugging you?" although somewhat more formal because of the presence of several supervisors of different levels. Nor can I find that they were discussions of "other matters affecting general working conditions". An individual's expression of dislike of a co-worker or supervisor, or the merits of the manner in which some operation was performed, is not properly characterized as a formal discussion of general working conditions of employees in the unit. The basic difficulty is the meagre and general nature of the evidence concerning the subject matter of these meetings. It is insufficient for me to conclude that they fell within the requirement of the last sentence of Section 10(e) of the Executive Order providing that the labor organization should be given an opportunity to be present.

But even if these meetings did fall within the provisions of the last sentence of Section 10(e) of the Executive Order, I cannot conclude that the Complainant was not given an opportunity to be present. The parties were in disagreement on what representatives of the union should be notified that a "diagonal slice" meeting was going to take place. There was no disagreement that representatives

of the union should be notified, without any persuasive evidence in the record that such notification should be given as a matter of right or simply as a matter of comity. In any event, after the Union told the Respondent that it thought representatives of the Union should be notified of the meetings, the Respondent did give notice.

It is now settled that a Union which has a right to be represented at a meeting has the right to determine who shall represent it. 3/ The record would not support a conclusion that the Respondent denied to the Union the right to select its own representative. The disagreement was over which Union representatives would be notified that the meeting was going to take place, not who would be there on behalf of the Union. The sparse record indicates that the Respondent was of the view that under the collective bargaining agreement it was obliged or entitled to notify the Union's area representative of a meeting, while the Complainant thought the President or Vice-President of Chapter 097 should be notified. The agreement is not in evidence. But there is nothing in the record to indicate that, regardless of what representative of the union was notified, the Respondent interfered with or tried to influence the Respondent in determining what representative of the Union, if any, would attend the meeting. Therefore, assuming the meetings were "formal" meetings, and assuming the subjects of the meetings fell within the subjects described in the last sentence of Section 10(e) of the Order, the Complainant was given an opportunity to be represented. There was thus no interference with the right recognized in the cases cited in footnote 3. It is noted that on a number of occasions the President of the Chapter was invited to attend some of these meetings because he was President, but did not attend them.

3/ Internal Revenue Service, Omaha District Office, A/SLMR No. 417; U.S. Army Training Center, Ft. Jackson Laundry Facility, Ft. Jackson, South Carolina, A/SLMR No. 242, p.4.

The Changes in the Tours of Duty

Section 11(b) of Executive Order 11491 provides in part:

"...the obligation to meet and confer does not include matters with respect to ... the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty ...."

In Plum Island Animal Disease Laboratory, Department of Agriculture, FLRC No. 71A-11 (July 9, 1971), the Federal Labor Relations Council held that under that provision there was no obligation to bargain over the establishment of or changes in tours of duty. In Department of Air Force, Norton Air Force Base, A/SLMR No. 261 (April 30, 1973), the Assistant Secretary held that while there was no obligation to negotiate over whether a shift should be abolished, there was an obligation to confer on the impact of such change. (Under the facts of that case he found that such obligation had been fulfilled.)

In Federal Employees Metal Trades Council and Naval Supply Center, FLRC No. 71A-52 (November 24, 1972), the Council held that the Plum Island doctrine applied only in situations in which the agency's staffing pattern would be affected. (That is what the language quoted above from Section 11(b) literally provides.) I conclude that in a situation in which a change in tours of duty does not integrally involve a change in staffing patterns, as in this case, there is an obligation to meet and confer not only concerning the impact of such change, but also concerning the change itself. The Plum Island case and the Naval Supply Center case both arose on the issue of the bargainability of a union proposal. But if the establishment of or changes in tours of duty, not "integrally related" to staffing, is bargainable when proposed by the union, I conclude it is also bargainable when initiated by management.

But the Union in this case expressly does not contend that there was an obligation to meet and confer on the decision to make the changes in tours of duty. The complaint alleges a violation in "the failure of the IRS to consult and/or negotiate concerning the impact of a change in the tour of duty of certain Fresno Service Center employees." The Union's brief expressly does not contend that there was an obligation to meet and confer on whether the changes should be made; it concedes that tours of duty are removed from the obligation to "meet and confer" by Section 11(b) of the Executive Order. 4/ In this situation, in which the Complainant does not allege or contend that there was a violation of an obligation to meet and confer on whether the changes should be made, and the Respondent relies on its position that the Complainant failed to prove the violation alleged and offered no evidence of its own, I do not consider and will make no recommendation on whether there was a violation of the obligation to meet and confer on whether the changes should be made.

In Federal Railroad Administration, A/SLMR No. 418 (July 31, 1974), the Assistant Secretary held that the obligation to "meet and confer" concerning the impact of a change by the agency requires "reasonable" notice by the agency to the recognized union and "ample" opportunity to "explore fully" the matters involved prior to taking action. In that case an amendment to the agency's governing legislation necessitated a reorganization of the Respondent's Office of Safety. The agency prepared a memorandum dated November 6, 1972 announcing a reorganization of that Office to which were attached new organizational charts and a staffing plan listing assignments which were to become effective on Monday, November 13. That memorandum and attachments were not communicated to the Union until Friday, November 10. The Assistant Secretary held that such timing did not meet the obligation to "meet and confer" on "reasonable" notice with an "ample" opportunity to explore fully the matters involved. Hence he found a violation of Section 19(a)(6) of the Order and that it had a restraining influence on the unit employees and a coercive

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4/ Brief, pp. 5-6.

effect upon their rights in violation of Section 19(a)(1).

This issue in this case then turns on what is a "reasonable" time for conferring as required by Section 11 (a). In Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR No. 289, a RIF case, it was held that the obligation to confer under Section 11 (a) was to confer as soon as the decision to have a RIF was reached, and in advance of the individual employees being notified, when it is feasible to give advance notice to the Union. I conclude that a similar requirement is applicable to a change in tours of duty.

The record does not show that the decision to change tours of duty was reached any earlier than April 6, 1973, the date of the memorandum from the Chief of the Taxpayer Relations Branch to "All Supervisors". 5/ The record shows that within a couple of weeks or so before that date rumors were circulating among the employees about a possible change. That would indicate only that the Respondent was considering a change, not that it intended to make it. When Wood called Levy on April 4 or 5 about the matter Levy, in the Employee Relations Branch, did not yet know about it. That would indicate that a decision had not yet been reached. The same day as the date of that memorandum, April 6, the Respondent asked the Chapter for a meeting to discuss the change. The fact that such a meeting was first suggested by Wood, the Chapter's President, is immaterial. Wood's suggestion was based only on rumor of a possibility, and Respondent's acquiescence was based on the rumored possibility becoming a fact.

The record does not show when the individual employees were notified of the change but it must have been after the conference on April 9. Mrs. Pollett was one of the employees affected and she first knew of the planned changes when she attended the April 9 conference as one of the Union's representatives and was given a copy of the April 6 memorandum.

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5/ Exh. C 3.

The meeting on April 9 fulfilled Respondent's obligation to confer prior to effectuating the changes.

The Union representatives raised a number of questions about the changes the Respondent proposed making. The principal subject of discussion was the problem of employees who had young children who were left in nursery schools while the employees were at work; two shifts were to change from a starting time of 7:30 a.m. to 6:30 a.m. and the nursery schools did not open until 7:00 a.m. The Union representatives took the position that the "lead time" to the intended effective date of the tour changes, one week, was insufficient for such employees to make new arrangements. The Respondent took the position that one week was sufficient time but that if it should prove insufficient in any particular case the individual employee should take it up with her supervisor who would try to resolve it on a case-by-case basis. And in fact such individual arrangements were made.


The Union representatives made some other suggestions concerning the manner of implementing the tour changes the Respondent intended to make. It suggested that some of the intended changes be postponed, some not be made at all, and some be made only on a voluntary basis. Although the Respondent made no commitment at the April 9 meeting, it did consider these suggestions. Some changes were made on April 16 as originally planned, but some were postponed, some had not yet been made at the time of the hearing and the record does not show whether they were ever made, and some were made optional with the individual employee as proposed by the Union.

This constituted sufficient fulfillment of the obligation to meet and confer on the manner of implementation and the impact of the intended changes, especially since the Complainant asked for no further meetings. The obligation to meet and confer is not a unilateral obligation. Section 11(a) provides that "An agency and a labor organization ... shall meet ... and confer ... with respect to ... matters affecting working conditions...." The

obligation is imposed on both. When a meeting has been held, and the Union asks for no further meeting because, as I have found above, it felt it had exhausted all it cared to discuss about the pending subject, it should not be heard to complain that there was insufficient conferring. Cf. Great Lakes Naval Hospital, supra, A/SLMR No. 289, at p. 6.

Recommendation

Since the Complainants have not sustained their burden of proof on either of the alleged violations of the Executive Order, the complaint should be dismissed.

  
MILTON KRAMER  
Administrative Law Judge

DATED: October 7, 1974  
Washington, D. C.

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, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ACADEMY OF HEALTH SCIENCES,  
 U.S. ARMY,  
 FORT SAM HOUSTON, TEXAS

HEADQUARTERS, U.S. ARMY,  
 HEALTH SERVICES COMMAND,  
 FORT SAM HOUSTON, TEXAS  
 A/SLMR No. 490

ACADEMY OF HEALTH SCIENCES,  
 U. S. ARMY,  
 FORT SAM HOUSTON, TEXAS

Activity

and

Case No. 63-4764(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,  
 LOCAL 28

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, AFL-CIO

Intervenor

HEADQUARTERS, U.S. ARMY,  
 HEALTH SERVICES COMMAND,  
 FORT SAM HOUSTON, TEXAS

Activity

and

Case No. 63-4776(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,  
 LOCAL 28

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held in the subject cases. Thereafter, on September 4, 1974, I issued a Decision and Remand,<sup>1/</sup> in which I ordered that the cases be remanded to the appropriate Assistant Regional

<sup>1/</sup> A/SLMR No. 426

The Petitioner, National Federation of Federal Employees, Local 28 (NFFE), sought elections in two units, one consisting of all General Schedule (GS) employees of the Academy of Health Sciences, U.S. Army, Fort Sam Houston, Texas, and the other consisting of all GS employees of the Headquarters, U.S. Army, Health Services Command, Fort Sam Houston, Texas. In the case involving the Academy of Health Sciences, the Intervenor, American Federation of Government Employees, AFL-CIO (AFGE), agreed with the NFFE that the unit was appropriate but contended that certain employees were subject to an agreement bar which would exclude them from any unit found appropriate. The Activities contended that the appropriate unit should include both GS and Wage Grade (WG) employees of the Headquarters, Health Services Command, and its four subordinate organizational entities, including the Academy of Health Sciences, located at Fort Sam Houston, Texas.

The Assistant Secretary found, contrary to the contention of the AFGE, that there was no agreement bar to the inclusion of certain employees in the claimed unit of the Academy of Health Sciences, and he found further that the claimed units of the Headquarters Health Services Command and the Academy of Health Sciences were appropriate. In this latter regard, he noted that these two organizations perform services on a command or U.S. Army-wide basis, while the other medical organizations of the Health Services Command located at Fort Sam Houston serve a more limited and specialized clientele. Further, he noted that the employees in the two claimed units have dissimilar skills, separate supervision and work locations, and have little day-to-day contact with each other or with employees in the other Health Services Command units at Fort Sam Houston, and that determinations on grievances arising within each subdivision of the Health Services Command are made by the commander of that subdivision. Further, he concluded that, under the circumstances, the WG employees in the Academy of Health Sciences did not share a community of interest with GS employees in the claimed unit and, therefore, should not be included in the unit found appropriate.

In accordance with his conclusions, the Assistant Secretary directed elections in the two units found appropriate.

Director for the purpose of reopening the record to secure additional evidence concerning the appropriateness of the units sought. Pursuant to the above-noted Decision and Remand, on October 8 and 9, 1974, a hearing was held before Hearing Officer A. J. Lewis. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, including those facts developed at the initial and reopened hearings, the Assistant Secretary finds:

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

2. In Case No. 63-4764(RO), the National Federation of Federal Employees, Local 28, herein called NFFE, seeks an election in a unit of all General Schedule (GS) professional and nonprofessional employees employed at the Academy of Health Sciences, Fort Sam Houston, Texas, excluding supervisors, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and all Wage Grade (WG) employees.

In Case No. 63-4776(RO), the NFFE seeks an election in a unit of all GS professional and nonprofessional employees employed by the Headquarters, Health Services Command, Fort Sam Houston, Texas, excluding supervisors, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and all WG employees.

The Activities contend that a single unit, including both GS and WG employees assigned to all medical activities located at Fort Sam Houston under the jurisdiction of the U.S. Army Health Services Command, is appropriate. This unit would encompass the Headquarters, Health Services Command, and four subordinate organizational entities, including the Academy of Health Sciences. The Intervenor in Case No. 63-4764(RO), the American Federation of Government Employees, AFL-CIO, herein called AFGE, is in agreement with the NFFE that the claimed unit in that case is appropriate; however, it contends that certain employees of the Academy of Health Sciences are subject to an agreement bar which would exclude them from any unit found to be appropriate.

The U.S. Army Health Services Command was created as a result of a major Army-wide reorganization entitled, "Operation Steadfast," most of which was effective on July 1, 1973. The Health Services Command has the mission of health care delivery throughout the United States and is comprised of a Headquarters at Fort Sam Houston and 58 subordinate elements, four of which are located at Fort Sam Houston. The four subordinate elements located at Fort Sam Houston are the Academy of Health Sciences, the Brooke Army Medical Center, the U.S. Army Regional Dental Activity, and the U.S. Army Medical Laboratory (Regional).

The Headquarters, Health Services Command, is a new organization staffed with employees transferred from the Office of the Surgeon General, Washington, D.C., employees reassigned from other organizations located at Fort Sam Houston, employees transferred from the Brooke Army Medical Center Management Information Systems Office, and a number of newly hired employees. The record reveals that it has approximately 414 GS employees. The Academy of Health Sciences, consisting of approximately 379 GS and 106 WG employees, was staffed with employees of the former U.S. Army Medical Training Center, which had been a part of the Headquarters, Fort Sam Houston Command, and employees of the former U.S. Army Medical Field Service School and of other former Brooke Army Medical Center education and training elements. The Brooke Army Medical Center, with approximately 613 GS and 284 WG employees, existed prior to the implementation of Operation Steadfast, but in its previous configuration included a number of employees and functions which were transferred to other organizational entities as a result of the reorganization. The U.S. Army Regional Dental Activity, with 7 GS employees, and the U.S. Army Medical Laboratory (Regional), with approximately 34 GS and 5 WG employees, were transferred intact to the Health Services Command. The evidence establishes that the commanding officer of each of the four subordinate elements at Fort Sam Houston reports to the Commander of the Health Services Command who, in turn, reports to the U.S. Army Chief of Staff.

Also located at Fort Sam Houston is the Institute of Surgical Research, with 67 GS and 13 WG employees, which has the mission of performing research relating to the treatment of burns. This organization is not a component of the Health Services Command, but rather, is an element of the Medical Research and Development Command, which is headquartered in Washington, D.C. The Commander of the Medical Research and Development Command reports to the Surgeon General, Department of the Army.

Prior to the implementation of Operation Steadfast, the AFGE held exclusive recognition for several units of employees at Fort Sam Houston, including certain employees now employed by the Health Services Command. Specifically, a unit of approximately 1200 GS and WG employees of Headquarters, Fort Sam Houston, Fifth Army, was represented by AFGE Local 2154. Also, AFGE Local 2169 held exclusive recognition for two units at the Brooke Army Medical Center - a unit of approximately 310 WG employees and a unit of approximately 125 GS nursing assistants. The record reveals that there was no negotiated agreement covering the employees in the latter two units in effect at the time of the filing of the petitions in the instant cases and, therefore, such employees would not be barred from being included in any unit found to be appropriate on the basis of an agreement bar.

With respect to the unit represented by AFGE Local 2154, the record reveals that, prior to the implementation of Operation Steadfast, the U.S. Army Medical Training Center was part of Headquarters, Fort Sam Houston, and, as such, its approximately 35 employees were represented by AFGE

Local 2154. As a result of the reorganization, the Medical Training Center became a part of the Academy of Health Sciences. An agreement covering AFGE Local 2154's unit of employees of Headquarters, Fort Sam Houston, expired on March 15, 1973, but was extended until July 1, 1973, the effective date of the reorganization. The record reveals that a successor agreement between the parties was signed at the local level by the Headquarters, Fort Sam Houston and the AFGE on April 25, 1973, and was approved by Headquarters, Department of the Army, on November 1, 1973. Thus, if the transfer of the employees of the former Medical Training Center constituted only an administrative relocation of a portion of AFGE Local 2154's exclusively recognized unit, it appears that there would exist an agreement bar which would preclude the inclusion of these employees in any unit found appropriate. In this regard, however, the evidence adduced at the reopened hearing establishes that approximately 24 of the employees of the former Medical Training Center were transferred to the Academy of Health Sciences as a result of Operation Steadfast and were dispersed throughout the various divisions and branches of the Academy. The record indicates also that these employees of the former Medical Training Center have been commingled with the other employees of the Academy and that they do not constitute a definable organizational identity within the Academy. Under these circumstances, I find that no agreement bar exists with respect to including the former Medical Training Center employees in the claimed unit in Case No. 63-4764(RO).

While all elements of the Health Services Command have the common mission of health care delivery, the record reveals that the Headquarters, Health Services Command and the four subordinate organizations located at Fort Sam Houston each have specific functions. Thus, while the Headquarters, Health Services Command, is responsible for providing certain services for the entire Health Services Command, including the 58 subordinate elements, the four subordinate organizations of the Health Services Command at Fort Sam Houston have varying roles within the Command. In this regard, the Academy of Health Sciences is an educational institution servicing the U.S. Army. However, the Brooke Army Medical Center consists basically of a hospital. Further, the Regional Dental Activity manufactures dental prostheses for members of the uniformed services located within a specific geographical area; and the Regional Medical Laboratory processes various types of medical specimens for military personnel located within a specified geographical area.

The record reflects that, as a result of the specialized functions performed by each component of the Health Services Command located at Fort Sam Houston, each has employees who, aside from clerical employees, have skills and duties that are dissimilar from those of the employees of the other organizations. The record further reflects that the five organizations are located in separate buildings, that different functions performed by these organizations result in minimal day-to-day contact between their respective employees, that each organization has separate supervision and, as noted above, each is headed by a separate commander. While the area of

consideration for promotions includes the five Health Services Command organizations located at Fort Sam Houston and the Institute of Surgical Research, the record reflects that the number of employees transferred between the organizations has been minimal. With respect to grievance actions held under the agency grievance procedure, the evidence establishes that if a grievance is not resolved at the first two steps of the grievance procedure, it would be processed for determination through the commander of the organization in which the grievance occurred. Thus, the Commanders of the Academy of Health Sciences, Brooke Army Medical Center, Regional Medical Laboratory and Regional Dental Activity would make determinations on grievances within their respective jurisdictions, while the Commander, Health Services Command, would make determinations on grievances within the Headquarters organization.

Under all of the foregoing circumstances, I find that separate units of the employees of the Headquarters, Health Services Command and of the Academy of Health Sciences are appropriate for the purpose of exclusive recognition. Thus, the evidence establishes that these two organizations of the Health Services Command perform services on a command or U.S. Army-wide basis, while the other medical organizations of the Health Services Command located at Fort Sam Houston - the Brooke Army Medical Center, the Regional Dental Activity, and the Regional Medical Laboratory - serve a more limited and specialized clientele. Further, the employees in the two claimed units have dissimilar skills, separate supervision and work locations, and little day-to-day contact with each other or with employees in the other Health Services Command units at Fort Sam Houston. Moreover, the record reflects that transfers of employees among the five organizations have been minimal and determinations on grievances arising within each organization are processed through the commander of that organization. Accordingly, I find that the employees in the Headquarters, Health Services Command and in the Academy of Health Sciences share a clear and identifiable community of interest within their respective Activities which is separate and distinct from other employees of the Health Services Command and the Institute of Surgical Research located at Fort Sam Houston, and that such units will promote effective dealings and efficiency of agency operations.

As noted above, the Activities contend that the appropriate unit should include both GS and WG employees of all medical activities located at Fort Sam Houston. The record reveals that nearly all of the approximately 106 WG employees in the Academy of Health Sciences are employed in positions such as baker, cook and food service worker, that their duties are not similar to those performed by the GS employees and that their work contacts with GS employees are of a limited and sporadic nature. Under these circumstances, I find that the WG employees of the Academy of Health Sciences do not share a clear and identifiable community of interest with the claimed GS employees therein and should not be included in the unit found appropriate. 2/

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2/ As noted above, the record indicates that there are no WG employees in the Headquarters, Health Services Command.



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 General Schedule professional and nonprofessional employees of the Academy of Health Sciences, U.S. Army, Fort Sam Houston, Texas, excluding Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

It is noted that the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in 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 General Schedule professional employees of the Academy of Health Sciences, U.S. Army, Fort Sam Houston, Texas, excluding nonprofessional employees, Wage Grade 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 General Schedule employees of the Academy of Health Sciences, U.S. Army, Fort Sam Houston, Texas, excluding professional employees, Wage Grade 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 as to whether they desire to be represented by the National Federation of Federal Employees, Local 28; by the American Federation of Government Employees, AFL-CIO; 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 National Federation of Federal Employees, Local 28; by the American Federation of Government Employees, AFL-CIO; 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 National Federation of Federal Employees, Local 28; or the American Federation of Government Employees, AFL-CIO; or neither was selected by the professional employee unit.

The unit determination is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All General Schedule professional and nonprofessional employees of the Academy of Health Sciences, U.S. Army, Fort Sam Houston, Texas, excluding Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees 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 Academy of Health Sciences, U.S. Army, Fort Sam Houston, Texas, excluding nonprofessional employees, Wage Grade 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 General Schedule employees of the Academy of Health Sciences, U.S. Army, Fort Sam Houston, Texas, excluding professional employees, Wage Grade 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, 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 General Schedule professional and nonprofessional employees of the Headquarters, Health Services Command, Fort Sam Houston, Texas, excluding Wage Grade 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.

However, because, as noted above, the Assistant Secretary is prohibited 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, I shall direct separate elections in the following voting groups:

Voting Group (c) All General Schedule professional employees of the Headquarters, Health Services Command, Fort Sam Houston, Texas, excluding nonprofessional employees, Wage Grade 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) All General Schedule employees of the Headquarters, Health Services Command, Fort Sam Houston, Texas, excluding professional employees, Wage Grade 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 (d) will be polled as to whether or not they desire to be represented by the National Federation of Federal Employees, Local 28.

The employees in the professional voting group (c) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees 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 28. In the event that a majority of the valid votes of voting group (c) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (c) shall be combined with those of voting group (d).

Unless a majority of the valid votes of voting group (c) are cast for inclusion in the same unit as 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 28, was selected by the professional employee unit.

The unit determination is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All General Schedule professional and nonprofessional employees of the Headquarters, Health Services Command, Fort Sam Houston, Texas, excluding Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees 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 Headquarters, Health Services Command, Fort Sam Houston, Texas, excluding nonprofessional employees, Wage Grade 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.

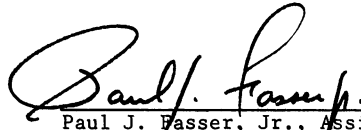
(b) All General Schedule employees of the Headquarters, Health Services Command, Fort Sam Houston, Texas, excluding professional employees, Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

#### DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among the employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for

cause since the designated payroll period, and who have not been rehired or reinstated before the election date. Those eligible in voting groups (a) and (b) shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 28; the American Federation of Government Employees, AFL-CIO; or by neither. Those eligible in voting groups (c) and (d) shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 28.

Dated, Washington, D.C.  
February 28, 1975

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

February 28, 1975

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

UNITED STATES ARMY AND AIR FORCE EXCHANGE SERVICE,  
REDSTONE ARSENAL EXCHANGE,  
REDSTONE ARSENAL, ALABAMA  
A/SLMR No. 491

This unfair labor practice proceeding involved a complaint filed in behalf of American Federation of Government Employees, AFL-CIO, Local 1858 (AFGE), alleging that the Respondent violated Section 19(a) (1) and (2) of the Order by threatening Mr. Walter W. Parks with termination if he did not resign his position as Vice-President of the AFGE.

The Administrative Law Judge found, contrary to the contentions of the Respondent, that Parks was not a supervisor within the meaning of Section 2(c) of the Executive Order. Under these circumstances, he concluded that the Respondent's threat to remove Parks from his job if he persisted in holding union office or in participating in the management of the AFGE was violative of Section 19(a)(1). However, the Administrative Law Judge concluded further that the Respondent did not violate Section 19(a)(2) based on the view that its conduct did not discourage membership in a labor organization by discriminating in regard to the conditions of Parks' employment.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the matter, and noting that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and issued an appropriate remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY AND AIR FORCE EXCHANGE SERVICE,  
REDSTONE ARSENAL EXCHANGE,  
REDSTONE ARSENAL, ALABAMA

Respondent

and

Case No. 40-5319(CA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO, LOCAL 1858

Complainant

DECISION AND ORDER

On December 5, 1974, Administrative Law Judge John H. Fenton issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain conduct which was violative of Section 19(a)(1), but was not violative of Section 19(a)(2) of the Order, and he recommended that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendation. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

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

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Army and Air Force Exchange Service, Redstone Arsenal Exchange, Redstone Arsenal, Alabama, shall:

1. Cease and desist from:

(a) Threatening to remove Mr. Walter W. Parks from his position with the Food Service Activity unless he resigns his position as a

representative of, and refrains from participation in, the management of American Federation of Government Employees, AFL-CIO, Local 1858.


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

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

(a) Post at its facility at the United States Army and Air Force Exchange Service, Redstone Arsenal Exchange, Redstone Arsenal, Alabama, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Exchange Manager of the United States Army and Air Force Exchange Service, Redstone Arsenal Exchange, Redstone Arsenal, Alabama, and shall be posted and maintained by him for sixty consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Exchange Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C.  
February 28, 1975

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



NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT threaten to remove Mr. Walter W. Parks from his position with the Food Service Activity unless he resigns his position as a representative of, and refrains from participation in, the management of American Federation of Government Employees, AFL-CIO, Local 1858.

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

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

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In the Matter of :  
 :  
UNITED STATES ARMY AND AIR FORCE :  
EXCHANGE SERVICE REDSTONE ARSENAL :  
EXCHANGE, REDSTONE ARSENAL, :  
ALABAMA, : Case No. 40-5319 (CA)  
Respondent :  
 :  
vs. :  
 :  
AMERICAN FEDERATION OF GOVERNMENT :  
EMPLOYEES, AFL-CIO LOCAL 1858, :  
Complainant :  
.....

Robert E. Edwards  
Assistant General Counsel  
Labor Relations Law Branch  
Army and Air Force Exchange  
Service  
Dallas, Texas 75222  
For the Respondent

Earnest L. Jackson  
2109 Clinton Building  
2109 Clinton Avenue West  
Huntsville, Alabama 35805  
For the Complainant

Before: JOHN H. FENTON  
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arose upon the filing of a complaint on March 18, 1974, by Mr. Kenneth T. Blaylock in behalf of Local 1858, AFGE. The complaint charged that the USAAFES at Redstone Arsenal violated Section 19(a)(1) and (2) of Executive Order 11491 on November 29, 1973, by threatening Mr. Walter W. Parks with termination if he did not resign his position as Vice President

of the Local. Notice of Hearing on Complaint was issued by the LMSA Regional Administrator, Atlanta Region, on May 13, 1974, setting this matter down for hearing before me on July 16, 1974, at Redstone Arsenal, Alabama. Both parties were present at the hearing on July 16 and 17, and were afforded full opportunity to call and examine witnesses and adduce relevant evidence. Briefs were filed and have been carefully considered.

Upon the entire record in this proceeding and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations to the Assistant Secretary.

Findings of Fact

A. The Chronology of Events

Local 1858 holds exclusive recognition as representative of the employees of the Redstone Arsenal Exchange. The Exchange is divided into a Services Activity, a Retail Activity and a Food Service Activity. Each of these activities is headed by a manager who reports to the Exchange Manager. We are concerned with the Food Service Activity, which consists of four installations: (1) The Appollo Inn (a cafeteria); (2) the Pizza Bar; (3) the Golf Course; and (4) the Hot Dog Push Carts. Mr. Morris Easler is the Food Activity Manager in overall charge of these activities. Mr. Walter Parks is classified as a Food Activity Supervisor, Grade 7. Aside from the issue of Mr. Parks' status as a supervisor, there is little dispute concerning the matters which led to the complaint.

Mr. Parks has worked in the Food Service Activity for 13 years. Until October 7, 1972, he was a Grade 2 Counter Attendant, paid at the rate of \$2.04 per hour. On that date he received a detail, not to exceed 180 days, as a Food Activity Supervisor at \$2.39 per hour. He was also at that time, and until November 30, 1973 he remained, a Vice President of Local 1858. He testified that he was asked if he would accept the detail and give up his Union office and that he replied he would rather give up the job. He further asserts that H. R. Frey, then the General Manager, informed him that the detail had no bearing upon his right to be a Union representative.

On March 10, 1973, Mr. Parks was promoted to the position of Food Activity Supervisor. The Personnel Request form used in effecting the promotion (Complainant's Exhibit 3) called for cancellation of his union dues deduction on the ground he was a supervisor. On the same day Parks signed his new job

description, which recited his supervisory responsibilities. It provoked no further discussion of the conflict posed by his retention of his Union post. Thereafter, however, General Manager Frey apparently told him on several occasions that he could not be both a supervisor and a Union officer, but he refused to relinquish his office. He testified that the Union President came to an agreement with Frey which permitted him to remain in office pending resolution of the matter by the Department of Labor.

On September 5, 1973 Frey wrote a letter of reprimand to Mr. Parks, in which he acknowledged Parks' right to represent employees in grievances (Complainant's Exhibit 5). On September 18 Frey again wrote Parks concerning a letter from the Union in which it contended that Parks was not a supervisor. Frey reiterated management's view that the position was a supervisory one and that hence any employee holding it, in order to avoid a conflict of interest, could not act as a representative or participate in the management of a labor organization which represents the employees he supervises. Parks was ordered to relinquish his position with the Union within 5 days or face action to remove him from his supervisory position. Parks refused to do so, taking the position he was not, in fact, a supervisor.

On November 29 Parks was summoned from his home to a meeting in the Personnel Office attended by General Manager Frey, Assistant General Manager Emmons, a Mr. Hoffman of Personnel and Mr. John Liczbenski, Labor Relations Representative for AAFES. Local 1858 President Burchfield was later called in when Mr. Parks refused to discuss Union matters in his absence. Mr. Liczbenski informed Mr. Parks that he would be immediately removed from his supervisory position if he did not resign from Union office. Parks was furthermore informed that, as there was no nonsupervisory position available to him, his employment would be terminated. By letter of November 30 to Frey, Parks stated that he was capitulating to the Activity's ultimatum. He announced his resignation, under protest, from Union office, as well as his request that the Union President file an unfair labor practice charge. The charge was filed on January 22, 1974.

B. The Status of Mr. Parks

Mr. Parks' job description (Respondent's Exhibit 1) states at item 3 of Duties and Responsibilities that he "supervises and trains assigned employees; establishes work schedules; recommends personnel actions." He is one of three Food Activity Supervisors directly under Food Activity Manager Morris Easler.

Sergeant Gerald is the Food Activity Supervisor at the Golf Course, where he works with a single "subordinate." That facility is open on Saturday and Sunday from 7 a.m. to 7 p.m., on Monday from 12 p.m. to 7 p.m., and on Tuesday through Friday from 10 a.m. to 7 p.m. Food Activity Supervisor Katie McReynolds works the evening shift from Saturday through Wednesday, from 2:30 p.m. to 11 p.m., at which time there are two employees at the Pizza Bar as well as the two hot dog counter attendants who work from 9:30 a.m. to 6 p.m.

The Cafeteria, or Appollo Inn shift, is from 5:30 a.m. to 2 p.m., and consists of about nine employees below the level of Supervisor. Food Activity Manager Morris Easler works from 8 a.m. to about 4 p.m. Monday through Friday. His shift on those days thus overlaps the morning and evening shifts of the employees. The highest graded employee, the cook, is one grade below Mr. Parks, who is a grade 7. (Food Activity Supervisor Gerald is one grade below the cook.) Mr. Parks workweek begins on Tuesday. On Tuesday and Wednesday he works at the Cafeteria from 5:30 a.m. to 2 p.m. On Thursday and Friday he relieves Mrs. McReynolds, working the 2:30 p.m. to 11 p.m. shift at the Pizza Bar, where he has two "subordinates." Thus on Monday, Thursday and Friday, Mr. Easler is the only supervisor present at the cafeteria. Obviously, he is in a good position to know the value of employees on the early shift as well as those who report at 2:30 p.m. In addition, Mr. Easler testified that he often relieves other employees on weekends. He thus is in a good position to observe the work performance of his approximately 21 subordinates.

Mr. Easler testified that Mr. Parks has never effectively recommended that anyone be hired, fired, laid off, recalled, suspended, promoted, rewarded or disciplined. There is no evidence that Parks or the other Supervisors adjust grievances. Whatever the authority management may have intended to give Mr. Parks in these areas, it is clear that he has not exercised it, indeed that on one specific occasion he refused to exercise it. Thus, while Easler testified that Food Activity Supervisors McReynolds and Gerald make annual appraisals of the performance of their subordinates, Parks refused to do so in the case of Mrs. Willie B. Alexander, and has never been asked to make such an appraisal since.<sup>1/</sup> While Parks' reluctance was ostensibly due to the fact that he worked with her only two days a week, it is clear that Easler considered Parks to be unwilling because he owed his first allegiance to the Union and the rank-and-file. In any event, only Easler was in a position

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<sup>1/</sup> Easler also testified that while the supervisors always had a right to evaluate employees, they in fact rarely did so, and that within the month the system was to be changed to require that they do so.

to observe the performance of most of the employees more than twice a week, as Gerald had only one subordinate and McReynolds only several. Easler also testified that he sought Parks' estimate of Mrs. Eudis Gilbreath before transferring her from the Cafeteria to the Golf Course. Parks concurred, explaining that he is always in favor of a promotion.

Parks testified that the nature of his alleged supervisory responsibilities was never explained to him. Three employees testified, in turn, that it was never explained to them. Parks described his supervisory responsibility as follows: "It's when an individual don't want to do something, I do it." He claims that if someone fails to report for work he has no authority to, and does not, call a substitute in. Rather he reports the matter to Easler. The same is true if someone refuses to do a job. Although he admits that Easler has told him to write people up, and to counsel them on such occasions, he asserts he has never done so, nor has he ever recommended discipline for any reason.<sup>2/</sup> He took a course given by the Arsenal on supervising people. He asserts that he merely notes the time when an employee leaves a shift early, but never questions the reason.<sup>3/</sup> He has shown new part-time help how to bus a table, but asserts he has no occasion to instruct the regular help, or to reassign them in case of absences, because they are all old-time employees who know their jobs and require no direction. (The four employees who testified had total service of 55 years.) He asserts he has never been specifically asked whether an employee was deserving of promotion, although he conceded he has been asked how a person is "getting along." In sum he claims his new position differs from his former position as counter attendant only in that he now knows the combination to the safe, totals the cash register at the end of the day, and locks up the building when he leaves.

There are five to eight occasions a year when Parks substitutes for Easler for one or two days. There was, some months ago, a bulletin board announcement to the effect that Parks, McReynolds and Gerald were "in charge" in Easler's absence. Again, however, Parks insists that he does not have or exercise supervisory authority on such occasions. Rather

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<sup>2/</sup> He explained his refusal to counsel on the ground it would be a waste of time because the individual he counselled could then go to Easler and be vindicated.

<sup>3/</sup> When employee Arthell Walker appeared at work either ill or inebriated, Parks told him he could not authorize him to go home. When Walker nevertheless left, Parks reported him to Easler.

if a problem arose, he would take it to Mr. Emmons. Easler testified that Parks does have the authority to secure replacements for absentees and to reassign employees, and that he inevitably must exercise such authority in order to keep the operation going. However, after asserting that Parks has the kinds of authority described in Section 2(c) of the Order, Easler was unable to think of an example of the exercise of such authority. He explained that most of the employees had 15 to 20 years service, and that there was no turnover except for the several part-time school boys.

Arthell Walker, a hot dog stand attendant with 15 years service, testified. He asserted that he clears leave with Easler and must account for tardiness to Easler. He stated he had never been told to first contact Parks about such matters, and claimed that when he takes a problem to Parks, the latter must take it to Easler for resolution. Employee Eudis Gilbreath, a counter attendant with 14 years service on the 5:30 a.m. to 2 p.m. shift, testified that she clears leave with, takes complaints to, and receives her rating from, Easler. She further asserted that Mrs. Beverly K. Hillis, the bookkeeper, manages the cafeteria in Easler's absence. Mrs. Gilbreath stated that Parks works just like the rest of the employees, and that he asks employees to do things, rather than issuing orders. Like Walker, she says that Easler never introduced Parks to her as a supervisor. Mrs. Willie B. Alexander, the cafeteria cook, has worked for the exchange for 18 years. She also asserted that Parks had never been introduced to her as a supervisor, that she clears leave with Easler, and that Parks does not clear leave, or talk to her about her job performance. She admitted that Parks is "in charge" in Easler's absence, but denied that Parks has occasion to exercise any supervisory authority vis-a-vis her. She asserted that neither Easler nor Parks has to tell her what to do, as she knows her job.

Mrs. Beverly K. Hillis, the bookkeeper, works from 8:30 a.m. to 4:30 p.m. She has been on the job for eight years. She impressed me as less involved in the prolonged controversy over Parks' status, and as more candid than the other witnesses. She asserted that employees are supposed to contact their supervisors about absences, but that most merely inform whoever answers the phone. She has seen Easler reprimand employees when they are tardy or are not performing, but has never seen Parks do so. She further stated that she had never seen Parks explaining to employees how a job is to be done, or what they are to do, as most employees have more than 10 years on the job. On one occasion, she asserted,

Mr. Walker left the facility when Parks told him not to open up the hot dog stand, but wash pots and pans. Hillis has called replacements on instructions from Easler but not from Parks. Rather Parks would come to her office and discuss such a problem, and she would make the call.

Contentions of the Parties

Complainant very strongly argues that the only question presented by its complaint is whether Respondent, or any Agency, has the right to remove an individual from a recognized unit, from contract coverage, from dues withholding or from union office without awaiting a decision by the Assistant Secretary on a petition for unit clarification proposing such an exclusion. It thus asserts that the question of supervisory status is irrelevant in this proceeding, and it contends that management was obliged to maintain the status quo, even were the Union to agree with its position, until an appropriate petition was processed. In the event this position is rejected, it argues that Mr. Parks is not a supervisor.

The Activity, in addition to asserting that its action was privileged because Mr. Parks "possesses the authority to perform" some of the functions described in Section 2(c) of the Executive Order, also asserts that its action was reasonable in these circumstances even if Parks is determined to be a nonsupervisor.

Conclusions

First, I must reject the Union's broad contention that the Activity's conduct here constituted a usurpation of powers delegated by the Order only to the Assistant Secretary, and a violation of Section 19(a), whether or not Mr. Parks is a supervisor. In United States Department of the Navy, Ordnance Station, Louisville, Kentucky, A/SLMR No. 400, the question presented was whether the Activity violated Section 19(a) (1), (2), (5) and (6) by excluding the classification of Progressmen from the bargaining unit and hence from contract coverage without first consulting and negotiating with the Union. Finding that the Progressmen had been supervisors since 1953, the Assistant Secretary concluded that the refusal to recognize the Union as their exclusive bargaining representative



was not violative of the Order.<sup>4/</sup> In Directorate of Maintenance, Manufacture and Repair Production Branch (MANPSM), Warner Robins Air Materiel Area (WRAMA), Robins Air Force Base, Georgia, A/SLMR No. 365, no violation of Section 19(a)(1) and (2) was found on the basis of the Agency's application of its rule precluding the appointment of a shop steward as an acting supervisor unless he resigned from union office for the duration of the detail.<sup>5/</sup>

The question whether Food Activity Supervisor Parks is a supervisor, as defined in Section 2(c) of the Order, is a more difficult one. It is complicated by the fact that the controversy concerning the propriety of his serving simultaneously as an alleged supervisor and as Union Vice President was an old argument at the time of the hearing, having festered for well over a year from the time of his detail as a Food Activity Supervisor. It was my distinct impression that witnesses called by the Union minimized Parks' responsibilities, and that management overstated them. It is at least clear that Parks does not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, and that he has never effectively recommended such action. There is a real question, however, concerning whether he possesses the authority to effectively recommend personnel actions.

In United States Naval Weapons Center, China Lake, California, FLRC No. 72A-11, the Council held that "the key to determining the effectiveness of an alleged supervisor's recommendation is not the mere fact of review, but the impact which that recommendation has upon the overall promotional procedures in force at any activity... (in) other words, the question is whether that recommendation, even though reviewed at a higher level, results in the promotion or refusal to promote an employee to a higher grade level." The Council also held in that case that Section 2(c) is to be applied in

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<sup>4/</sup> In doing so, he noted that he did not view the Agency's conduct as an "attempt to change unilaterally the scope of the existing bargaining unit" but rather as an effort "to assure that the Progressmen who admittedly were performing supervisory functions would not be included in the bargaining unit." He observed, however, that "this is not to say that if Progressmen were hired subsequently who did not exercise supervisory functions, I would consider them properly to be excluded from the unit."

<sup>5/</sup> See also U.S. Department of the Army, Edgewood Arsenal, Aberdeen Proving Ground Command A/SLMR No. 286.

the disjunctive, i.e., any individual who possesses the authority to perform a single function described in section 2(c) provided he does so in a manner requiring the use of independent judgment, is a supervisor and must be excluded from the unit. The Agency in its brief lays emphasis on the possession of such authority, as opposed to its actual exercise, confronted as it is with an individual who denies having the authority allegedly vested in him, and who has specifically and successfully refused to evaluate the performance of his alleged subordinates. The Assistant Secretary, on the other hand, has seemed to indicate that it is the exercise of such authority which is determinative (See footnote 4 above). I fail to see how the impact test set forth by the Council in China Lake can be applied except in circumstances where the results of the actual exercise of such a claimed supervisory function can be measured. It would follow that the possession of such authority can be established only by proof of its effective exercise. Thus, a finding here that management in good faith intended to delegate to Parks the power to make performance evaluations, and to accord real weight to his recommendations, would not end the inquiry in the absence of a showing that he indeed functions as a supervisor. It is not possible in any event, on this record, to test the efficacy of his recommendations by measuring their impact in the manner outlined in China Lake simply because he refuses to make them.<sup>7/</sup> Were his judgment in such matters of real value to management, it is difficult to understand why management would tolerate his insubordination. I am persuaded by the evidence that his recommendations would not, in fact be accorded significant weight. In reaching this result it is appropriate to consider the ratio of supervisors to employees, notwithstanding the admonition that supervisory status is to be determined on the basis of the authority of an individual rather than the precise number of subordinates.<sup>8/</sup>

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<sup>7/</sup> I hesitate to take an approach which appears to open up an incredibly complicating Pandora's Box, by calling for an assessment of each disputed supervisor's status in terms of whether the particular incumbent is weak and relatively ineffective or strong, well-regarded and highly effective. If carried to the extreme it could result in some incumbents in a given supervisory category being excluded from the unit while others in the same category are included. Nevertheless I cannot ignore the strong suggestion, arising from management's acquiescence in Parks' refusal to make evaluations, that he in fact in this respect is not a supervisor.

<sup>8/</sup> United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois A/SLMR No. 268.

Were the Food Activity Supervisors deemed to be supervisors, the resulting ratio would be 4 to 18, or 1 to 2.5. I think it highly unlikely in such a small operation, given the manager's very close contact with employees and the essentially simple and routine nature of their work, that the Food Activity Supervisors do, in fact, have the power to make effective recommendations which require the use of independent judgement.

I furthermore conclude that Parks does not responsibly direct the work of other employees. Quite aside from his self-effacing description of his duties and responsibilities, there is ample evidence, including Easler's testimony, that neither the operation of the cafeteria nor that of the Pizza Bar requires the use of independent judgment at the Supervisor's level. All but the several part-time bus boys are workers of lengthy service who know their jobs well. Moreover, with the exception of the cooks, their tasks are very simple, routine and repetitive, and are accomplished pursuant to well established work procedures. Thus the assignment and direction of such work does not require the use of independent judgment, but rather is of a highly routine nature.<sup>9/</sup> Even assuming Parks has the authority to arrange for substitutions or to make reassignments as they may be required by the workload there is no evidence that such responsibility in any real sense requires the use of discretion. Indeed, it is clear that a principal function of the Food Activity Supervisor is to perform himself the particular kinds of work that the exigencies of the moment require. He spends most of his day working with his alleged subordinates, doing exactly what they do, except for opening up and closing, issuing money and checking out at the end of the shift.

I conclude, in sum, that Food activity Supervisor Walter Parks is not a supervisor as defined in Section 2(c) of the Order. It follows that the threat to remove him from his job if he persisted in holding Union office or participating in the management of the Union, was violative of Section 19(a)(1). I further conclude that the Activity did not thereby violate Section 19(a)(2), as it did not discourage membership in the Union by discriminating in regard to the terms of Parks'

<sup>9/</sup> See Pennsylvania National Guard, Department of Military Affairs, A/SLMR No. 376 (Aircraft Mechanic Leader); Department of the Navy, United States Naval Weapons Center, China Lake, California A/SLMR No. 128 (Fire Captains); Federal Aviation Administration, National Capital Airports A/SLMR No. 405; United States Air Force, Non-Appropriated Fund Activities, Tyndall Air Force Base, Florida A/SLMR No. 226 (Billeting Fund Unit Supervisors).

employment. Parks' employment was unaffected by management's conduct. I do not pass upon the Union's contention, raised in its opening statement, that termination of Parks check-off was also a violation of the Order. Cancellation of his dues deduction authorization occurred when he was promoted, approximately 11 months before the complaint was filed.

RECOMMENDATION

Having found that Respondent has engaged in conduct violative of Section 19(a)(1) of the Order. I recommend that the Assistant Secretary adopt the following Order to effectuate the purposes of Executive Order 11491.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations the Assistant Secretary of Labor hereby orders that the United States Army and Air Force Exchange Service, Redstone Arsenal Exchange, Redstone Arsenal, Alabama, shall:

1. Cease and desist from:

(a) Threatening to remove Mr. Walter Parks from his position as Food Activity Supervisor unless he resigns his position as a representative of, and refrains from participation in the management of Local 1858, American Federation of Government Employees, AFL-CIO.

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

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

(a) Post at the U.S. Army and Air Force Exchange Service, Redstone Arsenal Exchange, Redstone Arsenal, Alabama, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Exchange Manager of the U.S. Army and Air Force Exchange Service, Redstone Arsenal Exchange and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where

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

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

John H. Fenton  
JOHN H. FENTON  
Administrative Law Judge

Dated: December 5, 1974  
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT threaten to remove Mr. Walter Parks from his position as Food Activity Supervisor unless he resigns his position as a representative of, and refrains from participation in the management of Local 1858, American Federation of Government Employees, AFL-CIO.

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

\_\_\_\_\_  
(Agency or Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

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

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

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1857  
A/SLMR No. 492

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 1857

Respondent

and

Case No. 70-4014

JOHN E. NELSON

Complainant

DECISION AND ORDER

This proceeding involved an unfair labor practice complaint filed by an individual (Complainant) alleging a violation of Section 19(c) of Executive Order 11491, as amended. Specifically, the complaint alleged that the American Federation of Government Employees, AFL-CIO, Local 1857 (Respondent) violated Section 19(c) of the Order by refusing the Complainant reinstatement to membership for reasons other than the failure to meet reasonable occupational standards or the failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

On December 16, 1974, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Administrative Law Judge, noting the decision of the Assistant Secretary in American Federation of Government Employees, Local 1650, Beeville, Texas (Naval Air Station, Chase Field, Beeville, Texas) and American Federation of Government Employees, Washington, D.C. (Naval Air Station, Chase Field, Beeville, Texas), A/SLMR No. 294, and the subsequent ruling of the Federal Labor Relations Council (FLRC No. 73A-43), concluded that the Respondent's August 1973 denial of reinstatement to membership with respect to the Complainant on grounds other than those set forth in Section 19(c) was violative of the Order. However, he found that the denial of the Complainant's application for reinstatement in April 1973 did not violate the Order inasmuch as the application was found to be for retroactive reinstatement and, in the view of the Administrative Law Judge, the Respondent was under no obligation to accept an application for reinstatement where the terms of such application for reinstatement went substantially beyond merely obtaining membership.

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

Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and take certain affirmative actions.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the American Federation of Government Employees, AFL-CIO, Local 1857, North Highlands, California shall:

1. Cease and desist from:

(a) Giving effect to any provision or section of the constitution and by-laws of American Federation of Government Employees, AFL-CIO, Local 1857, to the extent that it requires or calls for consideration by its Executive Board or a majority vote of approval by the members of said organization for admission or readmission to membership in American Federation of Government Employees, AFL-CIO, Local 1857, by any new applicant who is in a unit represented exclusively by such Local, or by a former member of said Local who is in a unit represented exclusively by

the latter and who had previously resigned, or removed himself, from membership in said Local.

(b) Denying membership to John E. Nelson, in American Federation of Government Employees, AFL-CIO, Local 1857, or any other employee, in a unit represented exclusively by Local 1857, for any reason other than the failure to meet reasonable occupational standards uniformly required for admission, or the failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

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

(a) Take such action as is necessary in order to bring the constitution and by-laws of American Federation of Government Employees, AFL-CIO, Local 1857, into compliance with the requirement that membership in said Local shall not be denied to any applicant for admission who is in a unit represented exclusively by said Local, or to any applicant for readmission, who is in a unit represented by said Local and who previously resigned, or removed himself, from membership in said Local, for any reason other than the failure to meet reasonable occupational standards uniformly required for admission, or the failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

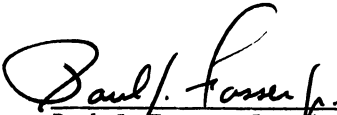
(b) Upon application and tender of initiation fees and dues uniformly required, reinstate John E. Nelson to membership in American Federation of Government Employees, AFL-CIO, Local 1857, and, if said application and monies are submitted within sixty (60) days from the date of this Decision and Order, grant retroactive membership in said Local from August 16, 1973.

(c) Post at its business office and in normal meeting places, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the President of the American Federation of Government Employees, AFL-CIO, Local 1857, and shall be posted by the Respondent for a period of 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Submit signed copies of said notice to McClellan Air Force Base, North Highlands, California, for posting in conspicuous places where unit employees are located where they shall be maintained for a period of 60 consecutive days from the date of posting.

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

Dated, Washington, D.C.  
February 28, 1975

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

APPENDIX

NOTICE TO ALL MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members that:

WE WILL NOT give effect to any provision or section of the constitution and by-laws of American Federation of Government Employees, AFL-CIO, Local 1857, to the extent that it requires or calls for consideration by the Executive Board or a majority vote by the members of said labor organization for admission or readmission to membership in the American Federation of Government Employees, AFL-CIO, Local 1857, by any new applicant who is in a unit represented exclusively by Local 1857, or any former member of said Local who is in a unit represented exclusively by Local 1857 and who had previously resigned, or removed himself, from membership in said Local.

WE WILL take such action as is necessary in order to bring the constitution and by-laws of American Federation of Government Employees, AFL-CIO, Local 1857, into compliance with the requirement that membership in said Local shall not be denied to any employee in a unit represented exclusively by Local 1857, who is an applicant for admission, or applicant for readmission who previously resigned or removed himself, for any reason other than the failure to meet reasonable occupational standards uniformly required for admission, or the failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

WE WILL, upon application and tender of initiation fees and dues uniformly required, reinstate John E. Nelson to membership in American Federation of Government Employees, AFL-CIO, Local 1857; and if said application and monies are timely submitted, grant retroactive membership in said Local from August 16, 1973.

American Federation of Government  
Employees, AFL-CIO, Local 1857

By \_\_\_\_\_  
(Signature and Title)

Dated \_\_\_\_\_

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

If members have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



.....  
 In the Matter of :  
 :  
 AMERICAN FEDERATION OF GOVERNMENT :  
 EMPLOYEES, AFL-CIO, LOCAL 1857 :  
 :  
 Respondent :  
 :  
 and :  
 :  
 JOHN E. NELSON :  
 :  
 Complainant :  
 :  
 .....

Case No. 70-4014

J. M. Hopperstad  
 Box 1037  
 North Highlands, California  
 For the Respondent

John E. Nelson  
 5116 Hazel Avenue  
 Fair Oaks, California  
Pro Se

Before: SALVATORE J. ARRIGO  
 Administrative Law Judge

REPORT AND RECOMMENDATIONS

Preliminary Statement

This proceeding, heard in Sacramento, California on January 15, 1974, arises under Executive Order 11491, as amended, (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations, (hereafter called the Assistant Secretary), a Notice of hearing on complaint issued on November 29, 1973, with reference to an alleged violation of Section 19(c) of the Order.

On July 27, 1973, John E. Nelson, (hereafter sometimes called Complainant), filed a complaint with the Department of Labor. The complaint, amended on August 14, 1973, alleges that the American Federation of Government Employees, AFL-CIO, Local 1857, (hereafter called Respondent or the Union), violated Section 19(c) of the Order by denying Complainant membership for reasons other than failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

At the hearing both parties were afforded full opportunity to adduce evidence, call, examine, and cross-examine witnesses and argue orally. Complainant made oral argument and waived filing a brief while Respondent waived oral argument and filed a brief.

Upon the entire record in this matter and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

1. At all times material herein, respondent was the exclusive bargaining representative of various employees at McClellan Air Force Base, North Highlands, California.1/
2. At all times material herein, Complainant was employed at McClellan Air Force Base and included within the collective bargaining unit represented by Respondent.
3. From October 2, 1968, to September 3, 1972, Complainant was a member of Respondent. During this period Complainant served in the appointed capacity of Base Chief Steward, Chief Union Negotiator and a Union representative for grievance appeals. While a member of Respondent, Complainant was "vocal" at membership meetings in his convictions about "means, methods and procedures" used by Respondent and was supported by some of the membership in his endeavor to improve, in his judgement,

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1/ The transcript incorrectly reflects that the parties stipulated that Respondent maintained such representational status at all times since "1973." (Tr. p. 20,1.19). Based upon my notes taken during the hearing, as well as considering other portions of the record relative to dates and occurrences, I hereby amend the transcript by deleting "1973" and inserting "1970" in place thereof.

Union standards for employees at the facility.

4. On June 23, 1972, nine members of Respondent, including Respondent's President, J.M. Hoppestad, filed charges with the Union against Complainant. The charges alleged that Complainant violated "...the National Constitution of the American Federation of Government Employees in that (Complainant) has publicly made statements which vilify, libel and impugn the honesty, ability and character of each and all of us." The signators requested that the charges be investigated and processed in accordance with provisions contained in the National Constitution. The record is silent as to the manner in which these charges were ultimately disposed of or resolved but apparently the charges were not processed further and no additional charges were filed against Complainant. President Hopperstad testified that he would have preferred charges against Complainant had he remained a member of the Union.

5. On August 4, 1972, Mr. Nelson revoked his authorization for payroll deductions for Union dues and on September 2, 1972, ceased paying dues to Respondent.

6. By letter dated October 12, 1972, President Hopperstad notified Complainant that he owed Respondent \$50.60. This sum represented deductions which Respondent failed to withhold when monies were paid to Complainant when he was a delegate to the 1972 American Federation of Government Employees' Convention, held in Miami, Florida. Complainant disputed that he owed the money and President Hopperstad sued Complainant in the Small Claims Court for the Sacramento Municipal Court District. On December 15, 1972, judgment was entered against Mr. Nelson and sometime thereafter Mr. Nelson satisfied the judgment.

7. On October 16, 1972, J. M. Hopperstad, Respondent's President since December 16, 1971, notified Complainant that his dues were delinquent since September 3, 1972, and that failure to pay by October 26, 1972, would result in termination of his membership status. Complainant made no further payment of dues and his membership status was automatically terminated.

8. On April 19, 1973, Respondent received from Complainant a letter and application requesting reinstatement of his membership. The letter stated as follows:

"Under the provisions of Article V Section 3 of the By-Laws; I hereby request reinstatement of my membership, in Local 1857.

"Enclosed herewith is an application for membership, insurability form, and my personal check for the amount of Seventy-one dollars and twelve cents (\$71.12). This check includes one (1) year's dues from October 1972, at Five dollars and seventy-six cents (\$5.76) per month, plus Two dollars (\$2.00) reinstatement fees.

"Request this application for reinstatement be voted on by the General Membership at meeting on April 19, 1973."

9. At the regular monthly meeting of Respondent on April 19, 1973, apart from other business, fifty-six new applications for membership and six applications for reinstatement were considered, one of these latter being that of Complainant. A motion was made and carried that Complainant's application be considered separately. President Hopperstad commented that Mr. Nelson had written letters to the Department of Labor and was "trying to cause trouble." Complainant's application was tabled by a vote of 17 to 16 and all other applications were accepted by Respondent.

10. On April 20, 1973, President Hopperstad returned Complainant's application for reinstatement and enclosures with the following letter:

"Action on your application for reinstatement in Local 1857 was tabled at the regular meeting, 19 April 1973. I am returning your check and your applications to you because of its apparent inconsistency with any provision in this Local. There is no provision for a member to pay any back dues after being dropped.

"Should you care to resubmit an application at a later date, resubmit your application with the tender of a reinstatement fee of \$2.00 plus a minimum of 2 months dues.

"I do not see any connection between your application and your reference to Article 5, Section 3 of the By-Laws. There is no Article 5, Section 3 of the current By-Laws. Article 5, Section 3 of the present constitution refers to filling a vacant office and that section has been superseded by an admendment(sic).



"Should you have any questions regarding the proper submission for reinstatement, I am available for consultation."<sup>2/</sup>

At that time, Respondent's Constitution relative to membership reinstatement requirements was Article III, Section 2(f) which read:

"Any Member being dropped, due to failure to pay dues as required, after appropriate and sufficient notice has been give[n], will be eligible for re-instatement in the future, only after paying an initiation fee of \$2.00 plus 2 months dues and filling out an insurability form for the National Office."

11. On June 5, 1973, a new Constitution and By-Laws for Respondent went into effect.<sup>3/</sup> The controlling parallel language of the new By-Laws is Article V, Section 3 which provides:

"SECTION 3. It shall be the duty and responsibility of all actively employed members who pay dues by other means than payroll deduction to see that such dues are paid in advance. Any actively employed member dropped for non-payment of dues, may be reinstated by payment of a \$2.00 reinstatement fee, a minimum payment of 2 months dues, and completion of an insurability form to be forwarded to the national office, provided the application for reinstatement is approved by the membership at a regular meeting."

12. On July 27, 1973, Complainant filed the complaint herein.

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<sup>2/</sup> At no time thereafter did Complainant request "consultation" with President Hopperstad regarding his reinstatement.

<sup>3/</sup> When writing his letter of April 19, 1973, (paragraph 8 above) Complainant had available to him a document which apparently was a copy of the Union's proposed revised Constitution and By-Laws. Hence his reference to "Article V Section 3 of the By-Laws."

I also note that President Hoperstad's letter of April 20 (paragraph 10 above) added the word "minimum" relative to additional dues payments, said word being found only in the new Constitution and By-Laws.

13. By letter dated August 3, 1973, Respondent filed its response to the complaint.

14. On August 10, 1973, Complainant submitted another application for reinstatement of membership in Respondent accompanied by the required insurability form and a check for \$13.52, which sum represented two months dues and the \$2.00 reinstatement fee. Said application was received by Respondent on August 14, 1973.

15. On August 16, 1973, at a regular monthly meeting of Respondent the membership considered various union business including a discussion of Mr. Nelson's unfair labor practice complaint. In addition, the membership considered thirty applications for new membership and six applications for reinstatement, one of these latter being that of Complainant. All applications were accepted except for the applications for reinstatement of Charles Dodd and Complainant. An objection to their applications was made and accordingly the matter was referred to the Executive Board in accordance with Article IV, Section 1 of respondent's by-laws which reads:

"SECTION 1. Anyone desiring to join this Local shall fill out a membership application which shall be presented for consideration to the membership at the next regular meeting. If no member present raises an objection to the applicant, he or she shall be deemed to have been approved for membership. If any member present raises an objection, the application shall then be referred to the Executive Board for investigation. They shall then investigate the objection and report back to the next regular meeting at which time the application shall be accepted or rejected."

16. On August 22, 1973, a letter was sent to Complainant requesting him to appear before the Executive Board <sup>4/</sup> of

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<sup>4/</sup> A number of the Executive Board members were signators to the June 23, 1972, letter of charges against Complainant, discussed above.

Respondent on September 5, 1973, for questioning regarding his application for reinstatement. Complainant did not respond to this letter in person or otherwise.<sup>5/</sup>

17. On September 5, 1973, the Executive Board, President Hopperstad presiding, recommended that Complainant's application for the reinstatement be denied "(i)n view of (his) lack of interest in the investigation." Further, the Executive Board decided to recommend that the application for the reinstatement of Charles Dodd not be accepted because of his refusal to meet with the Board.<sup>6/</sup>

18. On September 17, 1973, at the regular monthly meeting of Respondent,<sup>7/</sup> President Hopperstad presiding, the recommendations of the Executive Board were made. Complainant's application was denied by vote of 18 to 8. In spite of the recommendations, however, Charles Dodd was reinstated. Furthermore, ten new membership applications and three other reinstatement applications were accepted by the general membership.

19. On September 21, 1973, Respondent sent notification to Complainant of the decision regarding denial of his second application for reinstatement.

Positions of the Parties

Complainant alleges that membership in Respondent was denied him for reasons other than those set forth in Section

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<sup>5/</sup> Mr. Nelson testified that he did not attend the meeting of the Executive Board because Respondent's response to the complaint of August 3, 1973, a copy of which he received, stated that "the Executive Board has no authority to accept or reject any application."

<sup>6/</sup> Mr. Dodd sent a letter to the Executive Board notifying them that he would not attend the meeting.

<sup>7/</sup> The meeting was held in two sessions - one in the morning and one in the evening.

19(c) of the Order.<sup>8/</sup> Complainant contends that the denial of membership was for the purpose of preventing him from becoming eligible for election to Union office due to hostility against him engendered by his outspoken opinions relative to Union matters.

Respondent argues that Section 19(c) of the Order only applies to initial applications for membership and does not apply to requests for reinstatement of an individual who has previously withdrawn from membership. Further Respondent contends that Section 18(d) of the Order <sup>9/</sup> gives the Union the unfettered right to accept or reject an application for membership or reinstatement in the Union. In addition, Respondent urges that the membership provisions of the American Federation of Government Employees' constitution <sup>10/</sup> and the Union's constitution and by-laws are fair and reasonable and it was Mr. Nelson's own actions in refusing to appear before the Union Executive Board which prevented the Executive Board from complying with the Union's by-laws.

Discussion and Conclusions

I find that Respondent's refusal to accept Mr. Nelson's April 19, 1972, application for reinstatement was not violative of the Order. Mr. Nelson's submission of "one (1) year's dues from October 1972" carried with it, by inference, the condition that, if accepted, he would then be considered a member throughout this period as though he had never terminated his

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<sup>8/</sup> Section 19(c) provides:

"A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order."

<sup>9/</sup> Section 18(d) provides:

(d) The Assistant Secretary shall prescribe the regulations needed to effectuate this section. These regulations shall conform generally to the principles applied to Unions in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary.

<sup>10/</sup> The constitution of the parent American Federation of Federal Employees gives local unions the right to accept or reject applicants for membership.

membership. Thus the reinstatement would be fully retroactive, with all attendant rights and privileges of membership flowing therefrom. It is clear from the record that back dues have never been required of an individual seeking reinstatement and there is no evidence that retroactive reinstatement has ever been accorded an applicant. Nor does the Union's constitution or by-laws suggest that retroactive reinstatement would be proper. Retroactive reinstatement was neither uniformly required nor shown to be permitted and accordingly, I find that Respondent was under no obligation to accept Mr. Nelson's request for reinstatement, the terms of which went substantially beyond merely obtaining membership. In these circumstances Respondent's refusal to accept Mr. Nelson's request for reinstatement was permissible under the Order.

The Assistant Secretary and the Federal Labor Relations Council have held in the AFGE, Local 1650, Beeville, Texas case, 11/ which presented facts strikingly similar to those contained herein, that a denial of reinstatement based upon an individual's failure to obtain approval from the union's membership as required by that union's constitution is tantamount to a denial of Union membership. In the AFGE, Local 1650, Beeville, Texas case the Assistant Secretary and the Council further held that where a denial of membership or reinstatement is not based upon the very limited specified reasons provided in Section 19(c) of the Order, 12/ the denial is violative of the Order. Accordingly, since Mr. Nelson's

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11/ American Federation of Government Employees, Local 1650, Beeville, Texas (Naval Air Station, Chase Field, Beeville, Texas) and American Federation of Government Employees, Washington, D.C. (Naval Air Station, Chase Field, Beeville, Texas) A/SLMR No. 294 (July 31, 1973). By decision dated October 24, 1974, and reported November 27, 1974, the Federal Labor Relations Council sustained the Assistant Secretary's decision (FLRC No. 73A-43).

12/ Failure of an employee "to meet reasonable occupational standards..." or failure "to tender initiation fees and dues uniformly required...."

application for reinstatement of August 10, 1973, was refused by Respondent on August 16, 1973, for reasons other than those set forth in Section 19(c), I find such refusal violated the Order. 13/

Respondent construes the language of Section 18(d) of the Order to require the Assistant Secretary to adopt regulations and interpret the Order so as to equate a union's right in the Federal service to reject an applicant for membership to a union's right of rejection in the private sector. This construction of the meaning of Section 18(d) would render meaningless the express terms of Section 19(c) of the Order and accordingly, I find it to be without merit. 14/ Moreover, the Assistant Secretary has previously addressed the issue of the extent that the administration of the Order would be controlled by private sector experience. In Charleston Navy Shipyard, A/SLMR No. 1, the Assistant Secretary stated the following:

"There is no indication in the reports and recommendations which preceded Executive Orders 10988 and 11491 that the experience gained in the private sector under the National Labor Relations Act would necessarily be the controlling precedent in the administration of labor-management relations in the Federal sector."

The Assistant Secretary continued:

"Accordingly, I reject the reasoning...that all of the rules and decisions under the Labor-Management Relations Act, as amended, would constitute binding precedent on the Assistant Secretary with respect to the implementation of his responsibilities under Executive Order 11491."

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13/ I note that in the case herein, as in the AFGE Local 1650, Beeville, Texas case, Complainant has not been charged by the Union "with respect to alleged misconduct he engaged in during the period he was a member of such Local."

14/ See Section 204 "Standards of Conduct" of the Regulations which was promulgated by the Assistant Secretary pursuant to Section 6 and Section 18 of the Order.

Remedy

Because of the unfair labor practice conduct found herein, Complainant has been, since August 16, 1973, wrongfully restrained from participating in union activities as a member of Respondent. Therefore, it is my recommendation that in order to fully remedy the violation found herein, Complainant be granted full membership in Respondent and be considered a member by Respondent for any and all purposes, with all rights and privileges flowing therefrom as of August 16, 1973, provided Complainant tender initiation fees and dues uniformly required for reinstatement at the time of the rejection of his application. However I do not recommend that Complainant be required to tender back dues for the period during which he was deprived union membership. In my view, it would be inequitable to require the payment of back dues for this period since Complainant has been wrongfully denied the past benefits of full membership such as consideration for nomination and election to union office, attendance and participation at Union meetings and other rights of union members. In order to preclude any abuse of the retroactive affect of this remedy I also recommend that if Complainant wishes to avail himself to the retroactive portion herein, he must tender initiation fees and dues uniformly required with sixty(60) days from the date of my Report and Recommendations. Accordingly, tender of initiation fees and dues thereafter would only carry with it the obligation for the Union to consider Complainant a member of the Union as of the time of such tender.

Recommendations

Having found that Respondent has engaged in conduct which is violative of Section 19(c) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Order.

Recommended Order

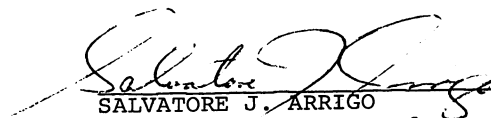
Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that American Federation of Government Employees, AFL-CIO, Local 1857, North Highlands, California shall:

1. Cease and desist from:
  - (a) Giving effect to any provision or section of the constitution and by-laws of American Federation of Government Employees, AFL-CIO, Local 1857, to the extent that it requires or calls for

consideration by its Executive Board or a majority vote of approval by the members of said labor organization for admission or readmission to membership in American Federation of Government Employees, AFL-CIO, Local 1857, by any new applicant, or any former member of said Local who has resigned, or removed himself, from membership in said Local.

- (b) Denying membership to John E. Nelson in American Federation of Government Employees, AFL-CIO, Local 1857, for any reason other than his failure to meet reasonable occupational standards uniformly required for admission, or his failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.
2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:
    - (a) Take such action as is necessary in order to bring the constitution and by-laws of American Federation of Government Employees, AFL-CIO, Local 1857, into compliance with the requirement that membership in said Local shall not be denied to any applicant for admission or applicant for readmission, who previously resigned, or removed himself, from membership in said Local for any reason other than the failure to meet reasonable occupational standards uniformly required for admission, or the failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.
    - (b) Upon application and tender of initiation fees and dues uniformly required, reinstate John E. Nelson to membership in American Federation of Government Employees, AFL-CIO, Local 1857, and, if said application and monies are submitted within sixty(60) days from the date of this Report and Recommendations, grant retroactive membership in said Local from August 16, 1973, for any and all purposes as more fully set forth under the heading herein entitled "Remedy."

- (c) Post at its business office and in normal meeting places, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by a representative of American Federation of Employees, AFL-CIO, Local 1857, and shall be posted by Respondent for a period of 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.
- (d) Submit signed copies of said notice to McClellan Air Force Base, North Highlands, California, for posting in conspicuous places where unit employees are located where they shall be maintained for a period of 60 consecutive days from the date of posting.
- (e) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this Order as to what steps have been taken to comply herewith.

  
 SALVATORE J. ARRIGO  
 Administrative Law Judge

Dated: December 16, 1974  
 Washington, D.C.

NOTICE TO ALL MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members that:

WE WILL NOT give effect to any provision or section of the constitution and by-laws of American Federation of Government Employees, AFL-CIO, Local 1857 to the extent that it requires or calls for consideration by the Executive Board or a majority vote by the members of said labor organization for admission or readmission to membership in the American Federation of Government Employees, Local 1857 by any new applicant, or any former member of said Local who has resigned, or removed himself, from membership in said Local.

WE WILL take such action as is necessary in order to bring the constitution and by-laws of American Federation of Government Employees, AFL-CIO, Local 1857, into compliance with the requirement that membership in said Local shall not be denied to any applicant for admission or applicant for readmission, who previously resigned or removed himself, for any reason other than the failure to meet reasonable occupational standards uniformly required for admission, or the failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

WE WILL, upon application and tender of initiation fees and dues uniformly required, reinstate John E. Nelson to membership in American Federation of Government Employees, AFL-CIO, Local 1857; and if said application and monies are timely submitted, grant retroactive membership in said Local from August 16, 1973, for any and all purposes.

American Federation of Government  
 Employees, AFL-CIO, Local 1857

By \_\_\_\_\_  
 (Signature and Title)

Dated: \_\_\_\_\_

March 24, 1975

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

UNITED 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

380th COMBAT SUPPORT GROUP,  
PLATTSBURGH AIR FORCE BASE,  
PLATTSBURGH, NEW YORK  
A/SLMR No. 493

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This case involved an unfair labor practice complaint filed by an individual, Mary J. Pemberton, alleging that the Respondent Activity violated Section 19(a)(1) of the Order by refusing the Complainant's request that she be allowed to have another employee present during a discussion of her supervisory appraisal with the next line supervisor. The Complainant contended, in this regard, that the discussion of her supervisor's appraisal was a "formal discussion" within the meaning of Section 10(e) of the Order involving personnel policies and practices. The Respondent, on the other hand, asserted that the discussion of the Complainant's appraisal was not a "formal discussion" within the meaning of Section 10(e) of the Order. In addition, the Respondent contended that the employee who the Complainant insisted should be present had no official representative status with the Complainant's exclusive representative and, therefore, even if the discussion of the appraisal was a "formal discussion" within the meaning of Section 10(e), no rights were violated by its denial of such an employee's presence.

The Administrative Law Judge found that the employee who the Complainant wished to be present during a discussion of her supervisor's appraisal was not a representative of the exclusive representative and that the Complainant's insistence that a designee who was not a representative of the exclusive representative be present was not the assertion of any right conferred by the Order. Moreover, he concluded the intended discussion of Complainant's appraisal would not have constituted a "formal discussion" within the meaning of Section 10(e). In this connection, he noted that the subject matter concerned a supervisor's assessment of an employee's work performance that had no wider ramifications beyond the particular employee involved and that no grievance had been lodged at this stage of the discussion.

Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in the case, including exceptions and a supporting brief, the Assistant Secretary adopted the Administrative Law Judge's finding, conclusions and recommendation that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

IT IS HEREBY ORDERED that the complaint in Case No. 35-3092(CA) be, and it hereby is, dismissed.

380th COMBAT SUPPORT GROUP,  
PLATTSBURGH AIR FORCE BASE,  
PLATTSBURGH, NEW YORK

Dated, Washington, D.C.  
March 24, 1975

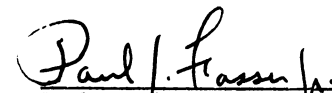
Respondent

and

Case No. 35-3092(CA)

MARY J. PEMBERTON

Complainant

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

DECISION AND ORDER

On January 23, 1975, Administrative Law Judge Gordon J. Myatt issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, National Federation of Federal Employees, Local 368, the exclusive representative of the Complainant, filed exceptions and a supporting brief on behalf of the Complainant with respect to the Administrative Law Judge's Report and Recommendation. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the exceptions and supporting brief filed on behalf of the Complainant, I hereby adopt the findings, 2/ conclusions and recommendation of the Administrative Law Judge.

1/ An answering brief filed by the Respondent was not considered. In this regard, under Section 203.24(b) of the Assistant Secretary's Regulations, answering briefs may be filed only at the discretion of the Assistant Secretary and the Respondent at no time requested that it be allowed to file such a brief in the instant case.

2/ On page 6 of his Report and Recommendation, the Administrative Law Judge inadvertently cited the decision of the Assistant Secretary in Internal Revenue Service, Chicago District, as A/SLMR No. 729, rather than A/SLMR No. 279. This inadvertence is hereby corrected.



DECISION

Statement of the Case

Pursuant to a Complaint filed on December 26, 1973, under Executive Order 11491, as amended, by Mary J. Pemberton (hereinafter called the Complainant) against 380th Combat Support Group, Plattsburgh Air Force Base (hereinafter called the Respondent Activity), a Notice of Hearing on Complaint was issued on March 21, 1974. The Complaint alleged, among other things, that the Respondent Activity violated Section 19(a)(1) of the Executive Order.

A hearing was held in this matter on June 4, 1974, in Plattsburgh, New York. All parties were represented and afforded full opportunity to be heard and to introduce relevant evidence on the issues involved.

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

Findings of Fact

The Complainant is a civilian employed by the Respondent Activity in the Procurement Division at the Plattsburgh Air Force Base. She had been employed in various branches of the Division for approximately 6 or 7 years, and at the time of the Complaint herein was assigned to the Services Procurement Branch. Dominick Camelo, Chief of the Services Procurement Branch was the Complainant's immediate supervisor. In addition to her job related responsibilities, the Complainant was the Union Steward for the Procurement Division, and had functioned in this capacity for approximately 3 years. <sup>1/</sup>

There is little factual dispute regarding the events which are alleged to be a violation of the Executive Order. The undisputed testimony indicates that on August 27, 1973,

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<sup>1/</sup> Local 368, National Federation of Federal Employees was the exclusive representative of the civilian employees in a unit which included the Procurement Division.

.....  
In the Matter of: :  
: :  
380th COMBAT SUPPORT GROUP, :  
PLATTSBURGH AIR FORCE BASE, :  
PLATTSBURGH, NEW YORK :  
: :  
Respondents :  
: :  
and : Case No. 35-3092 (CA)  
: :  
MARY J. PEMBERTON :  
: :  
Complainant :  
.....

Appearances:

John Helm, Esq.  
National Federation of Federal  
Employees  
Washington, D.C.  
For the Complainant

Major Nolan Sklute, Esq.  
Office of the Judge Advocate  
General  
Washington, D.C.

Captain Charles H. Wilcox, II, Esq.  
Plattsburgh Air Force Base,  
Plattsburgh, New York  
For the Respondent

BEFORE: GORDON J. MYATT  
Administrative Law Judge



the Complainant was called into Camelo's office to discuss his annual "Supervisor's Appraisal" of her work performance. 2/ At the commencement of the discussion on the appraisal, the Complainant stated that she wanted a co-worker, Ruth Flynn, to be present during the discussion. Although Mrs. Flynn was a member of the Union, she held no union office nor did she function in any representative capacity on behalf of the Union. Camelo indicated that he had no objection to Mrs. Flynn being present during the discussion, and the Complainant left and returned with Mrs. Flynn who remained throughout the appraisal interview. 3/

Camelo evaluated the Complainant's work performance in twelve different categories. On the scale required by the form, the Complainant was rated above average in ten categories and considered average in two. 4/ The Complainant took issue with the portion of the appraisal in which she was considered average. These categories were: (a) "working relationships"; and (b) "willingness to follow and carry out decisions". After some discussion Camelo indicated that his supervisor, Paul Pierson - Deputy Chief of the Procurement Division - had reviewed the appraisal and concurred with it. The Complainant then indicated that she wanted to discuss the appraisal with Pierson, and Camelo agreed to arrange a meeting.

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2/ The Respondent Activity followed a practice of having an annual "Supervisor's Appraisal" of its employees' work performance for purposes of the Merit Performance Program. This is not to be confused with the annual performance rating required by the Civil Service Commission's regulation contained in the Federal Personnel Manual.

3/ Mrs. Flynn testified that she accompanied the Complainant as a "friend, witness, and representative." It is evident from the testimony that there had been no prior discussion between the Complainant and Mrs. Flynn as to what the latter's capacity would be during the discussion.

4/ The Complainant had received an identical rating the preceding year.

In the late afternoon on September 5, 1973, Camelo informed the Complainant that Pierson was available to discuss her appraisal. As Mrs. Flynn had already left for the day, the Complainant requested that the discussion take place the following morning. At approximately 7:30a.m. the next day the Complainant, accompanied by Mrs. Flynn, went to Pierson's office along with Camelo. When Pierson entered he noticed Mrs. Flynn and wanted to know why she was present. The Complainant responded that Mrs. Flynn was her witness and would be there throughout the discussion. 5/ Pierson replied that it was an informal meeting where a witness was not required, and he asked the Complainant if she were "trying to build a case?" When Pierson refused to discuss the appraisal in Mrs. Flynn's presence, the Complainant and Mrs. Flynn left his office.

Sometime thereafter, Pierson instructed Camelo to inform the Complainant that he was willing to discuss her appraisal at any time that she was ready with anyone present, providing she gave him a good reason why a witness was necessary. The Complainant relayed through Camelo that she had a right to have a representative at the appraisal interview, and that it was unnecessary to advance any reason for exercising this right. The Complainant subsequently secured a form for an "Appeal from a Performance Rating." Although she filled out the form, it was never filed with the offices of the Respondent Activity.

#### Contention of the Parties

The Complainant contends that under Section 10(e) of the Executive Order she had a right to have a representative present during the discussion of her supervisor's appraisal. According to the Complainant, the subject matter involved personnel policies and practices and constituted a "formal

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5/ There is some conflict in the testimony as to whether the Complainant referred to Mrs. Flynn as her witness or her representative. For the purposes of this decision, however, it is of no consequence. The important fact is that the Complainant insisted that Mrs. Flynn be present during the appraisal interview.

discussion" within the meaning of Section 10(e): 6/

The Respondent Activity, however, takes the position that discussions regarding a supervisor's appraisal are not formal discussions within the meaning of Section 10(e). Further, that Section 10(e) applies to the right of a Union which has been accorded exclusive recognition to be afforded an opportunity to be present at formal discussions, and concomitantly to the right of an employee to have a representative of that Union present in the circumstances delineated by that portion of the Executive Order. Therefore, the Complainant's insistence that Mrs. Flynn be present at the appraisal discussion did not violate any rights assured by the Executive Order, since she had no representative capacity in the Union.

Concluding Findings

In my judgment, the position of the Claimant in this case is without merit. The contention that she was entitled to have an employee who was not an official representative of the Union present during the appraisal discussion finds no support in any of the provisions of the Executive Order.

The Complainant's reliance upon Section 10(e) of the Order is misplaced. That portion of the Executive Order deals with the right of the exclusive representative to be afforded an opportunity to be at formal discussions in certain circumstances regarding matters affecting unit employees, and with the co-existing right of unit employees to be represented in such circumstances by their exclusive representative. Department of the Army, Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278 (June 25, 1973). Even assuming the appraisal discussions here were "formal discussions" within the meaning of Section 10(e), there is nothing in the language of that provision which confers a right upon employees to be represented by one other than the exclusive bargaining representative. On a purely factual basis, therefore, the Claimant's insistence that Mrs. Flynn

6/ Section 10(e) of the Executive Order provides in pertinent part:

The labor organization [which has been accorded exclusive recognition] shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of the employees in the unit.

although she was not a representative of the Union, be present during the discussions of the appraisal, was not an assertion of a right conferred upon her by the Executive Order. Thus, the refusal of the official of the Respondent Activity to comply with her request did not violate any rights assured employees under the Order.

The only portion of the Executive Order which could be considered as conferring a right upon the Complainant, in these circumstances, to choose a representative other than the exclusive bargaining representative is found in Section 7(d)(1). That section provides in pertinent part that:

- (d) Recognition of a labor organization does not -
- (1) Preclude an employee, regardless of whether he is in a unit of exclusive recognition, from exercising grievance or appellant rights established by law or regulations; or from choosing his own representative in a grievance or appellant action, ....

The decisional authority, however, has held that Section 7(d) does not confer any rights enforceable under Section 19 of the Executive Order. Department of the Army Transportation Motor Pool, Fort Wainwright, Alaska, supra; Internal Revenue Service, Chicago District, A/SLMR No. 729 (June 25, 1973). Hence, it is clear that the Complainant's contention of a violation is not supported by any provision of the Executive Order.

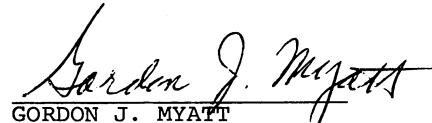
While on the basis of the above it is evident that no violation of the Executive Order has been established, brief treatment of whether the intended appraisal interview with Pierson would have been a "formal discussion" within the meaning of Section 10(e) appears warranted. In my judgment, neither of the appraisal discussions--either with first-level or the second-level supervisor--constituted a "formal discussion" within the ambit of Section 10(e). The subject matter concerned a supervisor's assessment of an employee's work performance, and had no wider ramifications beyond the particular employee involved. Although the Complainant took issue with her ratings in two categories, it cannot be said that a grievance had been lodged at this stage of the discussions--it was merely to acquaint the employee with the evaluation and to discuss why her superiors rated her as they did. This is not to suggest,

however, that at some further stage in the proceeding, such as filing a grievance or an appeal, the Complainant would not have been entitled to representation by the Union. It is simply to indicate that in this preliminary posture, the appraisal interview had not developed into the type of "formal discussion" which would convey rights under Section 10(e) of the Executive Order. Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336 (January 8, 1974); Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Center, A/SLMR No. 419 (August 1, 1974); Internal Revenue Services, Mid-Atlantic Service Center, A/SLMR No. 421 (August 26, 1974).

Accordingly, in the circumstances presented here, I find that the Respondent Activity did not engage in any conduct which violated the rights assured the Complainant under the Executive Order. I shall, therefore, recommend that the Complaint herein be dismissed.

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law, I find that the Respondent Activity, 380th Combat Support Group, Plattsburgh Air Force Base, Plattsburgh, New York, did not engage in any conduct in violation of Section 19(a)(1) of the Executive Order. I hereby recommend that the Complaint herein be dismissed in its entirety.

  
 GORDON J. MYATT  
 Administrative Law Judge

Dated: January 23, 1975  
 Washington, D.C.

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

DEPARTMENT OF THE NAVY,  
 MILITARY SEALIFT COMMAND, PACIFIC,  
 NAVAL SUPPLY CENTER,  
 OAKLAND, CALIFORNIA  
 A/SLMR No. 494

This case involved RA petitions filed by the Department of the Navy, Military Sealift Command, Pacific (MSC Pacific), seeking a determination by the Assistant Secretary with respect to the effect of a recent reorganization on certain existing exclusively recognized units. At the hearing, the parties agreed that what was sought, in effect, was a determination by the Assistant Secretary as to whether certain exclusively recognized units represented at the MSC Pacific by the Intervenor, Military Sea Transport Union, Seafarers International Union, AFL-CIO (MSTU), consisting of stewards and unlicensed civilian marine personnel, should be clarified to include stewards and unlicensed civilian marine employees previously represented by the Intervenor, National Maritime Union, AFL-CIO (NMU) in similar units at the Military Sealift Command, Far East (MSC Far East). The Assistant Secretary, noting the positions of all the parties, that the hearing be limited to the question whether there had been an accretion to the exclusively recognized units represented at MSC Pacific by the MSTU, agreed to treat the RA petitions as having been appropriately amended to constitute petitions for clarification of units.

On July 1, 1974, pursuant to a reorganization, the ship operating responsibilities of the MSC Far East were terminated and seven of its eight vessels were transferred to the MSC Pacific. One vessel was transferred to the Military Sealift Command, Atlantic. Those seagoing employees of the MSC Far East who chose to continue their employment with the Military Sealift Command were offered transfers to either of the remaining ship operating commands. The MSC Pacific and the MSTU contended that as a result of the reorganization the former stewards and unlicensed civilian marine personnel of the MSC Far East who transferred to the MSC Pacific became intermingled with the stewards and unlicensed civilian marine personnel of the MSC Pacific and, therefore, were accreted into the MSTU's two bargaining units. The NMU, on the other hand, contended that the mission of the former Far East vessels had remained constant under the MSC Pacific command; there had not been a thorough and complete integration of the seagoing personnel of the two commands; and, therefore, its units continued to be appropriate for the purpose of exclusive recognition.

The Assistant Secretary found that the steward and unlicensed civilian marine employees formerly employed by the MSC Far East and represented by the NMU, who transferred to the MSC Pacific, have been thoroughly combined and integrated into the existing units at the MSC Pacific represented by the MSTU, and that they, therefore, constitute accretions

or additions to the MSTU units. In reaching this conclusion, he particularly noted that, following the reorganization, former MSC Far East employees and the MSC Pacific employees work side-by-side on the MSC Pacific vessels, share in common those privileges and obligations which accrue to seagoing personnel of the MSC Pacific and the Military Sealift Command through their home port, share common supervision and, in many instances, perform the same job functions. The Assistant Secretary, therefore, ordered that the MSTU's units be clarified to include those employees who had been previously employed by the MSC Far East and who had transferred to the MSC Pacific.

A/SLMR No. 494

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
MILITARY SEALIFT COMMAND, PACIFIC,  
NAVAL SUPPLY CENTER,  
OAKLAND, CALIFORNIA

Activity-Petitioner

and

Case Nos. 70-4321(RA) and  
70-4324(RA)

MILITARY SEA TRANSPORT UNION,  
SEAFARERS INTERNATIONAL UNION, AFL-CIO

Intervenor

and

NATIONAL MARITIME UNION, AFL-CIO 1/

Intervenor

DECISION AND ORDER CLARIFYING UNITS

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer 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 the subject cases, including briefs filed by each of the parties, the Assistant Secretary finds:

The Military Sealift Command, Pacific, hereinafter called the MSC Pacific, filed two RA petitions seeking a determination by the Assistant Secretary with respect to the effect of a recent reorganization on certain existing exclusively recognized units. At the hearing, the parties agreed that what was sought, in effect, was a determination by the Assistant Secretary as to whether certain existing exclusively recognized units represented at the MSC Pacific by the Intervenor, the Military Sea Transport Union, Seafarers International Union, AFL-CIO, hereinafter called MSTU, and consisting of stewards (Case No. 70-4321(RA)) and unlicensed civilian marine personnel (Case No. 70-4324(RA)), should be clarified to include stewards and unlicensed civilian marine employees previously represented by the Intervenor, the National Maritime Union,

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1/ The names of the Intervenor appear as amended at the hearing.

AFL-CIO, hereinafter called NMU, in similar units at the Military Sealift Command, Far East, hereinafter called MSC Far East. 2/

The record reveals that on September 20, 1963, and June 5, 1964, the MSTU was granted exclusive recognition by the MSC Pacific for a unit of stewards and a unit of unlicensed civilian marine personnel, respectively. On January 15, 1963, and June 25, 1963, the NMU was granted exclusive recognition by the MSC Far East for a unit of unlicensed civilian marine personnel and a unit of stewards, respectively.

Pursuant to a reorganization, the ship operating responsibilities of the MSC Far East were terminated on July 1, 1974, and the number of the MSC Far East's shore personnel was reduced. In this connection, the record reflects that seven vessels under the MSC Far East's command were transferred to the MSC Pacific and one vessel was transferred to the Military Sealift Command, Atlantic. 3/ Those seagoing employees of the MSC Far East who chose to continue their employment with the Military Sealift Command (MSC) were offered transfers to either of the remaining ship operating commands, i.e., the MSC Pacific or the MSC Atlantic. The MSC Pacific contends that as a result of this reorganization the former unlicensed civilian marine personnel and stewards of the MSC Far East who transferred to the MSC Pacific became intermingled with the unlicensed civilian marine personnel and stewards of the MSC Pacific and, therefore, were accreted into the MSTU's two bargaining units. The NMU, on the other hand, contends that the mission of the former MSC Far East vessels has remained constant under the MSC Pacific's command; there has not been a thorough and complete integration of the seagoing personnel of the two commands; and, therefore, its units continue to be appropriate for the purpose of exclusive recognition.

The record reveals that the MSC Pacific is one of two subordinate commands of the MSC currently operating seagoing vessels, and that it provides logistic support to battle fleet elements and a system of ocean transportation for personnel and cargo for all elements of the Department of Defense. Further, the MSC Pacific operates ships in support of scientific projects and other programs for other Federal agencies and departments. At the time of the reorganization in 1974, the MSC Pacific operated 24 ships and employed approximately 1700 seagoing personnel, while the MSC Far East employed some 400 seagoing personnel to operate its 8 vessels. The record reveals that each command of the MSC has an authorized strength equal to the number of employees required to operate

2/ All of the parties, including the MSC Pacific, indicated their agreement that the instant RA petitions may have been filed inappropriately in view of the nature of the determination requested. They indicated, however, that they desired that the hearing be limited to the question whether there had been accretions to the exclusively recognized units represented at the MSC Pacific by the MSTU. In view of the MSC Pacific's clear intent as to the purpose of its petitions in this matter, I shall treat the instant petitions as having been appropriately amended to constitute petitions for clarification of units.

3/ The status of employees on the vessel transferred to the Military Sealift Command, Atlantic, was not at issue in this matter.

the vessels assigned to that command, plus an additional 22 percent who serve as a reserve placement pool to cover leave, illness, training assignments, etc. A seaman is employed by a particular command and has no rights to sail on any particular vessel. Thus, a seaman who exercises his leave rights, for example, would be assigned, upon his return, through the replacement pool operated by his particular command to any available vessel in that command. Moreover, the rate of pay and other tangential perquisites which accrue to seagoing personnel are established on the basis of their home port, as are the areas of consideration for promotions and reductions in force, disciplinary procedures, etc. In this connection, prior to the reorganization, the seagoing personnel assigned to the MSC Far East received home leave and repatriation privileges to the United States, as their home port, Yokohama, Japan, was overseas. However, as the MSC Pacific's home port is Oakland, California, its employees do not have such privileges. Therefore, subsequent to the reorganization, those former employees of the MSC Far East who chose to transfer to the MSC Pacific have lost the above-noted privileges.

As noted above, seven of the former MSC Far East vessels were assigned to the MSC Pacific as a result of the reorganization. One of these has since been taken out of service, while others have been given new route assignments. Some 260 of the MSC Far East employees in the units involved herein accepted transfer to the MSC Pacific. In this regard, by the end of September 1974, some three months subsequent to the reorganization, 38 former MSC Far East employees in the units involved herein were serving on vessels assigned to the MSC Pacific prior to the reorganization, while 54 former MSC Far East employees in the pertinent units were being carried in the MSC Pacific's replacement pool, to be assigned by the MSC Pacific to any of its available vessels. In this period, the MSC Pacific also has filled vacancies on the former MSC Far East vessels transferred to the MSC Pacific with 50 employees who were employed by the MSC Pacific prior to the transfer of these vessels to the MSC Pacific's command authority. In addition, replacements of supervisory personnel on the former MSC Far East vessels, now under the jurisdiction of the MSC Pacific, also have been assigned from the MSC Pacific's replacement pool subsequent to the July 1, 1974, reorganization.

Based on all of the foregoing circumstances, I find that the unlicensed civilian marine and steward employees formerly employed by the MSC Far East and represented by the NMU and who have transferred to the MSC Pacific, have been thoroughly combined and integrated into the existing units at the MSC Pacific represented by the MSTU, and that they therefore constitute accretions or additions to the MSTU units. In reaching this conclusion, it was noted particularly that, following the reorganization, former MSC Far East employees and the MSC Pacific's employees work side-by-side on the vessels, including those transferred from the MSC Far East to the MSC Pacific; they share in common those privileges and obligations which accrue to seagoing personnel of the MSC Pacific and of the MSC through their home port; they share common supervision, and, in many instances, they perform the same job functions. Accordingly, I find that the existing unit of the MSC Pacific's unlicensed civilian marine employees should be clarified to include all eligible unlicensed civilian marine employees previously employed by the MSC Far East and that the existing unit of the MSC Pacific's steward department employees should be

clarified to include all eligible steward department employees previously employed by the MSC Far East.

March 31, 1975

ORDER

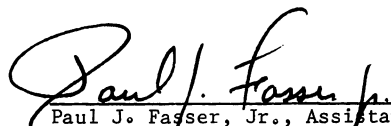
UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND DIRECTION OF ELECTION  
OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

IT IS HEREBY ORDERED that the unit of all unlicensed civilian marine non-officer personnel employed by the Military Sealift Command, Pacific, Oakland, California, for which the Military Sea Transport Union, Seafarers International Union, AFL-CIO, was granted exclusive recognition on June 5, 1964, be, and it hereby is, clarified to include in said unit all eligible unlicensed civilian marine non-officer personnel previously employed by the Military Sealift Command, Far East, Yokohama, Japan and now employed by the Military Sealift Command, Pacific, Oakland, California.

U. S. DEPARTMENT OF THE INTERIOR,  
U. S. GEOLOGICAL SURVEY,  
MID-CONTINENT MAPPING CENTER  
A/SLMR No. 495

IT IS FURTHER ORDERED that the unit of all civilian marine personnel in the ratings of Chief Steward, Chief Steward (Freighter), Second Steward, Second Steward (Troop Mess), Third Steward and Third Steward (Sanitation) employed by the Military Sealift Command, Pacific, Oakland, California, for which the Military Sea Transport Union, Seafarers International Union, AFL-CIO, was granted exclusive recognition on September 20, 1963, be, and it hereby is, clarified to include in said unit all eligible Steward Department personnel previously employed by the Military Sealift Command, Far East, Yokohama, Japan, and now employed by the Military Sealift Command, Pacific, Oakland, California.

Dated, Washington, D.C.  
March 27, 1975

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

The Petitioner, National Federation of Federal Employees, Local 1084 (NFFE), sought an election in a unit consisting of all Cartographic Technicians GS 1371 series (grades GS-7 through GS-11) and Survey Technicians GS 817 series assigned to the Branch of Field Surveys, Mid-Continent Mapping Center, U. S. Geological Survey, Rolla, Missouri, excluding professional employees, Wage Grade employees, headquarters' employees in a unit represented by NFFE Local 934, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, supervisors and guards as defined in the Order. The Activity contended that the petitioned for unit is not an appropriate, viable unit and that, with minor exception, all Cartographic Technicians GS 1371 series, GS-7 through GS-11, and Survey Technicians, GS 817 series at the GS-5 level, assigned to the Activity's Field District, Branch of Field Surveys, are supervisors within the meaning of Executive Order 11491, as amended.

The Assistant Secretary concluded that a unit limited to the Activity's nonsupervisory field employees would be appropriate for the purpose of exclusive recognition. In this connection, he found that there was minimal commonality between the Field District employees and the headquarters' employees in terms of job functions, working conditions, location, individual supervision, and interchange. Thus, in the Assistant Secretary's view, the field employees of the Branch of Field Surveys share a community of interest separate and distinct from the Activity's headquarters' employees and that a unit limited to the field employees would be appropriate for the purpose of exclusive recognition under the Order.

The Assistant Secretary concluded further that all of the Cartographic and Survey Technicians of the Field District, Branch of Field Surveys, with the exception of those Cartographic Technicians primarily responsible for the elevation meter operations, are supervisors in that they have the authority to, and in fact exercise authority with respect to their Assistants to hire, fire, adjust grievances, evaluate job performance and approve leave. As the Assistants were hired for a specific period of time and had no reasonable expectation of future employment beyond that period, the Assistant Secretary found that the Topographic Field Assistants should be excluded from the unit.

Accordingly, the Assistant Secretary ordered that if an adequate showing of interest remained following the eligibility determinations made, an election should be conducted in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF THE INTERIOR,  
U. S. GEOLOGICAL SURVEY,  
MID-CONTINENT MAPPING CENTER

Activity

and

Case No. 62-3992(RO)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1084

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 E. Martinez. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

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

2. The Petitioner, National Federation of Federal Employees, Local 1084, herein called NFFE, seeks an election in a unit consisting of all Cartographic Technicians, GS 1371 series (grades GS-7 through GS-11), and Survey Technicians, GS 817 series, assigned to the Branch of Field Surveys, Mid-Continent Mapping Center, U. S. Geological Survey, Rolla, Missouri, excluding professional employees, Wage Grade employees, employees in a headquarters unit represented by NFFE Local 934, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order. 1/

1/ The petitioned for employees, together with the Topographic Field Assistants assigned to the Field District of the Branch of Field Surveys, constitute the field organization of the Activity.

The U. S. Department of Interior, U. S. Geological Survey, Mid-Continent Mapping Center, herein called the Activity, contends that the petitioned for unit is not an appropriate viable unit and that essentially all Cartographic Technicians, GS 1371 series, GS-7 through 11, and Survey Technicians, GS 817 series at the GS-5 level, who are in the claimed unit and are assigned to the Activity's Field District, Branch of Field Surveys, are supervisors within the meaning of the Order. 2/ The NFFE, on the other hand, takes the position that the petitioned for unit is appropriate because the Field District employees have different working conditions and skills than those employees at headquarters and the contact between the field employees and the headquarters' employees is minimal. Further, it asserts that the employees contended by the Activity to be supervisors are not supervisors within the meaning of the Order.

The Activity, which is one of four similarly organized mapping centers found throughout the country, is divided into four branches: Photogrammetry, Cartography, Field Surveys, and Plans and Production. The employees in the petitioned for unit are attached to the Field District which is part of the Branch of Field Surveys. 3/ The function of the Field District is to gather mapping information through surveys for the preparation of map manuscripts.

The petitioned for employees are supervised by District Engineers and Project Engineers who supervise only field employees and who are responsible directly to the Chief of the Branch of Field Surveys. The Cartographic Technicians and Survey Technicians in the claimed unit are assigned to the Branch of Field Surveys, are scattered over a 15 State area covered by the Activity, and are in permanent travel status as they move from one job to another upon the completion of their assignment. As they spend only approximately five days a year in the headquarters office, they have little or no contact with the employees working in the headquarters office. Although certain classifications of employees, such as Cartographic Technicians, are found in both the field and headquarters, their job descriptions and responsibilities at the field and headquarters levels are different. Thus, while the field Cartographic Technician is responsible for compiling the necessary data and information to prepare maps, it is the headquarters' Cartographic Technicians responsibility to utilize such information as is gathered in the field to prepare the maps. Moreover, as the

2/ In this regard, the Activity concedes that those Cartographic Technicians who are engaged primarily in elevation meter operations are not supervisors within the meaning of the Order as they do not hire, fire or direct Topographic Field Assistants as part of their routine daily operation.

3/ The National Federation of Federal Employees, Local 934, currently represents a unit of all headquarters' employees of the Activity.

type of work performed differs substantially at the field and the headquarters levels, there is little interchange or transfer between employees at these levels, even where similar classifications exist.

As the commonality between the field employees and the headquarters' employees in terms of job functions, working conditions, location, individual supervision and interchange is minimal, I find that the field employees of the Branch of Field Surveys share a community of interest separate and distinct from the Activity's headquarters' employees and that, therefore, a unit limited to the Activity's nonsupervisory field employees would be appropriate for the purpose of exclusive recognition under the Order. Moreover, in my view, such a unit would promote effective dealings and efficiency of agency operations.

The Activity contends that, based on their duties and responsibilities, many of the petitioned for Cartographic and Survey Technicians are supervisors within the meaning of the Order and should be excluded from the unit. As noted above, the Cartographic and Survey Technicians of the Field District are scattered over a broad 15 State area under the jurisdiction of the Activity carrying out their individual assignments. With the exception of those Cartographic Technicians who are responsible primarily for the elevation meter operations in each District, the field Cartographic and Survey Technicians generally go out on assignments alone and have the authority to recruit and hire a Topographic Field Assistant. <sup>4/</sup> The record reveals that when he gets an assignment, the Cartographic or Survey Technician generally visits the town or city closest to his assignment to recruit his Topographic Field Assistant. The Technicians' decision as to whom he hires is not subject to any review by a higher authority and once he prepares and signs the necessary papers, the job applicant is on the payroll. Topographic Field Assistants are hired under special Excepted Service not-to-exceed 180 days appointments and are paid under a special pay scale. Their function is to provide assistance to the Technicians and such assistance includes: carrying equipment, running errands, cutting brush, and holding the sight rod during surveys. The Technician trains and directs his Field Assistant on a day-to-day basis; assigns and checks his work; approves his leave; adjusts grievances; and at the end of the 180 days or on completion of the particular job, the Technician prepares a job evaluation in which he may recommend that the Field Assistant be hired again in the future if work is performed in that area or if there is an opportunity for permanent employment. The Technician also has the authority to terminate the Field Assistant before the 180 day period expires if the job is completed early or if, in the Technician's view, the Assistant is not performing his job satisfactorily.

Based on the foregoing circumstances and noting that, with the exception of those Cartographic Technicians primarily responsible for

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<sup>4/</sup> This authority is found in the job description of both the Cartographic and the Survey Technicians and the record reveals that it is exercised on a continuing basis.

the elevation meter operations, all other Cartographic and Survey Technicians of the Field District, Branch of Field Surveys have the authority to, and, in fact, exercise the authority to hire, fire, adjust grievances, evaluate job performance and approve leave with respect to their Field Assistants, I find that, with the above noted exception, the Cartographic and Survey Technicians are supervisors within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the unit found appropriate.

Although in its petition the Petitioner did not specifically seek to include in its claimed unit the Topographic Field Assistants, at the hearing it indicated that such employees should be included in the unit. As discussed above, the evidence establishes that the Field Assistants are hired under special Excepted Service not-to-exceed 180 day appointments and are recruited from the area in which a particular Cartographic or Survey Technician is operating. In the performance of their job functions, the Cartographic and Survey Technicians move from place to place rather than residing in a specific area and they seldom return to the same area twice within a short period of time. Thus, with minor exception, the Field Assistants are not rehired after their appointment has expired or their job has terminated. Under these circumstances, I find that the Topographic Field Assistants should be excluded from the unit found appropriate as the record indicates that they are hired for a limited specific period and, generally, have no reasonable expectation of future employment beyond that period.

Based on the foregoing, I find that the following unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All Cartographic Technicians GS 1371 series (grades GS-7 through GS-11) engaged in elevation meter operations attached to the Branch of Field Surveys, Mid-Continent Mapping Center, U. S. Geological Survey, Rolla, Missouri; excluding Wage Grade employees, employees in the headquarters unit represented by National Federation of Federal Employees, Local 934, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined by the Order.

#### DIRECTION OF ELECTION <sup>5/</sup>

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than

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<sup>5/</sup> In view of the above eligibility findings, it is not clear whether the NFFE has an adequate showing of interest to warrant an election in this matter. 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 eligibility determinations herein the NFFE's showing of interest is inadequate, the petition in this case should be dismissed.



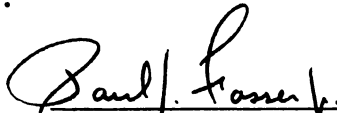
March 31, 1975

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

NAVAL EDUCATION AND TRAINING CENTER (NETC),  
NEWPORT, RHODE ISLAND  
A/SLMR No. 496

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 military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented by National Federation of Federal Employees, Local 1084.

Dated, Washington, D. C.  
March 31, 1975

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

In this case, the Activity filed a petition for clarification of unit (CU) seeking to clarify an existing unit represented exclusively by the American Federation of Government Employees, Local 190, AFL-CIO (AFGE), in order to have it conform to the organizational structure of the Activity. The Activity contended that because of a consolidation of certain former Naval shore establishments into the Activity, the employees of the former Naval Supply Center Norfolk, Newport Annex (Supply Annex), represented exclusively by the National Association of Government Employees, Local R1-189 (NAGE) have been integrated with employees in the AFGE's unit at the Activity. The NAGE asserted that the consolidation merely constituted a "paper reorganization." The Activity also petitioned to amend the NAGE's Certification of Representative by changing the name of the designated Activity.

Prior to the reorganization, the AFGE exclusively represented employees in separate units at the Naval Officer Training Center, the Naval Station, and the Naval Public Works Center. As a result of the reorganization, the employees of those Activities, and the employees of the Supply Annex represented by the NAGE, were reassigned to operational segments of the Activity responsible for Training, Facilities, Administration, and Supply. The Certification of Representative previously issued to the AFGE as the exclusive representative of the employees of the former Training Center was amended and its unit was clarified, without objection, to include all employees of the former Naval Station and Public Works Center who were transferred into the Activity. While most of the Supply Annex functions and employees were transferred to the Activity's Supply operation, other Supply Annex functions were abolished and certain employees were transferred elsewhere in the NETC.

The Assistant Secretary found that the employees of the former Supply Annex represented by the NAGE have been physically and administratively integrated into the NETC. In this regard, the Assistant Secretary found that following the consolidation these employees were dispersed throughout the NETC. Although many of the functions and employees of the Supply Annex were assigned to the NETC Supply and those employees continue to perform generally their same work assignments, the Assistant Secretary noted that they now work alongside of, and share common supervision with, other employees in Supply who perform similar work assignments and who have previously been found to

be part of the overall NETC unit represented by AFGE. Moreover, other Supply Annex employees were assigned to different segments of the NETC and perform work which is unrelated to supply operations. Accordingly, the Assistant Secretary clarified the existing overall NETC unit represented by the AFGE to include the employees of the former Supply Annex. Noting that the Supply Annex was no longer viable, the Assistant Secretary dismissed the petition to amend the NAGE's Certification of Representative to change the name of the Supply Annex.

A/SLMR No. 496

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL EDUCATION AND TRAINING CENTER,  
NEWPORT, RHODE ISLAND

Activity-Petitioner

and

Case Nos. 31-8583(AC) and  
31-8585(CU)

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R1-189

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon petitions 1/ duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Peter F. Dow. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

In Case No. 31-8585(CU), the Activity-Petitioner, Naval Education and Training Center, Newport, Rhode Island, herein called NETC, seeks to clarify an existing unit represented exclusively by the American Federation of Government Employees, Local 190, AFL-CIO, herein called AFGE, in order to have it conform to the organizational structure of the NETC. The NETC contends that because of a realignment of certain Naval shore establishments at Newport, Rhode Island, which resulted in the consolidation of their missions and operational functions within the NETC, the employees in a unit previously represented exclusively by the National Association of Government Employees, Local R1-189, herein called NAGE, have been physically and administratively integrated with the employees of the NETC currently represented exclusively by the AFGE. The NAGE, on the other hand, contends that the realignment and consolidation of operational functions and missions merely constituted a "paper reorganization", and that the unit for which it was certified as the exclusive representative continues to be viable and appropriate.

In Case No. 31-8583(AC), the NETC seeks to amend the Certification of Representative previously issued to the NAGE by changing the name of the Activity to the NETC.

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1/ Both of the subject petitions were amended at the hearing.

On April 1, 1974, the NETC was established under the jurisdiction of the Chief of Naval Education Training as part of a Naval shore realignment program. Under this program, the following activities located at Newport, Rhode Island, were abolished and their missions and operational functions were consolidated under the NETC: The Navy Officer Training Center; the Naval Station; the Naval Base; the Naval Public Works Center; and the Naval Supply Center Norfolk, Newport Annex, herein called Supply Annex.

Prior to the consolidation, the AFGE was the exclusive representative of employees in separate units at the Training Center, the Naval Station, and the Public Works Center, 2/ and the NAGE was certified as the exclusive representative of all eligible employees of the Supply Annex. 3/ The merger of the above activities began with the consolidation of the missions and functions of the Training Center, the Naval Station and the Naval Base into the NETC on April 1, 1974, and was completed with the consolidation of the missions and functions of the Public Works Center and the Supply Annex into the NETC on July 1, 1974.

Within the NETC there are four operational segments of authority which are responsible to a Chief Staff Officer who, in turn, is responsible to the Commander of the NETC. These operational segments of authority are: (1) Assistant Chief Staff Officer (ACSO) for Training; (2) ACSO for Administration; (3) ACSO for Facilities Management, herein called ACSO Facilities; and (4) Comptroller and ACSO for Supply Management, herein called ACSO Supply. 4/ Each operational segment is subdivided into departments which, in turn, are subdivided into divisions and branches. Also under the Chief Staff Officer are certain staff administrative segments and a Consolidated Civilian Personnel Office which administers personnel policies and procedures for all of the functions and missions of the NETC. As a result of the reorganization, employees of the former Training Center, Naval Station, and Public Works Center, represented by the AFGE, and employees of the former Supply Annex, represented by the NAGE, were reassigned to the four operational segments of the NETC.

The record reveals that many of the Public Works Center functions and employees were assigned to the ACSO Facilities and that employees of the Public Works Center who were not assigned to the ACSO Facilities included approximately 20 employees who were assigned to the ACSO Supply in the ADP and Supply Operations Departments. Following the above noted realignment, the prior Certification of Representative issued to the AFGE as the exclusive representative of all classified and non-classified employees of the Training Center was amended and clarified, without objection, to include the employees of its former Naval Station and Public Works Center units. The AFGE's unit was defined as follows:

2/ The AFGE was certified for the Training Center unit on September 27, 1971. Recognition for the other AFGE bargaining units was granted under Executive Order 10988.

3/ The NAGE was certified on March 8, 1971, and is party to a two-year negotiated agreement with the Supply Annex, effective November 16, 1973.

4/ ACSO Supply, in turn, is subdivided into Comptroller, Supply Operations, and Automatic Data Processing (ADP) Departments.

All Wage Grade and General Schedule employees of Naval Education and Training Center, Newport, Rhode Island, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, professional employees, firefighters, policemen, and guards and supervisors as defined by Executive Order 11491, as amended.

With respect to the clarification of the AFGE's unit, the Assistant Regional Director found in his consolidated Report and Findings in Case No. 31-8584(CU), that the former Public Works Center employees, including those assigned to ACSO Supply, had been physically and administratively integrated with employees of the NETC and that they no longer constituted a recognizable or viable unit and had, in fact, been added or accreted to the existing unit of employees of the NETC represented by the AFGE. 5/

The former Supply Annex consisted of three divisions, namely, Fuel, Personal Property, and Supply Operations. The record reveals that whereas some Supply Annex functions were abolished, the Receiving Section of the Receiving and Delivery Branch was transferred into the ACSO Facilities and most of Supply Annex functions were assigned to ACSO Supply. As a consequence of the transfer of these Supply Annex functions to ACSO Supply, approximately 66 employees were transferred and generally continued to perform their same work assignments as before the transfer. 6/ Essentially, these employees now work side-by-side with other NETC employees currently represented by the AFGE who perform similar duties and share the same supervision. 7/ Approximately 20 employees from the Supply Annex were assigned to the ACSO's Training, Administration, and Facilities, and are now performing work assignments unrelated to supply operations. 8/ During the

5/ The Assistant Regional Director issued his Consolidated Report and Findings on Petition for Amendment of Certification and Petition for Clarification of Unit on October 18, 1974, subject to the timely filing of a request for review by October 31, 1974, the date of the instant hearing. The record reveals that no request for review was filed. Also, the record reveals that the NAGE did not intervene in that proceeding. I am advised administratively that on October 31, 1974, the Assistant Regional Director ordered the former Public Works Center employees be included in the unit of the NETC employees represented exclusively by the AFGE.

6/ The job classifications of these employees include Warehouseman, Supply Clerk, Shipping Clerk, File Clerk, Inspector Personal Property, and Packing Inspector.

7/ The record reveals that approximately 60 other NETC employees are in the Supply Operations and Comptroller Departments of ACSO Supply.

8/ Five employees retired, one resigned, and one was transferred outside the jurisdiction of the NETC.

reorganization process, common competitive areas for promotions and reductions in force were established to include all employees of the five Activities which had been abolished, and that policy currently continues in the NETC.

Based on the foregoing, I find that the employees of the former Supply Annex represented by the NAGE have been physically and administratively integrated into the NETC and do not share a clear and identifiable community of interest that is separate and distinct from other employees of the NETC. Thus, the evidence establishes that the consolidation which abolished the Supply Annex did not result merely in an administrative transfer of its functions and employees into the NETC. Rather, some of its functions were abolished or transferred to other segments of the NETC and its personnel were dispersed throughout the NETC where they now work alongside of, and share common supervision with, other NETC employees. Although many of the functions and employees of the Supply Annex were assigned to ACSO Supply and those employees continue to perform generally their same work assignments, as noted above, the evidence establishes that they now work alongside, and share common supervision with, other employees in ACSO Supply who perform similar work assignments and who have previously been found to be part of the overall NETC unit represented by the AFGE. Moreover, other employees of the Supply Annex were assigned to different operational segments of the NETC where they perform work which is unrelated to supply operations. Finally, the evidence establishes that all of the employees of the NETC share the same personnel policies and practices and are in the same areas of consideration for promotions and reductions in force. Under these circumstances, I find that the employees of the former Supply Annex no longer constitute a recognizable or viable unit but, rather, now share a community of interest with, and are an integral part of, the existing unit of employees of the NETC represented by the AFGE.

Accordingly, I shall order that the existing unit of NETC employees be clarified to include the employees of the former Supply Annex. Further, in view of my finding above that the employees of the former Supply Annex no longer constitute a recognizable or viable unit, I conclude, with regard to the subject petition in Case No. 31-8583(AC), that the prior Certification of Representative issued to the NAGE for a unit at the former Supply Annex may not be amended to reflect the name change in the organizational designation of the NAGE unit precipitated by the reorganization inasmuch as such unit is no longer in existence. 9/

ORDER

IT IS HEREBY ORDERED that the unit of all Wage Grade and General Schedule employees of the Naval Education and Training Center, Newport, Rhode Island, for which American Federation of Government Employees,

9/ Cf. U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 482.

Local 190, AFL-CIO, was certified as exclusive representative on September 27, 1971, be, and it hereby is, clarified to include in said unit all eligible employees previously employed by the Naval Supply Center Norfolk, Newport Annex, Newport, Rhode Island.

IT IS FURTHER ORDERED that petition in Case No. 31-8583(AC) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
March 31, 1975

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

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

U. S. ARMY ENGINEER WATERWAYS  
 EXPERIMENT STATION,  
 VICKSBURG, MISSISSIPPI  
 A/SLMR No. 497

The case arose as a result of a petition filed by the American Federation of Government Employees, Local 3310, AFL-CIO (AFGE) seeking a unit of all Firefighter employees at the U. S. Army Engineer Waterways Experiment Station, excluding, among others, Shift Captains, GS-6, who it contended to be supervisors. The Activity took the position that the claimed employees are guards within the meaning of Section 2(d) of the Order and that the Shift Captains are not supervisors within the meaning of Section 2(c) of the Order.

Inasmuch as the Activity employs no guards those employees classified as Firefighters by the Activity perform both firefighting and security functions. While noting that the Firefighters may issue traffic citations, serve as armed guards, and perform other security functions, the Assistant Secretary found that such duties are incidental to their firefighting functions and that the Firefighters are not guards within the meaning of Section 2(d) of the Order. In this regard, it was noted that the Firefighters are selected from the Firefighters' register, that they perform firefighting duties as their paramount responsibility, as reflected in their job classification, and that they remain at the Fire Station on standby for a substantial portion of their 24-hour shift.

Further, the Assistant Secretary found that Shift Captains are not supervisors within the meaning of Section 2(c) of the Order. In this regard, it was noted that the Shift Captains perform essentially the same duties as those performed by other Firefighters, that they do not assign work on other than a routine basis, that they have no authority to hire, fire, award, evaluate or promote employees and that the evidence is insufficient to establish that their recommendations regarding discipline are effective or that their approval of sick leave or annual leave is other than routine in nature.

Accordingly, the Assistant Secretary directed that an election be held in the unit of all Firefighters, including Shift Captains, employed by the Activity.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. ARMY ENGINEER WATERWAYS  
 EXPERIMENT STATION,  
 VICKSBURG, MISSISSIPPI

Activity

and

Case No. 41-3599(RO)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, LOCAL 3310, 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 Milledge L. Dixon. 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, Local 3310, AFL-CIO, herein called AFGE, seeks an election in a unit of all Firefighters at the U. S. Army Engineer Waterways Experiment Station, excluding, among others, Shift Captains, GS-6, who it contends are supervisors. <sup>1/</sup> The Activity takes the position that the claimed employees are guards within the meaning of Section 2(d) of the Order and that, therefore, the instant petition should be dismissed. Further, it contends, contrary to the AFGE, that Shift Captains are not supervisors within the meaning of Section 2(c) of the Order.

The Activity is the principal research, testing and development facility of the U. S. Army Corps of Engineers. It occupies about 642

<sup>1/</sup> On October 12, 1973, AFGE Local 3310 was certified as the exclusive representative of all nonprofessional General Schedule and Wage Grade employees at the Activity with the standard exclusions including guards.

acres and has approximately 1,400 employees. Approximately 14 Firefighters, GS-4 and GS-5, and 3 Firefighters classified as Shift Captains, GS-6, constitute the Physical Security Section under the direction of a Section Chief, within the Physical Security and Custodial Branch. Inasmuch as the Activity employs no guards, the Firefighters perform both firefighting and security functions although their paramount duty, as reflected by their Civil Service classification, is that of Firefighters.

The Firefighters are selected from the Civil Service Firefighters' register and receive a majority of their training informally on the job. 2/ They operate out of and sleep in the Fire Station which houses two fire trucks and other firefighting equipment. Generally, the Firefighters work 72 hours a week in alternate 6-man shifts headed by a Shift Captain. They rotate through a specific schedule of the duties required on each 24-hour shift. Their four major duties include: (1) Evening, night and early morning standby; (2) Patrol duty (night); (3) Main gate duty (night); and (4) Day standby.

Evening, night and early morning standby varies from 9 to 11-1/2 hours, depending on the schedule worked by the Firefighter. Although the Firefighters may be called out for security or fire duty, the record indicates that they spend the majority of standby time sleeping in the Fire Station. Patrol duty at night varies from 1-1/2 to 3-1/2 hours for each Firefighter. In this connection, the Firefighter patrols the Activity for fire hazards, vandalism, and unlawful entry, and locks and unlocks gates. Main gate duty requires from 1-1/2 to 4-1/2 hours for each Firefighter. When performing this job function, the Firefighter prevents unauthorized entry onto the Activity and approves persons visiting residential areas. 3/ However, the record reflects that the Firefighter on Main gate duty devotes a considerable amount of time to performing miscellaneous responsibilities, including answering and transferring incoming telephone calls and operating the Base radio. In the event of a fire, the Firefighter on Main gate duty leaves the gate and proceeds to the fire. Day standby consists of 8 hours of duty for each Firefighter. This responsibility includes the patrolling of the Activity for fire and security hazards and may include, on occasion, the issuing of traffic citations and the investigation of a traffic accident. In addition, on occasion, a Firefighter may be required to accompany a clerk to the bank as an armed escort and, at infrequent intervals during the year, to serve as an armed guard at security conferences. Except when accompanying a clerk to the bank or guarding

2/ They receive limited formal training which includes the viewing of a film on subversion and espionage, briefings on guard responsibilities and regulations regarding the use of firearms, and additionally are required to qualify annually with a pistol on a firing range.

3/ The Firefighters are authorized to make only a "citizens arrest."

security conferences or classified material, a Firefighter is not required to wear a weapon. Most of the 8-hour day standby is spent by the Firefighter at the Fire Station, awaiting fire or ambulance calls or performing miscellaneous duties, including the maintenance of firefighting equipment.

Based on all of the foregoing circumstances, I find that the Activity's Firefighters are not guards within the meaning of Section 2(d) of the Order. Thus, while the Firefighters may issue traffic citations, serve as armed guards, and perform other security duties, the record reflects that such duties are incidental to their primary firefighting functions. In this latter regard, it was noted that the Firefighters are selected from the Firefighters' register, that they perform firefighting duties as their paramount responsibility, as reflected in their job classification, 4/ and that they remain at the Fire Station on standby for a substantial portion of their 24-hour shift. 5/

With regard to the status of Shift Captains, the record indicates that each six-man shift includes a Shift Captain, GS-6, who generally possess more seniority and job experience than the other Firefighters. In addition to performing essentially the same tasks as other Firefighters, the Shift Captains, due to their seniority and job experience, are called upon to assist and direct the other Firefighters in the performance of their duties. Although the Shift Captains do not draw up the schedule of duties for the 24-hour shift, they may answer questions and delegate tasks to Firefighters in response to emergencies. Generally, however, when unusual situations arise, the Shift Captains call the Section Chief or the Colonel of the Waterways Experiment Station during their off-duty hours for direction. Although the record indicates that Shift Captains may approve sick leave and annual leave, there is no evidence that the approval of such leave is other than routine in nature.

The Shift Captains do not attend supervisory meetings and have no role in hiring, firing, awarding, evaluating or promoting other Firefighters. While the record reflects that in one instance a Shift Captain recommended disciplinary action that subsequently was taken, in my view, the evidence is insufficient to establish that the Shift

4/ As a further indication of their primary responsibility, it was noted that if a fire occurs when a Firefighter is performing Main gate duty, he leaves the gate and proceeds to the fire.

5/ See United States Department of the Air Force, 910th Tactical Air Support Group (AFRES), Youngstown Municipal Airport, Vienna, Ohio, A/SLMR No. 12 and General Services Administration, Region 2, New York, New York, A/SLMR No. 220.

Captains' recommendations in this regard generally are effective and require the use of independent judgment.

March 31, 1975

UNITED 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

Under these circumstances, and noting particularly that the Shift Captains perform essentially the same duties as those performed by other Firefighters, that they do not direct or assign work on other than a routine basis, that they have no authority to hire, fire, award, evaluate or promote employees and that the evidence is insufficient to establish that their recommendations regarding discipline are effective or that their approval of sick leave or annual leave is other than routine in nature, I find that the Shift Captains are not supervisors within the meaning of Section 2(c) of the Order.

U.S. DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE,  
PITTSBURGH DISTRICT,  
PITTSBURGH, PENNSYLVANIA  
A/SLMR No. 498

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

All Firefighter employees, including Shift Captains, of the U. S. Army Engineer Waterways Experiment Station, Vicksburg, Mississippi, 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

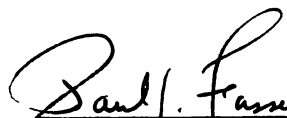
An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period, because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 3310, AFL-CIO.

This proceeding arose upon the filing of an unfair labor practice complaint by the National Treasury Employees Union and Chapter 34, National Treasury Employees Union (Complainants). The Complainants alleged, in effect, that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by refusing to proceed with meetings called for the purpose of implementing a grievance examiner's recommendations because the employee involved was accompanied by a representative of the exclusive bargaining representative. The Respondent asserted that the meetings in question succeeded the grievance process and, therefore, they were nothing more than individual counselling sessions at which neither the exclusive representative had the right to be present, nor the employee involved the right to be represented under the Order.

The Administrative Law Judge found that the implementation of the grievance recommendation was an integral part of the grievance procedure, and that the employee was entitled to representation at any meeting called for that purpose. Further, he found that the exclusive bargaining representative had a right, under Section 10(e) of the Order, to be represented at such meetings.

In finding that the Respondent had violated Section 19(a)(1) and (6) of the Order, the Administrative Law Judge suggested that under prior holdings it appeared that general impact on unit employees may be required in addition to the presence of a related grievance in order to bring a discussion concerning a grievance within the ambit of Section 10(e) of the Order. While adopting the recommendation of the Administrative Law Judge as to the violation of Section 19(a)(1) and (6) of the Order, the Assistant Secretary noted that when a grievance is the subject of a formal discussion, the exclusive representative is entitled, under Section 10(e) of the Order, to be represented, whether or not such grievance might have a general impact on unit employees. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions consistent with his decision.

Dated, Washington, D. C.  
March 31, 1975

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE,  
PITTSBURGH DISTRICT,  
PITTSBURGH, PENNSYLVANIA

Respondent

and

Case No. 21-3978(CA)

NATIONAL TREASURY EMPLOYEES UNION AND  
CHAPTER 34, NATIONAL TREASURY EMPLOYEES UNION

Complainants

DECISION AND ORDER

On October 24, 1974, Administrative Law Judge John H. Fenton issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendation. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Report and Recommendation together with a supporting brief, and the Complainants filed an opposition to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the Respondent's exceptions and supporting brief and the Complainants' opposition thereto, I hereby adopt the

Administrative Law Judge's findings, conclusions 1/ and recommendation, except as modified herein.

The Administrative Law Judge concluded that employee Francis Klaus was entitled to be represented by his designated union representative at certain meetings, relating to his grievance, which were held on September 19, 24, and October 1, 1973, and, further, that the Complainant Chapter, under the provisions of Section 10(e) of the Order, was entitled to be represented at these meetings. Although, as indicated herein, I concur in his findings with respect to the September 19 and 24, 1973, meetings, it was noted that the October 1 meeting was not a subject of either the charge or the complaint in this matter and that the evidence regarding the events which took place on that date was introduced, for the first time, at the hearing over the objection of the Respondent. Under these circumstances, I make no finding with respect to whether the Respondent's conduct at the October 1 meeting constituted a violation of the Order.

In finding that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to afford the Complainant Chapter an opportunity to be represented at the September 19 and 24, 1973, formal discussions with employee Klaus, called for the purpose of implementing a grievance examiner's recommendation, and violated Section 19(a)(1) of the Order by denying Klaus representation at such discussions, the Administrative Law Judge suggested that under prior holdings it appeared that general impact on unit employees may be required in addition to the presence of a related grievance in order to bring a discussion concerning a grievance within the ambit of Section 10(e) of the Order. In my view, however, whenever a grievance is the subject of a formal discussion the exclusive representative is entitled, under Section 10(e) of the Order, to be represented, whether or not such grievance might have a general impact on unit employees. Cf. Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448.

1/ In its brief to the Administrative Law Judge, the Respondent, for the first time, raised the contention that the Complainants had failed to prove the status of Chapter 34, National Treasury Employees Union as the exclusive bargaining representative entitled to Section 10(e) rights. As the Administrative Law Judge noted, the instant case was litigated as if the Complainant Chapter was the exclusive bargaining representative and no evidence was presented which cast doubt upon its unquestioned status. Accordingly, I agree with the Administrative Law Judge's conclusion that, under such circumstances, the Respondent may not now seek dismissal of the complaint by raising at this stage of the proceedings a point which it never placed in issue prior to the close of the hearing on this matter. Also noted, in this regard, is the fact that the U.S. Civil Service Commission's Publication, Union Recognition in the Federal Government, November 1973, which is based upon information supplied by Federal agencies, reflects that the Complainant Chapter herein was recognized on May 6, 1963, as the exclusive representative of the Respondent's employees in a District-wide unit.



It was noted also that the instant complaint alleged that the Respondent's conduct herein constituted a violation of Section 19(a)(2) of the Order, which allegation was not previously dismissed nor set forth in the Notice of Hearing. In this regard, however, there was no evidence that the Respondent's conduct herein was based on discriminatory considerations. Accordingly, I shall dismiss the instant complaint to the extent that a violation of Section 19(a)(2) is alleged.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Pittsburgh District Office, Pittsburgh, Pennsylvania, shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and unit employees, or their representatives, concerning grievances, without affording Chapter 34, National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) Refusing the request made by Mr. Francis Klaus, or any other employee in the bargaining unit, to be represented by a representative of Chapter 34, National Treasury Employees Union, the employees' exclusive representative, at any formal discussions between management and Mr. Francis Klaus, or any other employee in the bargaining unit, convened for the purpose of discussing the implementation of a grievance decision.

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

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

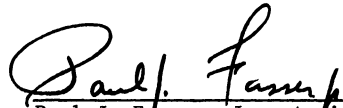
(a) Notify Chapter 34, National Treasury Employees Union of, and afford it the opportunity to be represented at, formal discussions between management and unit employees, or their representatives, concerning grievances.

(b) Post at its facility at the Internal Revenue Service, Pittsburgh District, Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Internal Revenue Service, Pittsburgh District, Pittsburgh, Pennsylvania, and they shall be posted for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

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

Dated, Washington, D.C.  
March 31, 1975

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

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and unit employees, or their representatives, concerning grievances, without affording Chapter 34, National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT refuse a request made by Mr. Francis Klaus, or any other employee in the bargaining unit, to be represented by a representative of Chapter 34, National Treasury Employees Union, the employees' exclusive representative, at any formal discussions between management and Mr. Francis Klaus, or any other employee in the bargaining unit, convened for the purpose of discussing the implementation of a grievance decision.

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 notify Chapter 34, National Treasury Employees Union of, and afford it the opportunity to be represented at, formal discussions between management and unit employees, or their representatives, concerning grievances.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pa. 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



reflecting his performance evaluation and his supervisory potential evaluation, or to discuss such matters with him, as required by the adopted report and recommendations of a grievance examiner, so long as his Union representative was present.

Notice of Hearing on Complaint was issued on April 26, 1974, by the LMSA Regional Administrator, Philadelphia Region, limiting the alleged violations to Sections 19(a)(1) and (6). Pursuant thereto a hearing was held on July 10 in Pittsburgh, Pennsylvania. Both parties were represented by counsel and were given full opportunity to call and examine witnesses and to adduce relevant evidence. Briefs were filed and have been carefully considered.

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

Findings of Fact

Mr. Francis Klaus, a Revenue Officer with the Pittsburgh Office of IRS, applied for the position of Supervisory Revenue Officer. He was not selected, and on October 2, 1972, he requested an opportunity to see the panel's evaluation and for counselling on any areas of weakness, pursuant to provisions of the Multi-District Agreement between IRS and the Union. He was thereafter informed that the provisions of that agreement did not apply because the position sought was not in the bargaining unit.

On October 16, 1972, Mr. Klaus was counselled by his group supervisor concerning the selection procedures but was refused permission to see the panel's findings. On October 20 he filed an informal grievance under the Agency's grievance procedure. Unsatisfied with the disposition of that grievance, he filed a formal one on December 1. He was again unsuccessful, and on April 17, 1973, he requested the appointment of an appeal's examiner, alleging that preselection of the successful applicant had occurred and that he had been prejudiced by the panel's improper departure from the posted procedures, which required that he be personally interviewed. Grievance Examiner Donald W. Johnson investigated the matter. In his decision dated September 4, 1973, he found that "proper evaluation procedures were followed and that the grievant was properly ranked on the basis of the supervisory appraisals of past performance and supervisory potential made available to the panel." He went on to note that the key to determining the ranking of Mr. Klaus in respect to the supervisory position

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In the matter of :  
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U. S. DEPARTMENT OF TREASURY :  
INTERNAL REVENUE SERVICE, :  
Respondent : Case No. 21-3978(CA)  
 :  
vs. :  
 :  
NATIONAL TREASURY EMPLOYEES :  
UNION, CHAPTER 34, :  
Complainant :  
.....

George T. Bell, Esquire  
Office of Chief Counsel  
Room 4134, IRS Building  
1111 Constitution Ave. N.W.  
Washington, D. C. 20024  
For the Respondent

Neal Fine, Esquire  
Room 1101  
1730 K Street, N.W.  
Washington, D. C. 20006  
For the Claimant

Before: JOHN H. FENTON  
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arose upon the filing of an unfair labor practice complaint on January 7, 1974, by the National Treasury Employees Union and its Chapter No. 34, against the U. S. Department of Treasury, Internal Revenue Service, Pittsburgh District. The complaint alleged violations of Sections 19(a)(1), (2) and (6) of Executive Order 11491, in essence on the ground that Respondent refused to show Mr. Francis Klaus personnel forms

sought was the information contained in two forms concerning Klaus, Form 3861, his Performance Evaluation and Form 4321, the Report of Supervisory Potential, and found that neither the Federal Personnel Manual nor the Internal Revenue Manual barred showing copies of such materials to an employee.<sup>1/</sup> He then recommended that, while no change should be made with respect to the personnel action effecting the filling of the vacancy, Forms 3861 and 4321 should be shown to, and thoroughly discussed with, Mr. Klaus.

These findings and recommendations were submitted to the Regional Commissioner of the mid-Atlantic Region, the superior of the Pittsburgh District Director who had initially ruled on the grievance. He had final authority to accept or reject the recommendations. By letter of September 27, he wrote Mr. Klaus, announcing his determination to accept the grievance examiner's findings and recommendations, and instructing Mr. Klaus that arrangements for review and discussion of the forms should be made through the District Personnel Officer. A copy of this letter was received by the District Director on October 1.

Meanwhile, much had happened by way of apparent implementation of grievance examiner Johnson's recommendations at the lower level of the Pittsburgh Office. On September 6, Mr. Klaus received his copy of Mr. Johnson's findings and recommendations. While the evidence is confusing as to precisely what happened next, it is undisputed that Mr. Sam Simon, his former supervisor who had engaged in the original counselling, approached Klaus for purposes of showing him the forms and discussing them. Mr. Simon had been told by Mr. Klaus' then-supervisor, Mr. Herbet Joseph, that he should counsel Mr. Klaus, as he had made the original evaluations. Mr. Joseph provided Mr. Simon with the last two pages of the grievance examiner's decision, attached to which was a yellow buckslip from Mr. Joseph to Mr. Leo Nancy, the Respondent's labor relations specialist. The yellow slip, dated September 14, indicated that Mr. Nancy would discuss with the District Director Mr. Klaus' request that he be shown the Form 4321. While it is not clear whether the Regional Commissioner's decision was ever conveyed prior to receipt of his letter on October 1, it is clear from the testimony of supervisors Simon and Joseph that instructions came down either from the District Director's Office or the Personnel Office that the decision had been made to carry out the grievance

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<sup>1/</sup> This, notwithstanding that the provisions of the FPM in evidence (Exhibit No. 4, an attachment to Assistant Secretary's Exhibit No. 1) plainly state that an employee is not entitled to see a supervisory report on his potential for higher level or different work.

examiner's recommendations. Accordingly, Mr. Simon contacted Mr. Klaus for purposes of arranging a meeting to show him the forms and discuss them with him. A meeting was scheduled for September 19.

Mr. Klaus came to the meeting with the designated Union representative, Mr. Robert Renshaw, and requested the right to be represented.<sup>2/</sup> Mr. Simon took the position that the meeting was to be a "counselling session" between supervisor and subordinate, and that he did not think the presence of a representative was authorized. They agreed that Mr. Simon would verify the correctness of his position and have an answer by September 24.

The parties met again on September 24. Mr. Simon refused to permit Mr. Renshaw to be present while the Form 4321 was shown to Mr. Klaus. Mr. Klaus contended that the discussions sought were merely a continuation of his grievance, and since Mr. Renshaw had represented him, he should be present. Mr. Klaus or his representative then requested that a copy of the Form 4321 be provided him when the discussions took place. Mr. Simon refused, and was then asked whether Mr. Klaus could make a handwritten copy when he was looking at it. Mr. Simon said he would check this out and have an answer by September 26. His notes (Respondent Exhibit 4) indicate he sought such advice and that he was informed by Mr. Nancy, who contacted the Assistant District Director, that Mr. Klaus should receive a copy. A meeting was then scheduled for October 1, with the understanding a copy of Form 4321 was to be made available.

Mr. Klaus then, in his words, "reluctantly" met with Mr. Simon without Union representation, on October 1, and was given copies of the evaluation forms and counselled with respect to the need for improving his communication skills. Mr. Simon made a number of specific suggestions as to available training in effective speaking and leadership.

#### Contentions of the Parties

The Union argues that Respondent violated Sections 19(a)(1) and (6) of the Order when it refused to allow Union representative Renshaw to be present during formal discussion of a grievance, thus denying the Union and the employees rights secured by Section 10(e). It views the meeting which management labels a "counselling session" as in fact an integral part of the grievance procedure--the implementation of the grievance examiner's recommended disposition. It relies heavily on the Assistant

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<sup>2/</sup> Mr. Renshaw had represented Mr. Klaus throughout the processing of his grievance.

Secretary's decision in U. S. Department of the Army, Fort Wainwright, Alaska, A/SLMR No. 278.

Respondent's defenses are manifold, and can perhaps be best set forth by quoting from its brief:

"In Conclusion, the meetings of September 19 and 24 did not violate the Executive Order since they either were informal in nature and not concerned with the grievance or Mr. Klaus was, in fact, accompanied by his Union Representative. The meeting of October 1, 1973, was not held in violation of the Order since it was an informal counselling session which could have no impact on other employees of the bargaining unit. Furthermore, the discussion was not concerned with grievances processed under a negotiated procedure, personnel policies or procedures or other matters affecting the working conditions of other bargaining unit employees. No probative evidence has been introduced establishing any anti-union considerations in this matter. Moreover, this entire meeting is beyond the scope of the Complaint, which can no longer be amended, and thus should not even be considered in the case at hand."

"Mr. Klaus was not entitled under any provision of the Executive Order to a Union Representative at a counselling session which may have been the by-product of a grievance processed under agency grievance procedure unilaterally established by the Respondent. The Complainant has never established that it has been accorded exclusive recognition by the agency, without which the rights ensuing from section 10(e) of the Order would be inapplicable. Nevertheless, the Assistant Secretary decisions interpreting section 10(e) establish that such provisions do not entitle the Union to representation at informal meetings, such as counselling sessions, nor at meetings concerning grievances processed under an agency established procedure when such meetings would have no affect on the general working conditions of other bargaining unit employees."

Discussion and Conclusions

The Assistant Secretary has held that discussions with an employee concerning matters raised in a grievance filed under an agency's grievance procedure constitute formal discussions within the meaning of Section 10(e), and that denial of an opportunity for the exclusive representative to be present at such discussions is therefore violative of Sections 19(a)(1) and (6).<sup>3/</sup> He has also held that Section 10(e) confers on employees a concomitant right to choose the exclusive representative as their representative in "formal discussions," and that denial of such right is violative of Section 19(a)(1).<sup>4/</sup>

Thus, on the facts of this case, it is clear that Mr. Klaus had a right to Union representation at the meetings of September 19 and 24, and October 1, and that the Union had a right to be present during discussions directed by the grievance examiner, unless there is merit to the argument that the grievance process had terminated with the Agency's acceptance of the grievance examiner's decision, and that what followed was a mere "counselling session" devoid of ramifications beyond Mr. Klaus' individual predicament. Acceptance of the first part of this argument, as a naked proposition, would require the conclusion that the conceded right of an exclusive bargaining representative to be present, and a grievant's right to such representation throughout all prior stages of the grievance process, was terminated precisely at the most crucial stage of that process - implementation of the award. Nowhere in the Order or the cases relied upon by Respondent do I find warrant for its assertion that effectuation of a grievance examiner's recommendation is a mere byproduct of the grievance procedure, somehow divorced from that process in terms of representation rights. I reject such an obviously emasculative construction of the rights conferred by Section 10(e).<sup>5/</sup>

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<sup>3/</sup> FAA, National Aviation Facilities Center, Atlantic City, New Jersey, A/SLMR No. 438

<sup>4/</sup> U. S. Department of the Army, Transportation Motor Pool, Ft. Wainwright, Alaska, A/SLMR No. 278

<sup>5/</sup> Cf. Fort Wainwright, A/SLMR No. 278. It is interesting to note that there, as in this case, no merit was found to the gravamen of the grievance, but the agency accepted the presiding official's recommendation that it take action apparently deemed in the circumstances to be constructive, if not remedial.

The second part of that argument is more troublesome, for it is clear that, but for the pending grievance, the discussion which took place here between supervisor and employee would meet the definition of a "counselling sessions" to which no representation rights attach.<sup>6/</sup> The "counselling" which occurred here, as in Texas Air National Guard "did not involve general working conditions and job performance," and related only to "an individual employee's alleged shortcoming." Thus Mr. Klaus was counselled only with respect to his personal developmental needs, as perceived by his immediate supervisor and as they related to his supervisory aspirations. Such discussion had no greater impact on the general working condition of employees in the unit than was the case in Texas Air National Guard, IRS, Mid-Atlantic Center or Great Lakes Program Center, unless such an impact is viewed as deriving, ipso jure, from the associated grievance. In the former case the Assistant Secretary distinguished the Ft. Wainwright decision by noting that there the Chief Administrative Law Judge's conclusion that the discussions were "formal" within the meaning of Section 10(e) was bottomed on his finding "that resolution of the grievance would have a general impact on all employees in the unit." There, resolution of the grievance (EEO Complaint) required job rotation which clearly affected one other employee. In other respects the grounds relied upon by the Chief Administrative Law Judge were very similar to considerations since rejected by the Assistant Secretary as a basis for finding such meetings to be formal.<sup>7/</sup> I am unable to perceive why "precedential value," "long-range ramification," and "ultimate and cumulative effect" were found to be associated with the grievance resolution in Ft. Wainwright and, those same consequences were not found to attend the "counselling" sessions in Texas Air National Guard, Great Lakes Program Center and IRS, Mid-Atlantic Service Center, for it seems to me that the scope, the detail, the procedures and the results of such discussions serve to fashion the law of the

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6/ Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, FLRC No. 74A-11; Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Center, A/SLMR No. 419; Internal Revenue Service, Mid-Atlantic Service Center, A/SLMR No. 421, U. S. Army Headquarters, U. S. Army Training Center, Ft. Jackson, South Carolina, A/SLMR No. 242.

7/ In this respect, see particularly the Administrative Law Judge's analysis of the May 9 meeting, at pages 30 and 31, in FAA, A/SLMR No. 438.

shop which governs the working lives of unit employees. While the Assistant Secretary has rejected such a rationale as a basis for finding "counselling" to be formal in the absence of a pending grievance, the fact that he distinguished Texas Air National Guard from Ft. Wainwright by noting that the latter involved resolution of a grievance which had a general impact on all unit employees suggests that the discussions in that case were not found to be formal in nature simply because they were concerned with the subject matter of a grievance. This in turn suggests the possibility that general impact on unit employees may be required in addition to the presence of a related grievance.

In Texas Air National Guard the Assistant Secretary, in concluding the discussions were informal, first observed that they did not relate to the processing of a grievance. Similarly in Great Lakes Program Center, he noted that the "performance Interview" at issue did not include consideration or discussion of the three then pending grievances of the affected employee. It would appear then, that the existence of a grievance is indispensable to a finding that a counselling session between an employee and his immediate supervisor constitutes a formal discussion. Whether such discussion must otherwise and independently concern a subject-matter having broad impact on others in the unit remains to be answered. I would be inclined to the construction of Section 10(e) as defining any discussion concerning a grievance as formal by its very nature. Its literal language is not helpful, as it grants the exclusive representative the right to be present at formal discussions "concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." Thus it describes the subject matter of discussions which must be open to the union, but does not tell us what formal discussions are. I think the purposes of the Order can best be realized if any matter grieved about is deemed to be of such importance to all unit employees and their representative as to constitute any discussion about that matter formal. It is, of course, entirely possible to hold the discussions in this case were personal and informal, for reasons already stated. To do so however, would impose upon the parties who must live under the Order the requirement that the impact and ramifications of any such discussions be rather precisely measured against a sophisticated and ever-enlarging body of law, before day-to-day decisions on representation rights are made. In addition, while the Assistant Secretary has rejected the "law of the shop" approach where there was no grievance, it cannot be gainsaid that the law of the shop is formally laid down through the disposition of grievances. Their consequences directly affect all employees and the Union has a very large and, it seems to me, legitimate interest in the process by

which they are handled. I therefore conclude that any discussion concerning a grievance is formal within the meaning of Section 10(e). As Ft. Wainwright held that Section 10(e)'s reference to "discussions...concerning grievances" encompasses any discussion having as its purpose effectuation of the grievance award, it follows that Mr. Simon's discussions with Mr. Klaus on September 19 and 24, as well as October 1 were formal, and the exclusion of the Union was violative of Section 19(a)(1) and (6) for reasons explicated in the first paragraph of this discussion.<sup>8/</sup>

There remains for treatment one threshold argument advanced by Respondent: that there is no proof of Complainant's status as exclusive bargaining representative. The complaint contains no such allegation, nor was such evidence adduced at the hearing. However, the rights Complainants claimed to have been violated can only derive from such status, and at no time was such status put in issue until the brief. On the contrary, the Response to the complaint proceeded on that assumption and nevertheless argued that the rights ordinarily flowing to the exclusive representative were inapplicable in the particular circumstances of this case. Thus, in the main, it defended on the grounds that at the time of the September meetings no binding decision calling for counselling had been made, and that informal counselling did not require that the Union have an opportunity to be represented. Thus the case was litigated as if the Union was, in fact, the exclusive bargaining representative, and no evidence was presented casting doubt on such unquestioned status. Respondent does not now attempt to come forward with any such evidence, but merely alleges that the Union failed to prove a status which had never been questioned at any prior point in the proceeding and which was an absolutely essential element of the claimed violations. In such circumstances Respondent may not now defeat that claim simply by pointing to the Union's failure to prove a point never placed in issue.

Recommendations

Having found that Respondent has violated Sections 19(a)(1) and (6) of the Executive Order, I recommend that the Assistant Secretary adopt the following Order, designed to effectuate the purposes of Executive Order 11491, as amended.

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<sup>8/</sup> Respondents arguments about the lawfulness of the September meetings because the Union representative was present, and the failure of the Complaint to attack the October 1 session are rejected. It is clear that the discussions planned for the earlier sessions did not ensue because of Respondents refusal to go forward in the presence of the Union representative.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U. S. Department of the Treasury, Internal Revenue Service, Pittsburgh District, shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving the National Treasury Employees Union, Chapter 34, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) Refusing the request made by Mr. Francis Klaus to be represented by the representative for the Collection Division of Chapter 34, National Treasury Employees Union, or any other representative designated by said labor organization, at any formal discussion between management and Mr. Francis Klaus, convened for the purpose of discussing the implementation of a grievance decision.

(c) Interfering with, restraining, or coercing Mr. Francis Klaus or any other employee in the bargaining unit by denying them the right to be represented by the individual designated to act as a representative of the National Treasury Employees Union, Chapter 34, at any meeting or formal discussion between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

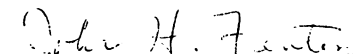
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Notify the National Treasury Employees Union, Chapter 34, of and give it the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit by its own chosen representative.

(b) Post at its facility at U. S. Department of the Treasury, Internal Revenue Service, Pittsburgh District, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor-Management Relations. Upon

receipt of such forms, they shall be signed by the District Director, United States Department of the Treasury, Internal Revenue Service, Pittsburgh District, and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

  
JOHN H. FENTON  
Administrative Law Judge

Dated: October 24, 1974  
Washington, D. C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED, LABOR RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving National Treasury Employees Union, Chapter 34, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT refuse the request made by Mr. Francis Klaus to be represented by the representative for the Collection Division, National Treasury Employees Union, Chapter 34, or any other representative designated by said labor organization, at a formal discussion between management and Mr. Francis Klaus convened for the purpose of discussing the implementation of a grievance decision.

WE WILL NOT interfere with, restrain, or coerce, Mr. Francis Klaus or any other employee in the bargaining unit by denying them the right to be represented by the individual designated to act as a representative of the National Treasury Employees Union, Chapter 34, at any meeting or formal discussion between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_



March 31, 1975

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, U. S. Department of Labor, whose address is: Room 15440, 3535 Market Street, Philadelphia, Pennsylvania, 19104.

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

BARKSDALE AIR FORCE BASE,  
BOSSIER CITY, LOUISIANA  
A/SLMR No. 499

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, Local 2000, AFL-CIO, (AFGE) seeking essentially the clarification of the status of certain "working leader" employee job classifications in the existing exclusively recognized bargaining unit. Contrary to the AFGE, the Activity contended that the employees in each of the disputed classifications were supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit.

Noting the duties and responsibilities related to the employee positions in contention which included the selection of new employees, the evaluation of the performance of other employees, and the making of effective recommendations with regard to personnel matters concerning the members of their crews, the Assistant Secretary found that the employees in certain of the classifications had the indicia of supervisory authority within the meaning of Section 2(c) of the Order, and therefore, concluded that such classifications should be excluded from the existing unit. With regard to those classifications in which the incumbent was found to be a supervisor based solely on the authority to evaluate the performance of another employee, the Assistant Secretary, noting that as Executive Order 11838, which amended Executive Order 11491, deletes such criterion from the definition of supervisor, concluded that such individuals would not be considered supervisors following the effective date of Executive Order 11838.

With respect to other classifications, the Assistant Secretary found that the evidence was insufficient to establish that the authority vested in the individuals in these classifications with respect to the employees in their crews was other than of a routine nature and dictated by established procedures. Accordingly, the Assistant Secretary concluded that these individuals did not possess the indicia of supervisory authority within the meaning of Section 2(c) of the Order, and determined that their classifications should be included in the existing unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

BARKSDALE AIR FORCE BASE,  
BOSSIER CITY, LOUISIANA

Activity

and

Case No. 64-2380(CU)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2000, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

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

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner, American Federation of Government Employees, Local 2000, AFL-CIO, herein called AFGE, filed a petition for clarification of unit in the subject case seeking clarification of certain classifications of employees. Specifically, the AFGE seeks to clarify the status of employees who are in the following classifications: Aircraft Electrician, WG-2892-12; Egress and Jettison Systems Mechanic, WG-6659-11; Aircraft Hydraulic Systems Mechanic, WG-8268-12; Aircraft Mechanic, WG-8852-12; Aircraft Maintenance Analysis Technician, GS-0301-9; Military Personnel Technician, GS-0204-7; Medical Administrative Specialist, GS-0301-7; Aircraft Instrument and Control Systems Mechanic, WG-3355-12; Aircraft Armament Systems Mechanic, WG-6652-12; Turbine Powered Systems Repairer, WG-8274-12; Sheet Metal Mechanic (Aircraft), WG-3806-12; Supply Technician, GS-2005-6; Welder Leader, WL-3703-10; Painter Leader, WL-4102-9; Boiler Plant Equipment Mechanic Leader, WG-5309-10; Electrician (High Voltage) Leader, WL-2810-10; Air Conditioning Equipment Mechanic Leader, WL-5306-10; Mason Leader, WL-3603-10;

The Activity contends that the employees in the foregoing classifications are supervisors within the meaning of the Order and, therefore, should be excluded from the unit. Basically, the employees in these classifications are working leaders whose working time with other employees in their respective crews, performing similar functions, ranges from approximately 20 percent to 90 percent. In addition, they spend some time in training the members of their respective crews, instructing them in safety matters and securing the necessary materials and parts required to do the job.

The record indicates that the AFGE was granted recognition on January 27, 1966, as the exclusive bargaining representative of all civilian employees paid from appropriated funds of the Barksdale Air Force Base and the on-Base tenant organizations, excluding supervisors and certain other categories of employees. Thereafter, the parties negotiated several agreements. There are approximately 894 employees in the exclusively recognized unit.

The Activity is operated by the Strategic Air Command, United States Air Force (USAF), and is under the administration of the Second Bomb Wing, which has jurisdiction over 17 major subordinate organizations, including the USAF Hospital and the Second Combat Support Group. The mission of the Activity is to maintain combat readiness with respect to both men and aircraft, while also providing combat support functions which furnish maximum operational support for the combat missions. There are 20 tenant units on the Base.

DISPUTED JOB CLASSIFICATIONS

Air Conditioning Equipment Mechanic Leader, WL-5306-10

There are three employees designated as Air Conditioning Equipment Mechanic Leader, WL-5306-10, in the Base Civil Engineering Division, Operations/Maintenance Branch, Mechanical Section, Refrigeration and Air Conditioning Unit. Each of the three employees works with a crew of three to five air conditioning and refrigeration servicers. The record reveals that the incumbents do not hire, transfer, suspend, lay-off, recall, promote, discharge, reward, or discipline other employees, or evaluate their performance. Further, the evidence does not establish that they make effective recommendations in this regard.

1/ Inasmuch as the evidence establishes that there are no employees employed presently in the classifications of Carpenter Leader, WL-4607-9, and Military Personnel Clerk (Typing), GS-0204-5, I will neither include nor exclude these classifications with respect to the unit sought to be clarified.

The record also reflects that any assignment or direction of work which they may give to other employees is within established guidelines and is in the nature of a more experienced employee assisting a less experienced employee.

Under these circumstances, I find that the evidence is insufficient to establish that the authority vested in the Air Conditioning Equipment Mechanic Leaders, WL-5306-10, or the actions taken by them, are other than routine in nature and dictated by established procedures. Accordingly, I conclude that the Air Conditioning Equipment Mechanic Leaders, WL-5306-10, are not supervisors within the meaning of Section 2(c) of the Order and, therefore, should be included in the unit. 2/

Military Personnel Technician, GS-0204-7

The employee in this classification is located in the Quality Control Section of Military Personnel, which is responsible for recruiting reservists for the Air Force reserve group, and for all record keeping and related matters with regard to the functional responsibilities of quality control. The evidence establishes that the Military Personnel Technician, GS-0204-7, presently employed, was recently promoted and has not made any recommendations to date to his supervisor with regard to personnel matters concerning the employee in his Section. Nor has he prepared any referrals for consideration for hire or any personnel evaluations.

Under the current circumstances, I find that the evidence presented is insufficient to establish that the incumbent possesses supervisory authority within the meaning of Section 2(c) of the Order. Accordingly, I conclude that the Military Personnel Technician, GS-0204-7, is not a supervisor within the meaning of Section 2(c) of the Order and, therefore, should be included in the unit.

Aircraft Instrument and Control Systems Mechanic, WG-3355-12

The employee in this classification is located in the Aircraft Maintenance Division, Avionics Branch, Instrument Section, which is involved in aircraft maintenance. The record reveals that the Aircraft Instrument and Control Systems Mechanic, WG-3355-12, works with one other employee. He has not prepared any referrals for consideration for hire, evaluated the performance of the other employee with whom he works, or adjusted any grievances. Although the incumbent testified that

2/ In support of its position that employees in all of the above noted classifications are supervisors, the Activity submitted the job descriptions and certifications of these classifications. As the record reflects that the actual job descriptions for the disputed job classifications are, in many respects, in direct contradiction to the testimony of the employees involved, I find such certifications to be of limited probative value, when in conflict with the testimony of persons having actual knowledge of the work performed.

he interviewed a potential hire and recommended him for the job, no evidence was presented that such recommendation was effective.

Under the circumstances, I find that the evidence presented is insufficient to establish that the authority vested in the Aircraft Instrument and Control Systems Mechanic, WG-3355-12, or actions taken by him with respect to the employee with whom he works, are dictated by other than established procedures, and are other than routine in nature. Accordingly, I conclude that the Aircraft Instrument and Control Systems Mechanic, WG-3355-12, is not a supervisor within the meaning of Section 2(c) of the Order, and that the employee in this classification should be included in the unit.

Electrician (High Voltage) Leader, WL-2810-10; Painter Leader, WL-4102-9; Plumber Leader, WL-4206-9; Mason Leader, WL-3603-10; Welder Leader, WL-3703-10, and Boiler Plant Equipment Leader, WL-5309-10

The employees in the above-named classifications are employed in the Base Civil Engineering Division, Operations/Maintenance Branch, Electrical Section, Structures Section, and Mechanical Section.

The Electrician (High Voltage) Leader, WL-2810-10, whose job function involves working with high lines, transformers, and overhead switches of the outside electrical facilities, works with a crew that varies in size, but usually includes three or four employees. The Painter Leader, WL-4102-9, who is engaged in the performance of inside and outside painting of buildings, has four or five employees in his crew. The Plumber Leader, WL-4206-9, who is engaged in the maintenance and repair of the fire systems at the Base, has a crew that varies according to the workload, but normally has a complement of two employees. The job functions of the Mason Leader, WL-3603-10, who works with one employee, include the performance of carpentry and masonry work in the construction and repair of wood and masonry buildings. The Welder Leader, WL-3703-10, who is engaged in the installation, repair, and manufacture of ducts for air conditioning, and the like, works with a crew of one welder and five military personnel. The Boiler Plant Equipment Mechanic Leader, WL-5309-10, who is engaged in the repair and maintenance of the boiler, air compressor, and air conditioning equipment at the Base hospital, works with a crew of four employees.

The record reveals that the employees in the above-named classifications do not grant leave, hire, transfer, suspend, lay-off, recall, promote, discharge, reward, discipline, or prepare performance evaluations of other employees, nor do they make recommendations to their supervisors in this regard. Further, the record reflects that foremen are frequently at the work sites, are in daily contact with the Leaders,

are responsible for all administrative matters, and are familiar with the work of the majority of the employees in the crews. The evidence establishes that the work which is to be performed by these individual Leaders is initiated through the planning division and the controller, and that the work standards involved are preestablished and can only be changed by the leaders in emergency situations.

Under these circumstances, I find that the evidence is insufficient to establish that the authority vested in the individuals in the above noted classifications with respect to the employees in their respective crews requires the exercise of independent judgment, or that the actions taken by them are other than of a routine nature, dictated by established procedures or directed by higher officials. Accordingly, I conclude that the Electrician (High Voltage) Leader, WL-2810-10; Painter Leader, WL-4102-9 (Gordon); Plumber Leader, WL-4206-9; Mason Leader, WL-3603-10; Welder Leader, WL-3703-10; and Boiler Plant Equipment Mechanic Leader, WL-5309-10 (Wooden), are not supervisors within the meaning of Section 2(c) of the Order, and, therefore, should be included in the unit. 3/

Aircraft Electrician, WG-2892-12; Egress and Jettison Systems Mechanic, WG-6659-11; Aircraft Hydraulic Systems Mechanic, WG-8268-12; Aircraft Mechanic, WG-8852-12; Turbine Powered Systems Repairer, WG-8274-12, and Sheet Metal Mechanic (Aircraft), WG-3806-12

The employees in these six classifications are located in the Air Force Reserve (AFRES), 917th Tactical Fighter Group, Aircraft Maintenance Division, Field Maintenance Branch, Aerospace Systems Section, which is involved in the maintenance of aircraft. The incumbents work in various shops within the Aerospace Systems Section, under one foreman and work with crews of one or two employees. The record reveals that these employees make recommendations with regard to personnel matters concerning the members of their respective crews. Thus, they prepare and sign performance evaluation appraisals with regard to their crew members. In this latter regard, the evidence establishes that their foreman "endorses" their recommendations.

Under these circumstances, and noting that the evidence establishes that the employees in the above noted classifications effectively evaluate the performance of other employees, or make effective recommendations in this regard, I find that the Aircraft Electrician,

3/ Although the record indicates that there is an additional employee other than Merce B. Gordon in the Painter Leader, WL-4102-9, classification, there is insufficient evidence to indicate whether such employee has the same duties as Gordon. Further, although the record indicates that there are two additional employees in the Boiler Plant Equipment Mechanic Leader, WL-5309-10, classification other than Gora Wooden, the evidence is insufficient to determine their duties and responsibilities. I, therefore, shall not make any findings with regard to the eligibility of these additional employees.

WG-2892-12; Egress and Jettison Systems Mechanic, WG-6659-11; Aircraft Hydraulic Systems Mechanic, WG-8268-12; Aircraft Mechanic, WG-8852-12; Turbine Powered Systems Repairer, WG-8274-12, and Sheet Metal Mechanic (Aircraft), WG-3806-12, are supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit. 4/

Medical Administrative Specialist, GS-0204-7 and Supply Technician, GS-2005-6

At the hearing, the parties stipulated that the existing position descriptions with respect to the employees in the above classifications were authentic and accurate as to their duties and responsibilities. With regard to the Medical Administrative Specialist, GS-0204-7, the record reveals that he has one employee in his office, that he has prepared a referral for consideration for hire of an employee who was selected, and that he has prepared and signed performance evaluation appraisals of another employee.

The position description of the classification of the Supply Technician, GS-2005-6, states that an employee in this classification supervises one employee, selects new employees, provides training, evaluates performance, establishes work standards, approves leave, and recommends promotion or other personnel management actions to his supervisor. The record reflects that the incumbent has made an effective referral for consideration for hire in that the employee so recommended was selected as a member of the incumbent's crew, and that he has prepared and signed the evaluation appraisal of that employee.

Under these circumstances, I find that the evidence establishes that the employees in the above noted classifications have the indicia of supervisory authority within the meaning of Section 2(c) of the Order. Accordingly, I conclude that the Medical Administrative Specialist, GS-0204-7, and the Supply Technician, GS-2005-6, should be excluded from the unit.

Aircraft Maintenance Analysis Technician, GS-0301-9

This position is located in the AFRES, 917th Tactical Fighter Group, Aircraft Maintenance Division, Maintenance Analysis Branch. The record reflects that the employee in this classification has another employee working with him in the Branch who he selected and whose performance he has evaluated.

4/ It should be noted that in accordance with Executive Order 11838, which amended Executive Order 11491, "to evaluate their performance" has been deleted from the Section 2(c) definition of supervisor. Accordingly, following the effective date of Executive Order 11838, the above noted incumbents would not be considered to be supervisors based solely on such a criterion.

Under the circumstances, and noting that the record reflects that the incumbent has the authority to select and evaluate effectively the employee assigned to him, or to make effective recommendations in this regard, I conclude that the Aircraft Maintenance Analysis Technician, GS-0301-9, is a supervisor within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit.

Aircraft Armament Systems Mechanic, WG-6652-12

The employee in this classification is located in the Aircraft Maintenance Division, Munitions Management Branch, Gun Services Section, whose function is to maintain weapons in good repair. He has two employees working with him in his crew and provides the members of his crew with technical direction. The record reveals that when a vacancy occurred in his crew, the incumbent recommended that an employee in the loading department be transferred to fill that vacancy. Pursuant to this recommendation, the employee involved was transferred. Thereafter, the incumbent prepared an appraisal evaluation of this employee.

Under these circumstances, and noting that the record reflects that the employee in the above noted classification has the authority to recommend effectively the transfer of other employees and to evaluate their performance, I conclude that the Aircraft Armament Systems Mechanic, WG-6652-12, is a supervisor within the meaning of Section 2(c) of the Order, and, therefore, should be excluded from the unit. 5/

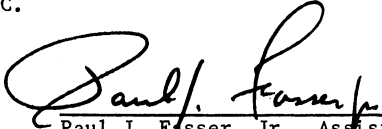
ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the American Federation of Government Employees, Local 2000, AFL-CIO, on January 27, 1966, at the Barksdale Air Force Base, Bossier City, Louisiana, be, and hereby is clarified by including in said unit the positions classified as: Air Conditioning Equipment Mechanic Leader, WL-5306-10; Military Personnel Technician, GS-0204-7; Aircraft Instrument and Control Systems Mechanic, WG-3355-12; Electrician (High Voltage) Leader, WL-2810-10; Painter Leader, WL-4102-9 (Gordon); Plumber Leader, WL-4206-9; Mason Leader, WL-3603-10; Welder Leader, WL-3703-10; and Boiler Plant Equipment Mechanic Leader, WL-5309-10 (Wooden); and by excluding from said unit the positions classified as: Aircraft Electrician,

5/ At the hearing, the parties stipulated that the testimony of the above employee regarding his job functions and his working relationships with his supervisor and his subordinates would reflect essentially the same working conditions of one other Aircraft Armament Systems Mechanic, WG-6652-12, (Alvie J. Barlow). As there is no evidence in the record to the contrary, I shall exclude also that employee from the existing unit.

WG-2892-12; Egress and Jettison Systems Mechanic, WG-6659-11; Aircraft Hydraulic Systems Mechanic, WG-8268-12; Aircraft Mechanic, WG-8852-12; Turbine Powered Systems Repairer, WG-8274-12; Sheet Metal Mechanic (Aircraft), WG-3806-12; Medical Administrative Specialist, GS-0204-7; Supply Technician, GS-2005-6; Aircraft Maintenance Analysis Technician, GS-0301-9, and Aircraft Armament Systems Mechanic, WG-6652-12.

Dated, Washington, D. C.  
March 31, 1975

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

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

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

FIFTH U.S. ARMY,  
CAMP MCCOY, WISCONSIN,  
102d ARMY RESERVE COMMAND (ARCOM),  
AREA MAINTENANCE SUPPORT ACTIVITY,  
SHOP 44  
A/SLMR No. 500

FIFTH U.S. ARMY,  
CAMP MCCOY, WISCONSIN,  
102d ARMY RESERVE COMMAND (ARCOM),  
AREA MAINTENANCE SUPPORT ACTIVITY,  
SHOP 44

Activity

and

Case No. 50-11124(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER

This case involves a representation petition filed by the American Federation of Government Employees, AFL-CIO (AFGE), for a unit of all civilian employees assigned to Area Maintenance Support Activity Shop 44, Cahokia, Illinois, one of five such shops in the 102d ARCOM. The AFGE contends that the petitioned for unit is appropriate because it is the only shop in the 102d ARCOM which maintains aircraft, it is the only shop of the 102d ARCOM located in Illinois, and it operates independently from the other shops in the 102d ARCOM. The Activity maintains that the petitioned for unit is inappropriate because it would divide and fragment the 102d ARCOM.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Carolyn R. Cernea. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Upon the entire record in this case, including briefs submitted by the Activity and the Petitioner, the American Federation of Government Employees, AFL-CIO, herein called AFGE, the Assistant Secretary finds:

The record revealed that all of the shops of the 102d ARCOM are supervised by the Assistant Chief of Staff for Logistics of the 102d ARCOM and that all have a common mission of providing equipment maintenance support for U.S. Army Reserve units. Moreover, the personnel policies, practices, and procedures of all civilian elements of the 102d ARCOM, including Shop 44, are centralized in the Civilian Personnel Office, Camp McCoy, Wisconsin. Further, many of Shop 44's employees perform administrative and other functions which are also performed by employees with similar job classifications who work for other segments of the 102d ARCOM. In addition, there have been a number of transfers and details of employees between Shop 44 and other segments of the 102d ARCOM, and Shop 44 works with some of the other shops of the 102d ARCOM in the maintenance of the 102d ARCOM's equipment.

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

2. The AFGE seeks an election in a unit composed of, "All Wage Board Employees and General Schedule employees of the 102d USAR Flight Facility, Area Maintenance Support Activity (A) #44, 1400 Upper Cahokia Road, Cahokia, Illinois 62206. Excluded: Professional employees, confidential employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in Executive Order 11491, as amended." 1/

The AFGE contends that the petitioned for unit is appropriate because Shop 44 performs a unique function and operates independently from other shops in the 102d U.S. Army Reserve Command (ARCOM) and because it is the only shop of the 102d ARCOM in Illinois. The Activity, on the other hand,

1/ It is not clear from the unit description whether or not the petitioned for unit is intended to encompass employees of Shop 44 and the Flight Facility, both of which are located in Cahokia, Illinois, or only the eligible employees of Shop 44.

The Assistant Secretary found that the petitioned for unit did not constitute a distinct and homogenous grouping of the Activity's employees. He found that neither functionally nor administratively does the claimed unit reflect that the employees therein share a separate and distinct community of interest from certain other employees of the 102d ARCOM. Additionally, he concluded that such a unit would, in effect, divide and fragment the 102d ARCOM solely on the basis of geographic location and the aircraft maintenance function of the petitioned for unit, and could not reasonably be expected to promote effective dealings and efficiency of agency operations.

Accordingly, he ordered that the petition be dismissed.

asserts that the petitioned for unit is inappropriate because it would fragment the 102d ARCOM and would not promote effective dealings and efficiency of agency operations. In this regard, the Activity contends that the claimed employees share a clear and identifiable community of interest with all other employees of the 102d ARCOM inasmuch as all employees of the 102d ARCOM have similar and interdependent functions, and are covered by the same personnel policies, practices, and procedures. Further, it asserts that the employees of the 102d ARCOM have the same overall supervision and mission, and that units similar to that which is sought herein have previously been found to be inappropriate.

The 102d ARCOM is commanded by a Major General who reports to the Commander, Fifth U.S. Army, Fort Sam Houston. Its Headquarters are located in St. Louis, Missouri, and it is responsible for 58 military units and 17 U.S. Army Reserve Centers in Southern Illinois and Missouri. There are some 198 civilian employees assigned to these units and centers, including 119 General Schedule employees and 79 Wage Board employees. All of the 102d ARCOM employees are serviced by the same Civilian Personnel Office, located at Camp McCoy, Wisconsin. In this regard, all of the employees of the 102d ARCOM are subject to the same grievance and appeals procedures and personnel regulations, and they share the same merit promotion opportunities. Further, employees of the 102d ARCOM who are assigned to the St. Louis, Missouri area, including the employees of Shop 44, are subject to the same reduction-in-force procedures. 2/

The record reveals that Shop 44, which is located in Illinois, is one of five area maintenance support activity shops in the 102d ARCOM, whose overall mission is to provide equipment maintenance service for the 102d ARCOM. 3/ All of the maintenance support activity shops are under the supervision of the Assistant Chief of Staff for Logistics of the 102d ARCOM, although there is a supervisor and foreman located at Shop 44. The principal responsibility of Shop 44 is to provide maintenance service for aircraft. It is located in the same building with the 281st Aviation Company of the 102d ARCOM whose helicopters are the primary maintenance responsibility of Shop 44. Although Shop 44 is the only shop in the 102d ARCOM whose chief responsibility is aircraft maintenance, the record reveals that it works with other shops of the 102d ARCOM in maintenance of the ARCOM's equipment. Thus, Shop 44 shares responsibility for maintenance of its ground vehicles with Shop 55 of the 102d ARCOM in St. Louis, Missouri. Also, several of the other shops in the 102d ARCOM assist Shop 44 in armament repairs and in the acquisition of supplies. The record reveals that although most of Shop 44's 35 employees are aircraft mechanics or aircraft inspectors, Shop 44 also employs several administrative, supply, and electronics technicians whose duties are similar to the duties of employees having similar classifications in other elements of the 102d ARCOM. The record shows also that a number of employees have

2/ The record reveals that segments of five other ARCOMS are located in the St. Louis, Missouri, area and that the employees of these ARCOMS are subject to the same reduction-in-force procedures as are the employees of the 102d ARCOM in the St. Louis area.

3/ The four other shops are located in Missouri.

been permanently transferred or temporarily detailed between Shop 44 and other segments of the 102d ARCOM, that the employees of Shop 44 are trained in administrative matters by the same instructors who conduct such training throughout the 102d ARCOM, and that Shop 44 and the other shops of the 102d ARCOM participate in frequent staff meetings wherein mutual support efforts and the training of Army Reserve personnel are discussed.

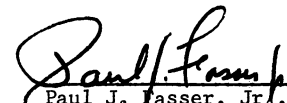
Based on the foregoing circumstances, I find that the petitioned for unit does not constitute a distinct and homogenous grouping of the Activity's employees. Thus, the record shows that the employees in the claimed unit are only some of those in the 102d ARCOM performing related functions and that many of the employees in the unit sought perform duties similar to those performed by other employees of the 102d ARCOM. Further, the evidence establishes that the maintenance support shops of the 102d ARCOM, including Shop 44, assist one another in their common overall mission of equipment maintenance for the 102d ARCOM and that all of the maintenance support shops of the 102d ARCOM are under the direction of the Assistant Chief of Staff for Logistics of the 102d ARCOM. It was noted also that personnel activities of the 102d ARCOM are centralized in the Civilian Personnel Office, Camp McCoy, Wisconsin, that there have been a number of permanent and temporary transfers of employees between the unit sought and other segments of the 102d ARCOM, and that the employees in the petitioned for unit share the same area of consideration for reduction-in-force purposes with other segments of the 102d ARCOM and other ARCOMS. Thus, neither functionally nor administratively does the claimed unit reflect that the employees therein share a separate and distinct community of interest from certain other employees of the 102d ARCOM. Therefore, in my view, the unit proposed by the AFGE would, in effect, divide and fragment the 102d ARCOM solely on the basis of geographic location and the aircraft maintenance function performed by certain employees within the petitioned for unit, and could not reasonably be expected to promote effective dealings and efficiency of agency operations. 4/ Nor, in my view, would a contrary result be required if the petitioned for unit was intended to include personnel of the Flight Facility at Cahokia, Illinois, in addition to the employees of Shop 44.

Accordingly, I shall dismiss the petition herein.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 50-11124(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
March 31, 1975

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

4/ See First U.S. Army, 83rd Army Reserve Command (ARCOM), U.S. Army Support Facility (Fort Hayes), Columbus, Ohio, A/SLMR No. 35; Department of the Army, Headquarters, Camp McCoy, Wisconsin, St. Louis Metropolitan Area, A/SLMR No. 166; and Fifth U.S. Army, Camp McCoy, Wisconsin, 86th Army Reserve Command (ARCOM), Area Organizational Maintenance Shop G-49, A/SLMR No. 244.

March 31, 1975

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

DEPARTMENT OF HEALTH, EDUCATION  
AND WELFARE, SOCIAL SECURITY  
ADMINISTRATION, WESTERN PROGRAM  
CENTER, SAN FRANCISCO, CALIFORNIA  
A/SLMR No. 501

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This proceeding involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1122 (Complainant) alleging, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order by instituting a new reassignment plan at its installation without first consulting with the Complainant, the certified exclusive representative of its employees.

As found by the Administrative Law Judge, in response to the Respondent's request for comments and discussion with the Complainant as to the proposed change, the Complainant's Vice President met and discussed the reassignment proposal with the Respondent's Director of Operations, the official responsible for initiating the change, and made a counter proposal as to one aspect of the plan. Thereafter, although the Complainant was under the impression that its counter proposal had been accepted, the Director of Operations, based on a letter received from the Complainant wherein it lauded the Agency for adopting a plan "akin" to that utilized at an earlier date by the Claims Authorization Branch, had the contrary impression that the Complainant was in basic agreement with the Respondent's proposed plan. Subsequently, without any further discussion as to the substance of the plan, the Complainant discussed informally the implementation of the plan with different personnel in the Division of Management. Later, in anticipation of announcing its plan, the Respondent's Director of Operations sought further input, if any, from the Complainant and, upon not hearing anything further from the Complainant, put the plan into effect.

Under these circumstances, the Administrative Law Judge concluded that, although a change in working conditions not to the liking of the Complainant was instituted by the Respondent, the Respondent did engage in prior good faith consultation with the Complainant, received its input on the proposed plan, and solicited additional comments from the Complainant prior to the final announcement of the plan. The Administrative Law Judge concluded further that in the absence of any evidence that the Respondent intentionally misled the Complainant, or of an

obligation imposed by the Order requiring agreement between the parties prior to instituting a change in working conditions upon which there had been prior good faith consultation, the Respondent did not violate Section 19(a)(1) and (6) of the Order. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record, including the Complainant's exceptions and supporting brief and the Respondent's answering brief, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and ordered that the complaint be dismissed.



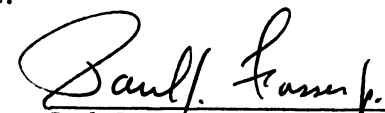
UNITED STATES DEPARTMENT OF LABOR

IT IS HEREBY ORDERED that the complaint in Case No. 70-4290 be, and it hereby is, dismissed.

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION  
AND WELFARE, SOCIAL SECURITY  
ADMINISTRATION, WESTERN PROGRAM  
CENTER, SAN FRANCISCO, CALIFORNIA

Dated, Washington, D. C.  
March 31, 1975

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

Respondent

and

Case No. 70-4290

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 1122,  
SAN FRANCISCO, CALIFORNIA

Complainant

DECISION AND ORDER

On January 8, 1975, Administrative Law Judge Burton S. Sternburg, issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief, and the Respondent filed an answering brief with respect to the Complainant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the Complainant's exceptions and supporting brief and the Respondent's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation that dismissal of the complaint is warranted.



Statement of the Case

In the Matter of:

DEPARTMENT OF HEALTH, EDUCATION AND  
WELFARE, SOCIAL SECURITY ADMINISTRA-  
TION WESTERN PROGRAM CENTER, SAN  
FRANCISCO, CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 1122,  
SAN FRANCISCO, CALIFORNIA

Complainant

Case No. 70-4290

Francis X. Dippel, Esquire  
Social Security Administration  
516 Altmeyer Building, BRSI  
6401 Security Boulevard  
Baltimore, Maryland 21235

For the Respondent

Frank B. James, Esquire  
152 Bonview Street  
San Francisco, California 94110

For the Complainant

Before: BURTON S. STERNBURG  
Administrative Law Judge

REPORT AND RECOMMENDATION

Pursuant to an amended complaint first filed on May 21, 1974, under Executive Order 11491, as amended, by Local 1122, American Federation of Government Employees, hereinafter called the Union, against the Western Program Center, Department of Health, Education and Welfare, Social Security Administration, hereinafter called the Agency or Respondent, a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the San Francisco, California Region on October 2, 1974.

The complaint alleges, in substance, that Respondent violated Sections 19 (a) (1) and (6) of the Executive Order by virtue of its actions in instituting a new reassignment plan at its installation without first consulting with the Union which is the certified representative of its employees.

A hearing was held in the captioned matter on November 26, 1974, in San Francisco, California. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

1. In March of 1973, the Western Program Center effected a reorganization which changed the Program Center from a functional organization into a modular one. The reorganization resulted in five of the then existing six branches being converted into six modules, each of which contained approximately 160 employees. The six modules contained essentially the same types of jobs.
2. Prior to the establishment of the module system, employees were generally allowed, upon request, to transfer from one position to another within the same branch.
3. The claims branch of the Program Center, prior to the reorganization had in effect a plan called "mini-shuffle" which allowed employees on a periodic basis to voluntarily shift from one position to another and thereby change location and immediate supervision. If a particular requested position was not available, the employee retained the option to renege on his or her request and refuse any other transfer offered. Although the Agency attempted to satisfy all requests, the plan or "mini-shuffle" resulted in numerous requests to work positions under certain supervisors and few applications or requests for others.
4. Following the reorganization into modules a number of requests were received by the Division of Operations for transfers within and without the various modules. Such requests were handled individually and informally by Paul Quandt, Director of Operations, and/or the six module managers.

5. On September 17, 1973, apparently because of the increased number of requests for transfer, Quandt issued a memorandum to all module managers wherein he set forth a proposed plan for periodic transfers and requested comments thereon by September 26, 1973. <sup>1/</sup> On the same date, September 17, 1973, Quandt also sent a copy of the memorandum to Carlos Montelaro, President of the Union, and in a covering letter invited both comments and discussion on the proposal at the Union's convenience. The memorandum read in pertinent part as follows:

It seems as though we are receiving more and more requests from our employees to transfer to a different module. Rather than handle these requests on a one-by-one basis, I am proposing that, except in emergency situations, these requests be honored only at periodic intervals, and then all such requests be acted upon at one time. What I have in mind is that every 6 months we make it known to our people that if they desire a reassignment to a different module they let it be known at a particular time. With these requests we would then shuffle those involved to the extent necessary. The approach we should use I believe is that we will honor all requests for reassignments. However, the employees requesting reassignment must accept our decision as to which module they will be assigned to.

6. Pursuant to the invitation in Quandt's covering letter of September 17, 1973, Frank B. James, Executive Vice-President of the Union, met with Quandt on or about September 18 or 19, 1973, and discussed the proposed shuffle for some fifteen or twenty minutes. According to James' uncontroverted testimony, he, James, urged that the proposed shuffle be

<sup>1/</sup> The covering letter to the memorandum proposed to put the plan into effect after the next appraisal period.

identical to the "mini-shuffle" formerly employed in the claims branch whereby employees "were given an option of either moving or not moving, a preference of what supervisor they were going to have, and they would not be forced into assignments under supervisors they didn't wish to work under". Further, according to James, he left the meeting with the "impression" that Quandt would accept his proposal.

7. On September 20, 1973, James sent a letter to Paul Quandt which reads in pertinent part as follows:

We take it that your proposal is in substance a decision to grant to module employees an opportunity every six months to change floors, akin to the Claims Authorization Branch "mini-shuffle", for whatever reasons they may have, even if wholly subjective and that these requests would be honored at such intervals regardless of "merit" as to the reasons.

We laud your decision to treat such problems in such a realistic and sympathetic manner, and feel sure that such a recognition of the intangibles of employee morale will ultimately benefit the installation.

We further take it that this proposal would not in any circumstances represent a change in the established Payment Center policy of agreeing to make immediate reassignment changes in circumstances of hardship or of irreconcilable disputes within an organizational unit.

If our understanding of your proposal is correct, and we will assume it is correct unless we hear from you to the contrary prior to September 26th, the proposal is satisfactory to the Local.

8. Quandt acknowledges meeting with James but does not recall the exact substance of the conversation except that it is his recollection that the meeting involved another subject

not related to the shuffle proposal. Further according to Quandt, he viewed the shuffle plan to be similar to the "mini-shuffle" in the claims department and considered James' letter of September 20, 1973, to constitute agreement with his proposal of September 17, 1973.

9. Sometime subsequent to September 20, 1973, the date of the Union's letter with respect to the shuffle plan, following the "tail-end of the regular monthly meeting", James entered into a conversation with Quandt concerning the effective date of the shuffle plan. Although the specifics of the plan were not discussed, there was general agreement that the plan would not take effect until after the annual employee appraisals were issued.

10. Nothing further of note occurred until sometime in March 1974, following the issuance of the annual appraisals. At such time, James approached Quandt and reminded him that the appraisals were out and that it was time to go forward with the shuffle plan. James further noted to Quandt that he, James, had been engaged in talks with the Director of Management's office with respect to "flexiday" (an experimental plan allowing employees to choose varied working hours) and suggested that the matter of the shuffle be referred to the Director of Management so that the two plans could be tied together. Although no connection whatsoever was shown between the two plans, Quandt indicated that he had no objection.

Following this conversation, James considered the matter of the shuffle as having been shifted to the office of Cummins, Director of Operations. 2 /

11. Thereafter, and without any further confirmation from, or discussion with, Quandt or Cummins, Director of Management, concerning the shifting of responsibility for the shuffle plan, James commenced informal discussions with various members of the staff of the Division of Administration. Such discussions consisted of one sided comments and/or suggestions by James during scheduled meetings on other matters with various representatives of the Division of Management. On other occasions, James' suggestions or comments were made to the representatives of the Division of Management while passing such representatives at their desks. James never sought any formal meetings on the proposed shuffle plan with Cummins or members of his staff.

2/ Following this meeting, Quandt telephoned Cummins, Director of Management and informed him of James' request. Cummins declined to get involved with the proposed shuffle since it was the responsibility of Quandt, Director of Operations. This resolution, which was accepted by Quandt, was unfortunately, for some unexplained reason, never conveyed to James.

12. On March 8, 1974, the employee appraisals were issued. Several weeks thereafter, Quandt determined that it was time to put the shuffle plan into effect and telephoned the Union's headquarters. Quandt spoke to Montelaro, President of Local 1122, and informed Montelaro that he was calling James to ascertain if he, James, had "anything more to say on the shuffle", and that if James did, he should call or stop by and see him. Hearing nothing further from James, Quandt on April 5, 1974, issued a Memorandum to All Employees wherein the shuffle plan was outlined. According to the shuffle plan an employee would not be able to stipulate where he wanted to transfer and would "be required to accept whatever assignment is made, once he requests a transfer". The memorandum went on to say that "The union has been consulted about the provisions of this plan, and is in basic agreement with the above outline".

13. Following the announcement of the shuffle plan on April 5, 1974, the parties have engaged in ongoing consultations with respect to such plan.

#### DISCUSSION AND CONCLUSIONS

It is well settled that Section 11(a) of Executive Order 11491 requires an Agency and a labor organization which has been accorded exclusive recognition to meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions of unit employees.

Failure of an agency to consult and confer is violative of Section 19 (a) (6) of the Order.

In the instant case it is clear that the change in the manner of transferring from one job to another and/or from place to place is a matter affecting working conditions. It is also clear that the Agency here involved recognized the obligations imposed by the Order with respect thereto and did in fact notify the Union and invite consultation with respect to the proposed change in the practice of honoring requests for transfer. Thereafter, pursuant to the Agency's invitation, a meeting was held between the parties wherein the Union was allowed to give its views on the proposed plan, namely that any such plan should allow the employees to renege or refuse to transfer if the preferred position was not to the liking of the affected employee. Several days after the meeting, the Union, being under the mistaken impression that its suggestion with respect to the plan had been accepted, wrote, what I find to be, an ambiguous letter wherein it lauded the Agency for adopting a plan "akin" to that utilized at an earlier date in the claims department. Subsequently, without any further discussion as to the substance of the plan, the Union, with permission, discussed informally the implementation of the plan with representatives of the Division of Management. Although, as later disclosed, the Agency had no intention of transferring

the control of the plan from the Department of Operations to the Department of Management and was in fact operating under the impression that the Union had accepted its original proposal, the Agency, did, however, prior to final announcement of the plan on April 5, 1974, seek further input, if any, from the Union. Not hearing anything further from the Union the Agency then put its plan into effect.

While I do not condone the actions of the Director of Operations in not clearing up the matter of ultimate responsibility for the plan in the mind of Union Representative James and deem it unfortunate that the parties each had a different understanding of each others position, I can not find on the basis of the evidence disclosed at the hearing that the Respondent violated Section 19 (a) (6) of the Order. Thus the Record amply supports a finding that the Respondent did consult in good faith with the Union and receive its input on the proposed plan. While, the ultimate resolution as to the workings of the plan was not to the liking of the Union, the fact remains that Agency did engage in prior good faith consultation thereon and did in fact solicit any additional comments prior to final announcement of the plan. Accordingly, in the absence of any evidence that the Agency intentionally misled the Union or of an obligation imposed by the Order requiring an Agency to achieve the Union's assent prior to instituting a change in working conditions, upon which there had been prior


April 28, 1975

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

good faith consultation, insufficient basis exists for a  
19 (a) (1) and (6) finding.

RECOMMENDATION

Having found that Respondent has not engaged in certain  
conduct prohibited by Sections 19 (a) (1) and (6) of Executive  
Order 11491, as amended, I recommend that the complaint herein  
be dismissed in its entirety.

  
BURTON S. STERNBURG  
Administrative Law Judge

Dated: January 8, 1975  
Washington, DC

UNITED STATES PUBLIC HEALTH SERVICE HOSPITAL,  
BRIGHTON, MASSACHUSETTS  
A/SLMR No. 502

This case arose when the Government Employees Assistance Council, Inc., Local I-NI (GEAC), filed a representation petition seeking an election in a unit of Wage Grade employees of the Activity represented exclusively by the National Association of Government Employees, Local R1-108 (NAGE). The parties stipulated that the petitioned for unit was appropriate. However, contrary to the position of both the Activity and the GEAC, the NAGE contended that there was an agreement bar to the petition.

The Assistant Secretary found, contrary to the NAGE, that there was no bar to the GEAC petition. In this regard, he found that the NAGE, by letter of April 9, 1971, requested renegotiation of its negotiated agreement with the Activity and that a new agreement with the Activity was signed at the local level on February 18, 1972. The Assistant Secretary further concluded that while an agreement such as the February 18, 1972, agreement normally would constitute a bar to a petition filed after it was signed locally, notwithstanding the fact that it was not approved at a higher level, under the particular circumstances of this case, it would not effectuate the purposes and policies of the Executive Order to hold that the GEAC's petition, filed over two years after the return of the unapproved agreement by the agency involved, should be barred. Thus, in the Assistant Secretary's view, when an agreement signed locally is returned promptly, as in the instant case, for alleged nonconformance with applicable laws and regulations, the parties to that agreement have an obligation to act expeditiously to conform the agreement, to renegotiate the agreement, or if appropriate, to utilize Section 11(c) procedures. As there was insufficient evidence that the parties, aside from an isolated effort in April 1972, attempted to resolve their differences during the two year period between nonapproval of the agreement by the agency and the filing of the GEAC petition, the Assistant Secretary concluded that under Section 202.3(c)(3) of the Regulations unusual circumstances existed which substantially affected majority representation and that, therefore, no bar existed to the petition in this matter. He further concluded that the unit sought herein was appropriate, noting the agreement of the parties in this regard and the fact that the claimed unit was coextensive with that represented by the NAGE. He, therefore, directed an election in the petitioned for unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES PUBLIC HEALTH SERVICES HOSPITAL,  
BRIGHTON, MASSACHUSETTS

Activity

and

Case No. 31-8628(RO)

GOVERNMENT EMPLOYEES ASSISTANCE  
COUNCIL, INC., LOCAL I-NI

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R1-108

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Executive Order 11491, as amended, a hearing was held before Hearing Officer Carol Blackburn. 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, Government Employees Assistance Council, Inc., Local I-NI, herein called GEAC, seeks an election in the following unit, which currently is represented exclusively by the Intervenor, National Association of Government Employees, Local R1-108, herein called NAGE:

All Wage Grade employees of the United States Public Health Service Hospital, Boston, Massachusetts, 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. 1/

1/ The unit appears as amended at the hearing.

At the hearing the parties stipulated that the unit sought is appropriate. However, contrary to the Activity and the GEAC, the NAGE asserts that there is an agreement bar to the petition in this matter.

The record reveals that the Activity is one of nine Public Health Service Hospitals in the United States. The claimed unit includes all the Wage Grade employees at the Activity who are part of the Administrative Branch and work primarily in the Laundry, Engineering, Housekeeping, and Dietetics Departments.

The NAGE was granted exclusive recognition for the claimed unit on April 13, 1966. A negotiated basic agreement between the NAGE and the Activity became effective, after higher agency approval, on November 12, 1968, for a period of two years. The agreement was renewable automatically from year to year thereafter until modified or terminated. 2/

By letter dated April 9, 1971, the NAGE's regional representative contacted the Activity's Director requesting a meeting "...to discuss and negotiate changes in the present labor-management agreement between the Hospital and NAGE Local R1-108." The letter went on to state that, "The changes will consist of updating the present agreement and making part of the agreement verbal agreements that were made by management but were not fulfilled." At the hearing, the parties stipulated that thereafter:

Initial proposals were presented by the Local to the Hospital in late November 1971; that they were returned to the Local with commentary in late December; that during January 1972, preliminary discussions pertaining to the Hospital's comments were carried out; that on January 27, 1972, management was presented with revised additions of the Union's proposals; and that on February 7, 8, and 9, 1972, the negotiating teams representing the two parties met and that final agreement was reached on February 9, 1972.

On February 18, 1972, an agreement was signed by the NAGE Local President and the Hospital Director and was forwarded to the Department of Health, Education and Welfare (HEW) for approval. However, by memorandum to the Activity dated March 27, 1972, the HEW stated that it was withholding approval because, in its view, the agreement needed to be brought into conformance with applicable laws and regulations. The record indicates that after the agreement had been returned by the HEW at least one meeting was held, in April 1972, to attempt to resolve the differences between the NAGE and the HEW regarding the agreement.

The petition in the instant case was filed over two years later on August 21, 1974. The NAGE claims that the agreement signed locally by the parties on February 18, 1972, constitutes a bar to the instant petition. Both the Activity and the GEAC contend that there is no agreement bar in existence because, in their view, there is no negotiated agreement. In

2/ The NAGE also negotiated a supplemental agreement with the Activity which was signed January 7, 1969, and which did not affect the term of the basic agreement.



this regard, they contend that the holding of the Assistant Secretary in Department of Health, Education, and Welfare, U.S. Public Health Service Hospital, Boston-Brighton, Massachusetts, A/SLMR No. 267, which states that there is no negotiated agreement in effect regarding the claimed unit, is dispositive of this issue. The NAGE argues, on the other hand, that the Assistant Secretary's statement in A/SLMR No. 267 was dictum and was not an issue in that case. The NAGE contends further that the agreement negotiated in 1972 was only a modification of the parties' 1968 agreement and that, therefore, the 1968 agreement never was terminated. The Activity and the GEAC take the view that the NAGE's letter, dated April 9, 1971, which initiated the negotiations culminating in the 1972 agreement, was, in effect, a request to renegotiate the 1968 agreement and, as such, served to terminate the 1968 agreement on its anniversary date, November 12, 1971, when no new agreement had been signed. And, as the February 18, 1972, agreement between NAGE and the Activity never was approved by the HEW, they contend it may not operate as a bar to the instant petition. In addition, the Activity asserts that when the NAGE met with the HEW regarding the latter's nonapproval of the 1972 agreement, there was, in effect, a new effort to renegotiate the agreement but the NAGE never followed through. Therefore, in the Activity's view, even if the agreement was effective as a bar when it was approved locally on February 18, 1972, it was, in fact, rescinded by the attempted renegotiation and would not operate as a bar to a petition filed thereafter.

Under the particular circumstances of this case, I find that there is no bar to the instant petition filed by the GEAC. In this regard, it was noted that the letter of April 9, 1971, from the NAGE representative to the Hospital Director was, in fact, a request to renegotiate the 1968 agreement and that subsequent negotiations between the parties occurred. Further, the evidence establishes that the changes in the 1968 agreement agreed upon by the parties were substantive and that a new agreement was signed on February 18, 1972. Under these circumstances, the agreement signed by the parties on February 18, 1972, at the local level would, in most instances, constitute a bar to a petition filed subsequent to February 18, 1972, notwithstanding the fact that such agreement was not approved at a higher level based on its alleged nonconformance to laws and regulations. <sup>3/</sup> However, I find that, in the particular circumstances of this case, it would not effectuate the purposes and policies of the Order to allow the parties' negotiated agreement of 1972, which was signed locally but not approved at a higher level, to act as a bar to the instant petition. In this regard, the record reflects the 1972 agreement was not held at the HEW level for an undue period of time but, rather, was returned unapproved in approximately one month with a clear statement, consistent with Section 15 of the Order, that certain of its provisions had to be brought into conformance with applicable laws and regulations. Thereafter, in my judgement, it was the obligation of the parties to the agreement to act expeditiously in order to conform the agreement as required, to renegotiate, or, if appropriate, to utilize the procedures set forth in Section 11(c) of Executive Order 11491, as amended. However, the record reflects that while the parties met in April 1972 to discuss the nonapproval by the HEW, there is insufficient evidence that, aside from this isolated

<sup>3/</sup> See Section 202.3(c) of the Assistant Secretary's Regulations.

effort, they continued to attempt to resolve any differences during the two year period between the HEW's nonapproval of the agreement and the filing of the instant petition. In this context, for either party to the February 18, 1972, agreement to be able to assert a bar to a petition filed by a third party more than two years later would, in my view, be to reward dilatory bargaining tactics by foreclosing the resolution of legitimate questions concerning representation and would not effectuate the purposes and policies of the Order. <sup>4/</sup> Accordingly, I find that under Section 202.3(c) (3) of the Regulations unusual circumstances exist which substantially affect majority representation and that, therefore, no bar exists to the GEAC's petition in the subject case. Further, noting the parties' agreement as to the appropriateness of the unit sought, and the fact it is coextensive with the existing unit encompassing all Wage Grade employees of the Activity, I find that the petitioned for unit is appropriate.

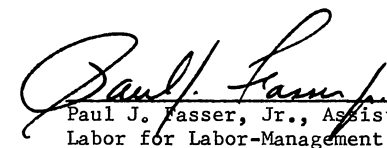
Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All Wage Grade employees of the United States Public Health Service Hospital, Boston, Massachusetts, 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.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during 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 Government Employees Assistance Council, Inc., Local I-NI; or by the National Association of Government Employees, Local R1-108; or by neither.

Dated, Washington, D.C.  
April 28, 1975

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

<sup>4/</sup> There is no evidence that any unfair labor practice complaint was filed in this matter.

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

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

DEPARTMENT OF THE ARMY,  
WESTERN MANAGEMENT INFORMATION  
SYSTEMS OFFICE,  
MILITARY TRAFFIC MANAGEMENT COMMAND,  
OAKLAND ARMY BASE,  
OAKLAND, CALIFORNIA  
A/SLMR No. 503

DEPARTMENT OF THE ARMY,  
WESTERN MANAGEMENT INFORMATION  
SYSTEMS OFFICE,  
MILITARY TRAFFIC MANAGEMENT COMMAND,  
OAKLAND ARMY BASE,  
OAKLAND, CALIFORNIA 1/

Activity

and

Case No. 70-4454(DR)

ELLIOTT H. SILVA 2/

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
LOCAL 1157, AFL-CIO,  
OAKLAND, CALIFORNIA

Intervenor

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in this case, the Assistant Secretary finds:

1. The Petitioner, Elliott H. Silva, an employee of the Activity, seeks the decertification of the Intervenor, American Federation of Government Employees, Local 1157, AFL-CIO, herein called AFGE, as the exclusive representative of the employees in the following unit:

"All nonsupervisory employees of the  
Directorate of Data Systems, Western Area,  
Military Traffic Management and Terminal  
Service [WAMTMTS] excluding employees

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

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

engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order." 3/

2. On February 3, 1969, the AFGE was recognized as the exclusive representative of the employees in the above unit which is identical to that petitioned for herein. The AFGE, however, asserts that the instant petition should be dismissed because the Petitioner, a GS-8 Computer Operator, and two other GS-8 Computer Operators, are supervisors and that a GS-12 Computer Specialist, who allegedly assisted the Petitioner in collecting employee signatures in support of the instant decertification petition, is a management official. On the other hand, the Activity and the Petitioner contend that the Petitioner and the two other GS-8 Computer Operators are not supervisors and that the GS-12 Computer Specialist referred to by the AFGE is not a management official within the meaning of Executive Order 11491, as amended.

The mission of the Activity is to advise and assist the Commander of the WAMTMTS on data processing matters; to provide automated data processing (ADP) system support to functional managers; to provide continuity of operations and mobilization plans to achieve a state of ADP readiness for WAMTMTS applications; and to exercise staff supervision over data processing operations throughout the Western Area Command.

The record reveals that the Petitioner is a GS-8 Computer Operator in the Data Control Branch of the Activity which is headed by a branch supervisor. The Petitioner's primary job function, as indicated in his job description, is to serve as a Senior Computer Operator for the Burroughs 5500 Computer Systems. The record reflects, in this regard, that he, in fact, serves as a lead operator and that he has certain technical responsibility for proper machine and program utilization. In this latter connection, the record reflects that the Petitioner's level of knowledge is such that he can make remedial decisions, if required, when machine malfunctions occur but that such technological expertise is not related to the supervision of other employees. Thus, he does not ordinarily direct other employees as the evidence establishes that the other computer operators in the Branch know what they are expected to do and, thus, generally do not require direction from the Petitioner. Further, when problems arise due to a machine malfunction, such problems usually are resolved by the shift supervisor, or by an alternate supervisor. Only in the absence of the shift supervisor, or of the alternate supervisor, is the GS-8 Computer Operator, because of his technical expertise, expected to resolve problems occurring in connection with machine malfunctions and to apply the appropriate remedial measures. The record further reveals that the Petitioner does not grant leave, adjust grievances, recommend promotions or hiring, approve sick or annual leave, or prepare job evaluations or make personnel recommendations. 4/

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3/ The unit appears as amended at the hearing.

4/ The record indicates that any personnel actions required are, in fact, handled by the shift supervisor. The record reveals also that the two other GS-8 Computer Operators have similar requirements and job responsibilities as the Petitioner.

Under these circumstances, as the record reveals that the GS-8 Computer Operators do not exercise any supervisory authority with respect to other employees that requires the use of independent judgment and do not have the authority effectively to recommend any action within the meaning of Section 2(c) of the Order, I find the GS-8 Computer Operators, including the Petitioner, are not supervisors within the meaning of the Order.

With respect to the GS-12 Computer Specialist, the evidence reveals that the incumbent is under the general supervision of the Chief of the Quality Control Division. The incumbent's job description indicates that she is involved in developing plans and programs and coordinating them with both internal activity elements and external activities in accomplishing program objectives. Essentially, the incumbent's job calls for assisting the Functional Manager and obtaining satisfaction from computer-prepared products. In that capacity, the incumbent is concerned primarily with evaluating the computer usage with respect to Activity programs. The record indicates that, although the incumbent conducts studies with respect to computer usage, receives input from customers using the machines and submits recommendations or ideas utilizing the input received from the various sources, the decisions affecting the conduct of the operation, as well as possible ramifications for the Activity, are, in fact, made by higher authority. In this regard, the evidence establishes that the incumbent does not attend management staff meetings and has made many recommendations which have been disapproved by her supervisor. Further, the record reveals that the incumbent's evaluations of operations are prepared and determined within established guidelines. In this connection, her input is given to her division chief who then passes it on to the various higher levels within the Activity. Thus, the record discloses that while the incumbent's opinion is sought in technical matters, there is no indication that, based on the strength of her opinion alone, policy has been made.

Based on all of the foregoing circumstances, I find that the Activity's GS-12 Computer Specialist is not a management official within the criteria set forth in the Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135. Thus, in my view, the role of the incumbent does not extend beyond that of a resource person rendering recommendations or information to the point of active participation in influencing or deciding Activity policy. Nor do I find, based on the evidence herein, that her interests are more closely aligned with management than with other unit employees.

As I have found that the GS-8 Computer Operators are not supervisors and the GS-12 Computer Specialist is not a management official, I conclude that the petition herein was not rendered defective by virtue of the fact that it was filed by a GS-8 Computer Operator who allegedly was assisted in this regard by a GS-12 Computer Specialist. 5/

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5/ Cf. U.S. Geological Survey, Department of the Interior, Rolla, Missouri, A/SLMR No. 460.


As noted above, the unit involved herein was established in 1969 under Executive Order 10938. Noting the lack of any disagreement between the parties as to the scope of the unit, 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, as amended:

All employees of the Directorate of Data Systems, Western Area, Military Traffic Management and Terminal Service, Oakland Army Base, Oakland, California, 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.

#### 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, Local 1157, AFL-CIO.

Dated, Washington, D.C.  
April 28, 1975

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

-4-

April 28, 1975

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

UNITED STATES DEPARTMENT  
OF THE NAVY,  
U.S. NAVAL STATION,  
PEARL HARBOR, HAWAII  
A/SLMR No. 504

The subject case involves a representation petition filed by the International Federation of Federal Police, Independent (IFFP). The Activity and the Intervenor, the American Federation of Government Employees, AFL-CIO, Local 882 (AFGE), which was the incumbent exclusive representative, asserted that the instant petition was filed untimely because it was filed two days after the parties had entered into a negotiated agreement. The IFFP contended that: (1) the alleged agreement of April 16, 1974, was not signed as a complete and finished document until after the instant petition of April 18, 1974, was filed; (2) the alleged agreement was not ratified by the AFGE's membership prior to the filing of the instant petition; (3) the alleged agreement did not become effective until after it had been approved by a higher agency authority, which did not occur until after the subject petition had been filed; and (4) the alleged agreement could not be extended retroactively to the date when the Activity and the AFGE contend that they entered into their agreement, because this would extend the agreement beyond the three year period referred to in Section 202.3 of the Assistant Secretary's Regulations.

The record showed that the AFGE and the Activity had negotiated over a period of several months and had initialed various articles of the agreement as they were approved. On April 16, 1974, they signed a Memorandum of Understanding which resolved the last two disputed articles.

The Assistant Secretary found that, under all of the circumstances, the petition of the IFFP was filed untimely. In this connection, it was noted that a binding negotiated agreement may be executed with signatures made in abbreviated form, as by the use of initials, and that such an agreement may be reproduced subsequently in a formal document after initial approval by authorized representatives. In this connection, the Assistant Secretary noted that the representatives of the AFGE and the Activity who initialed the articles of the negotiated agreement, and signed the Memorandum of Understanding, were authorized to negotiate and execute a binding agreement on behalf of their principals; that the agreement contained substantial and finalized terms and conditions of employment sufficient to stabilize the bargaining relationship; that the affixing of the party's signatures to the negotiated agreement after the filing of the instant petition constituted merely a formal execution of a previously agreed upon document; that the negotiated agreement did not require ratification by the AFGE's membership; and that the AFGE and the Activity effectuated certain provisions of the negotiated agreement before the instant petition was filed. Therefore, the Assistant Secretary concluded that, in fact, and in the contemplation of the

parties, there was a binding negotiated agreement two days before the instant petition was filed which served to bar the instant petition. Nor, in the Assistant Secretary's view, did Section 202.3(c) of the Assistant Secretary's Regulations require a contrary result. In this connection, he noted that Section 202.3(c) provides, in effect, absent unusual circumstances, a negotiated agreement awaiting approval at a higher management level serves as a bar to a petition filed subsequently.

Accordingly, the Assistant Secretary ordered that the IFFP's petition be dismissed.

A/SLMR No. 504

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT  
OF THE NAVY,  
U.S. NAVAL STATION,  
PEARL HARBOR, HAWAII

Activity

and

Case No. 73-558(RO)

INTERNATIONAL FEDERATION OF FEDERAL  
POLICE (INDEPENDENT)

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 882

Intervenor

DECISION AND ORDER

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

Upon the entire record in this case, including briefs filed by the Activity and the Intervenor, American Federation of Government Employees, AFL-CIO, Local 882, herein called AFGE, 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 (Independent), herein called IFFP, seeks an election in a unit consisting of all Federal police, including detectives and guards, located and assigned to the Naval Station, Pearl Harbor, Oahu, Hawaii, excluding all officers, clerical employees, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Order. <sup>1/</sup> The AFGE currently is the

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

exclusive representative of a mixed guard-nonguard unit which includes the petitioned for guard employees and the Activity's clerical employees.

The IFFP contends that its petition herein, filed on April 18, 1974, was timely because no negotiated agreement existed at the time of filing which would constitute a bar to an election. On the other hand, the AFGE and the Activity assert that a Memorandum of Understanding which they signed on April 16, 1974, and the provisions of a negotiated agreement which had been initialed earlier by representatives of the AFGE and the Activity constitute a valid signed agreement which serves as an agreement bar to the instant petition.

#### Background

The record reflects that on September 23, 1971, the AFGE and the Activity executed a negotiated agreement which became effective on October 12, 1971. Pursuant to Article XXV ("Duration of Agreement"), Section 1 of the agreement, which provides that either party may notify the other party of its desire to renegotiate no more than 90 days nor less than 60 days prior to the termination of the initial two year period of the agreement, on July 16, 1973, the AFGE notified the Activity of its desire to renegotiate the agreement. Subsequently, some ten negotiating sessions were held between November 1973 and January 23, 1974. During these sessions various articles of the expired agreement were discussed and either were changed or retained in their original form. Representatives of both the AFGE and the Activity signified their agreement on particular articles or sections by affixing their initials thereto. At the time of the negotiation session of January 23, 1974, the parties had agreed in this manner to all but two of the agreement's articles, "Hours of Work and Tours of Duty" and "Promotions and Details." On April 15 and 16, 1974, two final negotiation sessions were held and, on April 16, the parties signed a "Memorandum of Understanding" which resolved the above noted disputed articles. On April 18, 1974, the instant petition was filed. Thereafter, on April 26, 1974, a "smooth copy" of the negotiated agreement, consisting of the initialed articles and the articles resolved by the Memorandum of Understanding was signed by representatives of the AFGE and the Activity. On June 3, 1974, the booklet form of the negotiated agreement was signed, and, thereafter, on July 9, 1974, the negotiated agreement was approved by the Office of Civilian Manpower Management of the Department of the Navy.

The record reveals that it was the understanding of the AFGE and the Activity that a binding agreement had been reached on all of the issues at the time of the signing of the Memorandum of Understanding and that both parties considered themselves bound by the articles initialed by their representatives as well as by the articles covered by the Memorandum of Understanding. In this regard, the record shows that on April 16, 1974, the Activity began to develop a new work shift pursuant to the agreement article, "Hours of Work and Tours of Duty," which was the same date on which this article was agreed to in the Memorandum of Understanding. The record further reflects that the AFGE and the Activity implemented the

revised article concerning the AFGE's bulletin board privileges within a few days after April 16, 1974.

#### The Alleged Agreement Bar

The IFFP contends that the initialed articles and the Memorandum of Understanding did not constitute a final agreement which would bar its petition of April 18, 1974, inasmuch as: (1) the alleged agreement was not signed as a complete and finished document until April 26, 1974, at the earliest; (2) the alleged agreement was not ratified by the AFGE's membership prior to the filing of the instant petition; (3) the alleged agreement did not become effective until it was approved by the Office of Civilian Manpower Management of the Department of the Navy on July 9, 1974; and (4) the agreement approved July 9, 1974, provides for an initial three year term and does not provide for a retroactive extension to April 16, 1974. Moreover, with respect to the latter contention, it asserts that any retroactive extension would cause the agreement to have a term of more than the three year period, contrary to Section 202.3 of the Assistant Secretary's Regulations. 2/

Under all of the circumstances, I find that the IFFP's petition of April 18, 1974, was untimely filed. Thus, in my view, a binding negotiated agreement may be executed with signatures made in abbreviated form, as by the use of initials, and such an agreement may be reproduced subsequently and embodied in a formal document after a less formal document has been approved by the authorized representatives of the parties. In this connection, the evidence in the instant case establishes that the representatives of the AFGE and the Activity who initialed the various articles of the agreement, and who signed the Memorandum of Understanding, were fully authorized to negotiate and execute a binding agreement on behalf of their principals; that the initialed articles of the agreement and the signed Memorandum of Understanding contained substantial and finalized terms and conditions of employment sufficient to stabilize the bargaining relationship; and that the affixing of the parties' signatures on April 26 and June 3, 1974, constituted merely formal executions of the previously agreed upon documents. 3/ It was noted also that the parties' agreement did not require ratification by the AFGE's membership and that the parties, in fact,

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

3/ Cf. United States Air Force, 321st Combat Support Group, Grand Forks Air Force Base, North Dakota, A/SLMR No. 319.

UNITED 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

OFFICERS CLUB,  
NONAPPROPRIATED FUNDS,  
U.S. ARMY AIR DEFENSE CENTER  
AND FORT BLISS,  
FORT BLISS, TEXAS  
A/SLMR No. 505

The Petitioner, National Federation of Federal Employees, Local 39 (NFFE), sought to represent a unit of all employees of the Officers Club, Installation Club System, U.S. Army Air Defense Center and Fort Bliss, Fort Bliss, Texas. The Activity contended that the proposed unit was inappropriate. It asserted that the appropriate unit should include all the unrepresented employees of the nonappropriated fund (NAF) activities within the jurisdiction of the Commanding General, Fort Bliss, and that the unit sought by the NFFE would not promote effective dealings or efficiency of agency operations.

The Officers Club is one of fourteen NAF activities at Fort Bliss and, with the Non Commissioned Officers Club, is under the immediate supervision of the Installation Club Manager. All NAF activities ultimately are responsible to the Commander, Fort Bliss, through the Directorate of Personnel and Community Affairs.

The Assistant Secretary concluded that the claimed unit was not appropriate for the purpose of exclusive recognition under the Order. In this connection, it was noted that all the employees of the NAF activities at Fort Bliss, including those of the Officers Club, are covered by centrally administered uniform personnel policies and practices, and that the areas of consideration for employment opportunities and reductions in force include all NAF activities at Fort Bliss. Further, the Assistant Secretary noted that there is evidence that a number of similar job categories are found in two or more of the NAF activities, including the Officers Club, and that transfers of employees among the various NAF activities have occurred. Under these circumstances, he concluded that the claimed employees did not possess a clear and identifiable community of interest separate and distinct from other unrepresented NAF employees and that to separate the claimed employees from the Fort Bliss NAF employees with whom they share a community of interest would effectuate an artificial division among the employees resulting in a fragmented unit which would not promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

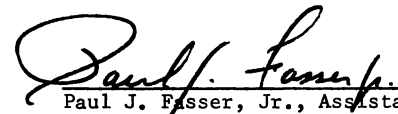
effectuated certain provisions of the newly negotiated agreement on and after April 16, 1974, before the more formalized documents were signed. Under these particular circumstances, I find that there was a binding negotiated agreement, in fact, and in the contemplation of the parties, as of April 16, 1974, and that such an agreement served to bar the IFFP's petition in this matter. Nor, in my view, does Section 202.3(c) of the Assistant Secretary's Regulations require a contrary conclusion. Thus, Section 202.3(c) concerns the timeliness of a petition in relation to the terminal date of a negotiated agreement. It also provides, in effect, that when, as here, an agreement has been signed by an Activity and an incumbent exclusive representative, absent unusual circumstances, such an agreement bars a subsequently filed petition for an election even though the agreement is awaiting approval at a higher management level. 4/

Accordingly, as the petition herein was untimely filed, I shall order that it be dismissed. 5/

ORDER

IT IS HEREBY ORDERED that the petition filed in Case No. 73-558(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
April 28, 1975

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

4/ Cf. Federal Aviation Administration, Department of Transportation, A/SLMR No. 173.

5/ In view of the disposition herein, I find it unnecessary to consider the appropriateness of the claimed unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OFFICERS CLUB,  
NONAPPROPRIATED FUNDS,  
U.S. ARMY AIR DEFENSE CENTER  
AND FORT BLISS,  
FORT BLISS, TEXAS

Activity

and

Case No. 63-5030(RO)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 39

Petitioner

DECISION AND ORDER

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

Upon the entire record in this case, 1/ 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 39, herein called NFFE, seeks an election in a unit of all employees of the Officers Club, Installation Club System, U.S. Army Air Defense Center and Fort Bliss, Fort Bliss, Texas, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in Executive Order 11491, as amended.

The Activity contends that the proposed unit is inappropriate. In this regard, it asserts that the appropriate unit should include the unrepresented employees of all nonappropriated fund (NAF) activities within the jurisdiction of the Commanding General, Fort Bliss, and that the unit sought by the NFFE would not promote effective dealings or

efficiency of agency operations. The NFFE, on the other hand, contends that the claimed unit is appropriate and, in support of this contention, notes that there are two existing exclusively recognized units of individual NAF activities at Fort Bliss.

The record reveals that the Officers Club is one of fourteen NAF activities at Fort Bliss and that all of the NAF activities report to the Commander, Fort Bliss, through the Directorate of Personnel and Community Affairs (DPCA). The Officers Club consists of facilities at two locations and includes some 61 NAF employees. Both the Officers Club and the Non Commissioned Officers (NCO) Club, which has approximately 145 employees working at three locations, are supervised by the Installation Club Manager. Other NAF activities at Fort Bliss include the Fort Bliss Golf Association, the Rod and Gun Club, the Flying Club, the Billeting Club, the Central Post Fund, the Chaplain Fund, and the Guest House Fund, which are under the jurisdiction of the Personnel Services Division; and the Sports and Athletic Branch, the Library Branch, the Recreation Branch, the Arts and Crafts Branch, and the Dependent Youth Branch, which are under the jurisdiction of the Recreation Services Division. The Installation Club Manager, Personnel Services Division, and Recreation Services Division report, in turn, to the DPCA.

The record further reveals that located within the Fort Bliss Civilian Personnel Office is a NAF Personnel Branch, which is responsible for providing centralized personnel services for recruitment, placement, position classification, maintenance of personnel records and advice on the processing of disciplinary actions, appeals and grievances for all NAF employees. Also, the areas of consideration for employment opportunities and reductions in force encompass all NAF activities at Fort Bliss and there are uniform leave procedures, a standard wage system, and common grievance procedures for all NAF personnel. The record reveals that, at present, there is a central accounting office for the Officers Club and the NCO Club, and that a central accounting system covering all NAF activities is being implemented. The evidence establishes further that a number of similar job categories, such as janitors, cooks, bartenders, food service workers, waitresses and clerk typists, are found in two or more of the NAF activities, including the Officers Club, and that there have been instances of transfers of employees among the various NAF activities.

As noted above, there are two existing exclusively recognized units of NAF activities at Fort Bliss. Thus, the Petitioner in the instant case, NFFE Local 39, was granted exclusive recognition for a unit of employees of the NCO Club pursuant to Executive Order 10988 in May 1969, and the National Association of Government Employees, Local R14-22, was certified as the exclusive representative of the employees of the Billeting Fund and Guest House Fund in April 1971. However, the evidence establishes that at the time these units were recognized, the individual NAF activities were considered to be separate entities and were not subject to the centralized personnel procedures and practices or a centralized accounting system.

1/ The Activity filed an untimely brief which was not considered.

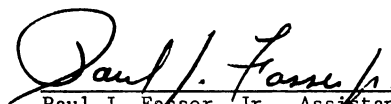


Based on the foregoing, I find that the claimed unit is not appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. Thus, as noted above, the record reflects that the employees of all the NAF activities at Fort Bliss, including those of the Officers Club, are covered by centrally administered uniform personnel policies and practices, and that the areas of consideration for employment opportunities and reductions in force include all NAF activities at Fort Bliss. Further, the record reveals that a number of similar job categories are found in two or more of the NAF activities, including the claimed unit, and that transfers of employees among the various NAF activities have occurred. Under these circumstances, I find that the claimed employees do not possess a clear and identifiable community of interest separate and distinct from other unrepresented NAF employees of Fort Bliss, and that to separate the claimed employees from those with whom they share a community of interest would effectuate an artificial division among the employees resulting in a fragmented unit which would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the NFFE's petition herein be dismissed.

## ORDER

IT IS HEREBY ORDERED that the petition in Case No. 63-5030(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
April 29, 1975

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

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

FARMERS HOME ADMINISTRATION,  
UNITED STATES DEPARTMENT OF  
AGRICULTURE,  
LITTLE ROCK, ARKANSAS  
A/SLMR No. 506

The Petitioner, The Arkansas Association of FmHA Clerks (Clerks), sought an election in a unit of all clerical employees in County Offices of the Farmers Home Administration (FmHA) in the State of Arkansas. The Activity contended that the unit sought was inappropriate for the purpose of exclusive recognition.

The Assistant Secretary determined that the proposed unit was not appropriate. In this connection, it was noted that all employees of the Activity, including the County Office clerical employees in the claimed unit, are under the direction of the State Director and are covered by the same personnel practices and labor relations policies. The Assistant Secretary noted also that there is daily contact between the employees in the claimed unit and employees in other job classifications in the County Offices and that there is frequent contact between the County Office employees and those in the State Office located in Little Rock. Moreover, it was noted that a number of transfers involving clerical and other employees were effected throughout the State by the State Director's Office.

Under these circumstances, the Assistant Secretary concluded that the employees in the claimed unit, or an alternate unit of all clerical employees in the State, did not possess a clear and identifiable community of interest separate and distinct from certain other employees of the Activity and that such fragmented units 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

FARMERS HOME ADMINISTRATION,  
UNITED STATES DEPARTMENT OF  
AGRICULTURE,  
LITTLE ROCK, ARKANSAS

Activity

and

Case No. 64-2511(RO)

THE ARKANSAS ASSOCIATION OF  
FmHA CLERKS

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 Joseph M. Saizan. 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, The Arkansas Association of FmHA Clerks, herein called Clerks, seeks an election in a unit of all clerical employees in the County Offices 1/ of the Farmers Home Administration, herein called FmHA, in the State of Arkansas, 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. 2/ The FmHA asserted that the claimed unit was inappropriate for the purpose of exclusive recognition.

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1/ At the hearing the Clerks indicated that it was agreeable to proceeding to an election in a unit which included the clerical employees of the State Office, as well as the County Offices, of the Activity should the Assistant Secretary find such a unit to be appropriate.

2/ It was noted that the National Federation of Federal Employees, Local 108, (NFFE), which was certified on June 7, 1971, as the exclusive representative of the employees of the FmHA for the State of Arkansas, did not intervene in the subject proceeding.

The mission of the FmHA involves the granting of loans to individuals, organizations and rural communities. The Headquarters Office for the State of Arkansas is located in Little Rock and is under the direction of a State Director, who has the overall responsibility for FmHA program and administrative matters within the State. An Administrative Officer supervises an Administrative Management Staff located in the State Office, which is responsible for personnel and management functions on a State-wide basis, including labor relations. In addition to the Administrative Officer, there are four Program Chiefs headquartered at the State Office, each of whom is responsible for a particular program. There are eight District Directors within the State who report to the State Director and who work out of the County Offices. Each of the 75 County Offices in Arkansas is directed by a County Supervisor who reports to the various District Directors.

The function of the County Offices is to receive and process applications for loans, to grant such loans, and to service them. 3/ Within these offices, all employees are involved in the preparation, processing and the granting of loans. Thus, the clerical employees in the claimed unit receive applications and elicit the necessary information from applicants, and check certain information received from the applicants. Following this, the clerical employees prepare a file which is then submitted to the County Supervisor. The County Supervisor and the Assistant County Supervisor make the required investigations which may require their absence from the office approximately twenty to fifty percent of their time. However, they contact the office daily and, at the termination of their investigations, return and work with the clerical employees in the completion of the file.

The record discloses that the State Office is called upon for pertinent information by the County Offices at least twice a week by telephone and much of the time on a daily basis. The State Office also is involved in the preparation of certain loans involving large sums of money and is engaged in the servicing of loans. Further, the record reveals that the duties of employees within the same classifications in the State and County Offices are similar, and that all employees, throughout the State are governed by the same State-wide personnel practices and labor relations policies. In addition, the record indicates that a number of transfers between offices involving clerical and other employees have been effected by the State Director's Office.

Based on the foregoing, I find that the claimed unit is not appropriate for the purpose of exclusive recognition under the Order. Thus, as noted above, the record reflects that all employees of the Activity, including the County Office clerical employees in the claimed unit, are under the direction of the State Director and are covered by the same

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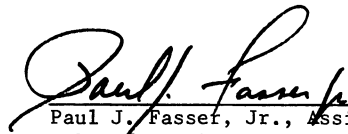
3/ These offices are staffed with a minimum of one supervisor and one clerical employee to a maximum of seven employees.

personnel practices and labor relations policies. Further, the evidence establishes that there is daily contact between the employees in the claimed unit and employees in other classifications within the various County Offices, and that there is frequent contact between County Office employees and those in the State Office. Moreover, there have been a number of employee transfers effected between offices by the State Director's Office. Under these circumstances, I find that the employees in the petitioned for unit, or in the alternate unit requested by the Clerks, do not share a clear and identifiable community of interest separate and distinct from certain other employees of the Activity and that such fragmented units would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the Clerks' petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 64-2511(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
April 29, 1975

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

April 28, 1975

UNITED 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, U. S. ARMY TRAINING AND  
DOCTRINE COMMAND (TRADOC),  
FORT MONROE, VIRGINIA  
A/SLMR No. 507

The Activity-Petitioner filed an RA petition seeking a determination by the Assistant Secretary with respect to the impact on an existing exclusively recognized unit of a Department of the Army reorganization. The Activity-Petitioner contended that as a result of the disestablishment of Headquarters, U. S. Continental Army Command (CONARC) and the establishment of Headquarters, U. S. Army Training and Doctrine Command (TRADOC) at the same location, Fort Monroe, Virginia, the scope and character of the previously existing certified unit had changed. It requested that an election be directed to determine whether the National Association of Government Employees, Local R4-12, (NAGE) represented the employees in a unit which the Activity-Petitioner contends is now appropriate following the reorganization. The NAGE, on the other hand, contended that because the reorganization was a "paper reorganization" the unit for which it was granted exclusive recognition still exists and is viable under the jurisdiction of Headquarters, U. S. Army Training and Doctrine Command.

The Assistant Secretary found that the instant RA petition should be dismissed. Under the circumstances of this case, the Assistant Secretary found that, notwithstanding a change in the designation of the Activity involved: (1) the former CONARC employees who represent a substantial majority of the TRADOC unit continue to fulfill, in general, their same responsibilities with no substantial change in the job functions which they performed under CONARC; (2) the terms and conditions of employment of the former CONARC bargaining unit employees were not materially affected by the reorganization; and (3) the former CONARC unit, although diminished in part by the loss of certain functions and augmented by additional employees to effectuate additional responsibilities, continues as TRADOC to remain an identifiable and viable bargaining unit.

Based on the foregoing, the Assistant Secretary found that the previously certified bargaining unit of all General Schedule and Wage Grade employees of Headquarters, U. S. Continental Army Command, Fort Monroe, Virginia, now designated as Headquarters, U. S. Army Training and Doctrine Command, Fort Monroe, Virginia remained appropriate and, therefore, he ordered that the instant RA petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

HEADQUARTERS, U. S. ARMY TRAINING AND  
DOCTRINE COMMAND (TRADOC),  
FORT MONROE, VIRGINIA

Activity-Petitioner

and

Case No. 22-5337(RA)

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R4-12

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 Nancy Anderson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

The Activity-Petitioner filed an RA petition seeking a determination by the Assistant Secretary as to the impact on an existing exclusively recognized unit of a Department of the Army reorganization. In this regard, the Activity-Petitioner contends that the National Association of Government Employees, Local R4-12, hereinafter called NAGE, no longer represents a majority of the employees in an appropriate unit as a result of the reorganization. 1/ Thus, the Activity-Petitioner asserts that, as a result of the reorganization, the scope and character of the previously existing certified unit has changed and that the current appropriate unit should now consist of all full-time General Schedule and Wage Grade employees of Headquarters,

1/ On December 17, 1970, the NAGE was certified as the exclusive representative for a unit consisting of: "All GS & WG employees of Headquarters, U. S. Continental Army Command and its support groups, Fort Monroe, Virginia, excluding employees engaged in Federal personnel work in other than a clerical capacity, professionals, guards, casual, and/or temporary employees."

U. S. Army Training and Doctrine Command, Fort Monroe, Virginia, excluding professional employees, casual employees, temporary employees, employees engaged in Federal personnel work in other than a clerical capacity, management officials and supervisors and guards as defined in the Order. 2/ Under these circumstances, the Activity-Petitioner requests that an election be directed to determine whether or not the NAGE represents the employees in the unit which the Activity-Petitioner contends is appropriate.

The NAGE, on the other hand, takes the position that the disestablishment of Headquarters, U. S. Continental Army Command and the establishment of Headquarters, U. S. Army Training and Doctrine Command at the same location, Fort Monroe, Virginia, was merely a "paper reorganization"; that the unit for which it was granted exclusive recognition still exists and is viable under the jurisdiction of Headquarters, U. S. Army Training and Doctrine Command; that the unit employees in question still possess a clear and definable community of interest; and that the instant RA petition was filed untimely in view of an agreement bar. 3/

Background Regarding the Reorganization of July 1, 1973

The reorganization which disestablished Headquarters, U. S. Continental Army Command, hereinafter called CONARC, on July 1, 1973, was part of a larger reorganization effort to eliminate unnecessary headquarters entities within the Department of the Army. Prior to the reorganization, there was a major command level and a middle management level between Headquarters, Department of the Army and the various Army

2/ The Activity-Petitioner's RA petition, as initially filed, did not describe a proposed bargaining unit. The petition was amended at the hearing to include the proposed bargaining unit contended to be appropriate for the purpose of exclusive recognition.

3/ The Activity-Petitioner's RA petition was filed two days prior to the expiration of the parties' negotiated agreement. Therefore, to the extent that the Activity's RA petition raises the issue whether the NAGE continues to enjoy majority status in its existing exclusively recognized unit, any determination in this regard would be barred by the parties' existing negotiated agreement. See Section 202.3(c)(1) of the Assistant Secretary's Regulations. However, insofar as the subject RA petition raises an issue whether the exclusively recognized unit remains appropriate because of a substantial change in its composition and character due to a reorganization, I find that the agreement bar limitations contained in Section 202.3(c)(1) of the Assistant Secretary's Regulations would not be applicable but, rather, the provisions of Section 202.3(c)(3) would apply so that the existing negotiated agreement would not constitute a bar to the subject petition. See Idaho Panhandle National Forests, United States Department of Agriculture, A/SLMR No. 394.

installations. The major command level reported directly to Headquarters, Department of the Army and consisted of three separate entities: (1) CONARC; (2) the U. S. Army Combat Developments Command; and (3) the U. S. Army Materiel Command. The middle management level consisted of four Continental U. S. Armies, hereinafter called CONUS Armies, which reported directly to CONARC.

Under the pre-reorganization CONARC structure, the CONUS Armies were responsible for distinct geographic areas of the 48 contiguous States, Puerto Rico, and the U. S. Virgin Islands. Within these geographic areas the CONUS Armies commanded all of the installations and all the active and reserve forces, operated the Army Training Centers, and supervised the National Guard. With respect to the installations, the CONUS Armies were responsible for "day-to-day operations" management, which normally involved housekeeping and base support, <sup>4/</sup> whereas CONARC was concerned with broad policy matters which the CONUS Armies implemented. Army schools were another major responsibility of CONARC. The schools reported directly to CONARC for matters of curriculum, student complements and scholastic matters. While, in most instances, the school commandant involved also was an installation commander, he reported to the appropriate CONUS Army commander with regard to his housekeeping requirements.

At the time CONARC was disestablished, its two major missions were divided between two new major command levels below the Headquarters, Department of the Army. Command of active and reserve forces and supervision of the National Guard was delegated to the U. S. Army Forces Command, hereinafter called FORSCOM, located at Fort McPherson, Georgia. The mission of individual and unit training was given to Headquarters, U. S. Army Training and Doctrine Command, hereinafter called TRADOC, located at Fort Monroe, Virginia. Further, the July 1, 1973, reorganization completely removed the CONUS Armies from the active Army chain of command and installation management command. <sup>5/</sup> Command of the installations was divided between FORSCOM and TRADOC with TRADOC commanding the training base installations and FORSCOM commanding the active forces throughout the remaining installations.

In essence, TRADOC retained CONARC responsibility for the schools, Army Training Centers and approximately one-half of the Continental U. S. installations. Additionally, it became responsible for approximately 90 percent of the combat developments mission when the U. S. Army Combat Developments Command at Fort Belvoir, Virginia, was disestablished

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<sup>4/</sup> Base support included such considerations as budget, personnel, logistics, etc.

<sup>5/</sup> The number of CONUS Armies was reduced to three and they were placed under FORSCOM with the specific mission of commanding reserve forces and supervising the National Guard.

as a part of the reorganization. Like CONARC before it, TRADOC is concerned with broad policy matters; however, unlike CONARC, TRADOC is responsible also for the "day-to-day" operations management of the installations under it.

#### Impact of the Reorganization

On June 30, 1973, the NAGE represented 625 General Schedule and Wage Grade employees of Headquarters, CONARC and its support groups at Fort Monroe, Virginia. The Activity-Petitioner's proposed bargaining unit of all full-time General Schedule and Wage Grade employees of Headquarters, TRADOC numbered some 814 employees as of May 16, 1974. According to the Activity-Petitioner, 487 employees of the 814 figure were former CONARC bargaining unit employees. Of the 487 figure, the Activity-Petitioner alleged that 316 employees remained in the same staff sections under TRADOC as they were in under CONARC with the remaining 171 former CONARC bargaining unit employees being placed in different staff sections under TRADOC. <sup>6/</sup>

The evidence establishes that the major impact of the reorganization on the functions performed by former CONARC bargaining unit employees stemmed primarily from the elimination of the CONUS Armies from the chain of command between TRADOC and the TRADOC installations. Thus, the record indicates that TRADOC employees were given most of the functions formerly performed by the CONUS Armies. In this regard, the record reflects that the former CONARC bargaining unit employees in TRADOC have had to adjust to exercising a broader span of control over the installations and dealing directly with their specific procedural problems. However, the evidence establishes that such adjustments have resulted only in changes in the scope of existing job skills rather than wholesale additions of entirely new job skills. <sup>7/</sup>

With the disestablishment of the U. S. Army Combat Developments Command at Fort Belvoir, Virginia, the combat developments function was delegated to TRADOC. The record indicates that of the 84 employees in TRADOC's general staff office for combat developments who are included in the Activity-Petitioner's proposed unit, 33 employees are former CONARC bargaining unit members. Further, record testimony indicates that personnel responsible for the combat developments function have continued to coordinate with the same personnel in TRADOC as they did in CONARC.

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<sup>6/</sup> The record reveals that of the 171 employees alleged by the Activity-Petitioner to have changed from their former "staff sections" under CONARC as a result of the reorganization, at least 62 employees had been Clerk Stenographers (312 Series), Secretary Stenographers or Typists (318 Series), or Clerk Typists (322 Series).

<sup>7/</sup> A number of former CONARC bargaining unit employees required no additional training to perform their TRADOC functions. Other nonsecretarial employees required only on-the-job training which in only one instance was characterized as "extensive."

The evidence overall establishes that the combat developments function has, in effect, been accreted to TRADOC without significantly changing the job skills of the former CONARC bargaining unit members assigned to it. Further, it appears from the record that the terms and conditions of employment of the other former CONARC bargaining unit employees in TRADOC have not been substantially affected by the reorganization. Thus, while there were a number of building changes as a result of the reorganization, record evidence discloses that, with two exceptions, the changes were only within the confines of Fort Monroe. <sup>8/</sup> Additionally, the record indicates that, under TRADOC, former CONARC bargaining unit employees continue to receive the same administrative services and are serviced by the same Central Civilian Personnel Office concerning labor relations matters and personnel matters as before.

Under all of the above circumstances, I find that the instant RA petition should be dismissed. Thus, notwithstanding a change in the designation of the Activity involved, I find that the former CONARC employees who represent a substantial majority of the TRADOC unit, following the reorganization, continue, in general, to fulfill their same responsibilities with no substantial change in the job functions which they performed under CONARC. Nor do I find that the terms and conditions of employment of the former CONARC bargaining employees have been materially affected by the reorganization. <sup>9/</sup> Moreover, I find that the former CONARC unit, although diminished in part by the loss of certain functions and augmented by additional employees to effectuate additional responsibilities, continues as TRADOC to remain an identifiable and viable bargaining unit. Accordingly, I find that the previously certified bargaining unit of all General Schedule and Wage Grade employees of Headquarters, U. S. Continental Army Command, Fort Monroe, Virginia, now designated as Headquarters, U. S. Army Training and Doctrine Command, Fort Monroe, Virginia, remains appropriate and, therefore, I shall order that the instant RA petition be dismissed.

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<sup>8/</sup> The two exceptions involved 43 former CONARC unit employees who had their place of work moved approximately 7 miles distant from Fort Monroe to the "Liberty Building" and another 17 employees who were moved approximately 9 miles away to the "Newmarket Annex."

<sup>9/</sup> The movement of some former CONARC unit employees to new locations some 7 to 9 miles from their previous locations was not considered to require a contrary result in view of the limited distance and number of employees involved. Nor do I consider determinative 54 changes in grade or 84 changes in job series out of the 487 former CONARC bargaining unit employees.

ORDER

IT IS HEREBY ORDERED that the petition filed in Case No. 22-5337(RA) be, and hereby is, dismissed.

Dated, Washington, D. C.  
April 28, 1975

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

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

DEPARTMENT OF THE NAVY,  
 PORTSMOUTH NAVAL SHIPYARD  
 A/SLMR No. 508

This case involved an unfair labor practice complaint filed by the Federal Employees Metal Trades Council, Portsmouth, New Hampshire (FEMTC) alleging that the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire (Respondent) violated Section 19(a)(6) of the Order by changing the character of the food services available to employees and replacing full-service restaurants with vending machines and self-service operations without prior consultation with the FEMTC, and by failing to include the FEMTC in the Respondent's discussions with the food service concessionaire with respect to such changes. At the hearing, the FEMTC centered its allegations of violation of the Order on the change which occurred at one particular cafeteria facility located in Building 18.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In this regard, he concluded that the FEMTC was not precluded by Section 19(d) from utilizing the unfair labor practice procedures in this matter. With respect to the allegation as to the failure to consult and confer regarding the conversion of the restaurant facility in Building No. 18, the Administrative Law Judge concluded that the Respondent entered the April 30, 1973, meeting held with all the labor organizations represented at the Shipyard, at which it presented its tentative plans with respect to the changes in the food service operations, without having come to any final conclusion in that regard and that it was therefore incumbent upon the FEMTC to seek bargaining concerning such proposals or to ask for additional time to consider them. In addition, with regard to the FEMTC's assertion that it should have been present at meetings between the Respondent and the food concessionaire, the Administrative Law Judge concluded that the Order does not oblige an agency to include an exclusive bargaining representative in its negotiations with a third party as long as the representative's right to consult and confer with regard to any decision which may impact on working conditions is not infringed upon. Based on the foregoing, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

The Assistant Secretary, noting particularly that no exceptions were filed, adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
 PORTSMOUTH NAVAL SHIPYARD

Respondent

and

Case No. 31-7515(CA)

FEDERAL EMPLOYEES METAL TRADES COUNCIL,  
 PORTSMOUTH, NEW HAMPSHIRE

Complainant

## DECISION AND ORDER

On February 7, 1975, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions <sup>1/</sup> and recommendation that dismissal of the complaint is warranted.

## ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-7515(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
 April 29, 1975

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

<sup>1/</sup> On Page 8 of his Report and Recommendations the Administrative Law Judge inadvertently cited the holding in Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448, as being A/SLMR No. 488. This inadvertent error is hereby corrected.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



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In the Matter of .

DEPARTMENT OF THE NAVY .

PORTSMOUTH NAVAL SHIPYARD .

Respondents .

and . 31-7515 (CA)

FEDERAL EMPLOYEES METAL TRADES COUNCIL. .

PORTSMOUTH, NEW HAMPSHIRE .

Complainant .

.....

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For the Complainant

Before: SAMUEL A CHAITOVITZ  
 Administrative Law Judge

DECISION

I. Statement of the Case

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing on Complaint thereunder was issued on April 2, 1974 by the Acting Assistant Regional Administrator for Labor Management Services

Administration, New York Region, based on a Complaint filed on September 11, 1973 by Federal Employees Metal Trades Council affiliated with Metal Trades Department (herein called Complainant or FEMTC). The complaint was filed against the Portsmouth Naval Shipyard (herein called the Activity or Respondent) alleging that the Activity violated Sections 19(a)(2), (3) and (6) of the Order <sup>1/</sup> by closing restaurant facilities, substituting vending machines and reaching agreement with the "Vendor" without consultation with the FEMTC. On September 26, 1973, Respondent filed an Answer to Complaint consisting of a denial and on September 27, filed a "Motion to Dismiss Complaint," contending that the Complaint was barred by Section 19(d) of the Order. The Motion was denied by the Assistant Regional Director because of the existence of a factual dispute.

A hearing was held before the undersigned on June 5, 1974 in Portsmouth, New Hampshire. All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Opportunity was also afforded the parties to argue orally and to file briefs. Complainant and Respondent filed briefs, which have been duly considered by the undersigned.

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

II. Findings of Fact

Background and Conclusion of Building No. 18 Cafeteria

The Portsmouth Naval Shipyard's mission is to overhaul, repair and alter naval vessels. Since 1962 FEMTC has been the exclusive collective bargaining representative of a unit composed of all Wage Grade Employees, including General

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<sup>1/</sup> FEMTC later withdrew references to Sections 19(a)(2) and (3) of the Order.



Schedule Radiation Monitors, employed at the Portsmouth Naval Shipyard, a unit of approximately 3,800 employees. During 1972 and until April 30, 1973, Buildings No. 153, 174 and 18, 3/ had food services; Building No. 153 had food vending machines and Buildings No. 174 and 18 had manual cafeteria food lines. 4/

The blue collar employees represented by FEMTC primarily patronized the cafeteria located in Building No. 174, but also patronized the cafeteria located in Building No. 18, which was, however, primarily patronized by white collar employees not represented by FEMTC. At all times material herein all the food services were provided and operated by Servend Food Services, which had a contract with the Activity to provide these services.

Also located at various places on the Shipyard were private coffee messes. These were in the nature of cooperative ventures wherein a number of employees chipped in together to provide themselves with coffee.

During the early part of 1973 the Commanding Officer of the Portsmouth Naval Shipyard, Rear Admiral Elmer T. Westfall, was concerned about the Shipyard's overall efficiency. He concluded that there was excessive employee idleness, a result of morning and afternoon coffee breaks by employees who patronized either coffee vending machines or private coffee messes. The Admiral sought suggestions as how to deal with this problem and to increase productivity, from both his own managerial personnel and from representatives of the various unions, including FEMTC. At a meeting on February 6, 1973, Activity's representatives discussed these problems with union representatives, including representatives of FEMTC. No suggestions were made by the FEMTC representatives. The Activity was considering and studying the problem under the leadership of Capt. David F. Purinton, and, as part of its study, Capt. Purinton consulted with Servend concerning the impact of shutting down the private coffee messes and limiting times of consumption of food and beverages. Servend indicated it would have a substantial impact. The report of this study was submitted on March 13.

3/ Building No. 18 is apparently also referred to as Building No. 118.

4/ Additional food and beverage vending machines were apparently also located elsewhere on the premises of the Activity.

At the regular monthly meeting between the Activity and the unions, on March 6, Admiral Westfall repeated his concern and suggested that he might shut down all private coffee messes and all vending machines during non-meal hours. The unions offered no suggested solution or alternatives.

During the various discussions Servend apparently indicated that in the circumstances then present and in the event employees were not permitted to consume coffee and beverage except at lunch time, it would have to substantially curtail and eliminate some or all cafeteria service. The Activity inquired of other vendors to see what services they could and would provide.

Admiral Westfall then reached a tentative decision to shut down the private coffee messes, restrict the use of vending machines and the cafeteria to meal hours, and to retain the hot service line in Building No. 18 only. FEMTC was advised of these proposals by letter dated March 21, which also solicited comments and suggestions. A meeting between Activity representatives and FEMTC was held, at the request of FEMTC, on April 2. Raymond Hall, President of FEMTC, objected to the plan to close the cafeteria line at Building No. 174, which was primarily patronized by blue collar workers, represented by FEMTC, while leaving the cafeteria line open in Building No. 18, which was primarily patronized by white collar employees. Mr. Hall also suggested that it was the first line supervisors' responsibility to make sure the coffee breaks weren't abused. Other than the foregoing, FEMTC came up with no alternatives or suggestions. At the regular monthly meeting on April 4, these same matters were discussed again. Admiral Westfall contends that he advised representatives of all the unions that "one of the real possibilities we faced was a complete closedown of the manual food operations in this shipyard as part of the price I might have to pay for continued food service of any kind with the changes I had in mind to make regarding the coffee messes." 5/

5/ FEMTC President Hall, claims he was not notified of any proposed change with respect to Building No. 18 until April 30. It is found that although this statement may have been made, it was part of a discussion focused on coffee messes and Building No. 174 and would not normally have been perceived as introducing an entirely new possibility, the closing of all cafeterias.

On April 19th the Activity announced that all private coffee messes were to be closed down. On April 24, a meeting was held between the Activity and FEMTC during which this April 19th decision was discussed. They dwelt solely on the decision to abolish private coffee messes, and did not discuss the conversions of cafeterias or any other matter.

During this entire time representatives of the Activity were meeting with Servend representatives exploring the impact of these proposed changes on Servend service. Servend made various suggestions and explored a number of possibilities. Servend even indicated it might have to end all manual cafeteria services. The Activity tried to hold out for at least some manual cafeteria service. By letter dated April 19, Servend proposed to install vending machines in Buildings No. 174 and 18 and thereby to eliminate all manual cafeteria service. By letter dated April 25, Servend indicated that it would need certain logistical support in order to complete its proposed switch over on May 7, 1973.

On April 30, 1973, the Activity called a meeting with representatives of various unions, including FEMTC at which meeting proposed instructions 6/ concerning the closing of both cafeterias, including the one in Building No. 18, and the converting of them totally to vending machine operations, were explained and discussed. These proposed instructions were read to the unions from notes. FEMTC representatives indicated displeasure with the proposals and left before the meeting was concluded. The FEMTC representatives did not seek to discuss the proposals, suggest alternatives, or ask for additional time to consider the proposals. After FEMTC left the meeting, the meeting continued and the Activity continued to discuss and explain its proposal to the remaining representatives from other unions.

Later, on April 30, the proposed instructions converting the two cafeterias to vending machine operations, effective May 7, were prepared in final form. Admiral Westfall then finally decided to make the cafeteria changes and signed the instructions. The instructions were subsequently reproduced and distributed.

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6/ Normally proposed instructions were submitted to FEMTC ten (10) days in advance, with a covering letter soliciting suggestions.

Restaurant Board

For at least the past four or five years there existed a panel consisting of supervisors and employees of the Activity called the Restaurant Board.

The Restaurant Board was established and operated pursuant to CMMI 790.7 and Portsmouth Naval Shipyard Instruction 5420.6G. Each union submitted a list of names to the base commander, who chose one of those named by each union, including FEMTC, to be that union's representative on the Board. The Chairman of the Board was a Group Superintendent and the Vice Chairman was usually the FEMTC representative. The Board, under the direction and supervision of the base commander, was responsible for determining operating policies, executing contracts with concessionaires, developing and recommending plans for improving the operation of the restaurant, etc.

The Board, which met once a month, in the past had considered changes in prices and operations. The Restaurant Board also considered equipment Servend wished to buy and requested shifting of Servend employees because of work load changes. The Board was usually advised by its Chairman as to what went on during the prior month. During December, 1972 and January, 1973, Servend advised the Chairman of the Restaurant Board of various financial problems and proposals for changing operations. The Board responded to these particular proposals. The Chairman of the Board, together with Capt. Purinton, met with Servend on two occasions and became aware of the tentative plans to close Building 18 cafeteria, sometime during early or mid April 1973. The Chairman of the Restaurant Board, Mr. William G. Poor, seemed somewhat confused in his testimony as to whether he advised the Board of Servend's intent to close the cafeteria in Building No. 18. The minutes of the April 24 meeting refer to the changes in the two cafeterias, both the FEMTC and the American Federation of Government Employees (AFGE) representatives on the Restaurant Board deny that they were ever advised of this possibility. 7/

Grievances

During the period from April 30, 1973 until May 30, 1973, approximately 1,200 substantially identical grievances were filed by employees, 8/ designating officials of FEMTC

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7/ Because of the ambiguity of the minutes and Mr. Poor's confusion, I credit the FEMTC and AFGE representatives.

8/ These grievances were filed under the Navy's Grievance Procedure, not the one negotiated between the Activity and FEMTC. The Navy's Grievance Procedure is available only to employees and not to any union.

to be the representative of the grievants. The grievance of one individual, William Hobbs, was chosen as a representative grievance. The grievance alleged that the April 30 instruction violates certain Civilian Manpower Management Instructions, health standards and is beyond authority of the commander to deny employees adequate food services.

This grievance ultimately went to hearing before a Hearing Examiner who recommended that the grievance be dismissed because neither Mr. Hobbs nor his representative appeared at the hearing despite adequate notice and numerous postponements. This recommendation was adopted by the Secretary of the Navy.

III. Position of the Parties

Complainant contends that Respondent violated Section 19(a)(6) of the Order by failing to meet and confer with Complainant at reasonable times concerning the conversion of the Building No. 18 manual restaurant facility to an all vending machine operation, and further violated Section 19(a)(6) of the Order by failing to give Complainant the opportunity to be represented at formal discussions between Respondent and Servend concerning this conversion of the cafeteria in Building No. 18.

Respondent contends that FEMTC is precluded by Section 19(d) of the Order from utilizing the unfair labor practice procedures because it had instigated and processed grievances under the Navy's grievance procedure, wherein it raised or could have raised the issues raised in the subject unfair labor practice complaint. Respondent further contends that Complainant had no right, under the Order, to be present and/or to participate in the negotiations between Respondent and a vendor (Servend) concerning the sale of food services. Finally it is the Respondent's position that it did not violate Section 19(a)(6) of the Order because it provided the union with the opportunity to present its views and to be consulted on the conversion of the cafeteria in Building No. 18.

V. Conclusions

A. The Grievances and Section 19(d) of the Order

Section 19(d) of the Order provides, in part,:

"Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not both procedures."

Respondent contends that FEMTC was barred by this Section of the Order from utilizing the complaint procedures of the Order because FEMTC was, in reality the party who filed the 1200 identical grievances and FEMTC could have raised the alleged violations of Section 19(a)(6) of the Order in these grievances. In thus contending the Activity especially relies on the fact that the FEMTC President was named as their representative by the approximately 1200 grievants. In all the circumstances here present, however, it could hardly be found, that FEMTC was in reality the grievant. In this regard it must be noted that the grievance procedure utilized by the 1200 employees, the Navy grievance procedure, specifically provides that no union, including the FEMTC, could utilize this grievance procedure. FEMTC could not have filed any such grievance on its own behalf. Therefore, although FEMTC may have actively encouraged employees to exercise their option of filing a grievance, and offered to represent such employees during the grievance procedure, I am not able to conclude that FEMTC elected to follow this grievance procedure, on its own behalf, and thereby is barred from pursuing the complaint procedure of the Order. FEMTC was clearly asking and encouraging employees it represents to exercise their individual rights by utilizing the grievance procedure. See Internal Revenue Service, Southeast Center, A/SLMR No. 488. In such a situation I do not find FEMTC was attempting to have its rights adjudicated by a grievance procedure which specifically foreclosed FEMTC from using it. 9/

Further, even if, in some way, these grievances were attributable to FEMTC, the grievances solely raised the issue of whether the base commander exceeded his authority

9/ This is not to say that in other circumstances, where a large number of employees are encouraged by a union to file grievances and designate the union as its representative and the union could have filed such a grievance itself, that these grievances might not be attributed to that union.

in abolishing the cafeteria food services and private coffee messes, centralizing vending machines, etc. The grievance in no way raised the issue of whether the base commander or the Activity failed in any way in its obligations under the Order to bargain with FEMTC.

Respondent contends that once the grievance machinery is utilized by a union, the union is barred by Section 19 (d) from raising any issue that could have been raised in the grievance procedure, even if such issue was not raised. It contends that the "refusal to bargain" issue, although not raised in the grievance procedure, could have been raised there, and therefore FEMTC is barred from raising it in this unfair labor practice case. The Respondent relies upon Texas Air National Guard, A/SLMR No. 336 in urging this conclusion. However, that case specifically involved an "appeals procedure," not a grievance procedure, 10/ and the Order is quite specific in stating that, with respect to appeals procedures, "issues which can properly be raised under an appeals procedure may not be raised under this section." However, with respect to issues which may be raised under a grievance procedure, the Order clearly gives the grievant the option of deciding whether to raise the issue under the grievance procedure or the complaint procedure; nor does the Order state that if the grievant desires to raise an issue under a grievance procedure, all other issues must also be raised under the grievance procedure. Rather the Order recognizes that in the mind of the grievant, certain issues are more appropriately raised under one procedure and other issues under another procedure, and therefore the grievant is given that election. To make the employee or union raise all issues under one procedure would take away much of the option given by the Order. There are many situations where it is clear that certain issues would much more appropriately be raised under one procedure and other related issues under the other procedure. The subject case is a good example, where such an election clearly serves the aims and purposes of the Order. The issue of whether the base commander's action exceeded his naval authority was more appropriately decided under the navy's own grievance procedure than the unfair labor practice procedures; in fact, it probably would not be considered at all under the Order's complaint procedures. Similarly, however,

10/ Although the difference between an agency's own "grievance procedure", and an "appeals procedure" may not in all cases be clear, in the instant case the procedure in question is called a "grievance procedure" and the Respondent itself calls it and recognizes it as a grievance procedure.

whether the Activity fulfilled its bargaining obligations under the Order is more appropriately decided under the Order's complaint procedure than the Activity's grievance procedures. 11/

In light of all the foregoing therefore, I conclude that FEMTC is not barred by Section 19(d) of the Order from pursuing the Order's complaint procedures.

The Alleged Violations of Section 19(a)(6) of the Order

The Complainant alleges that Respondent did not consult and confer with it concerning the conversion of the cafeteria in Building 18, as required by Section 19(a)(6) of the Order. 12/

Some employees represented by FEMTC utilized the manual cafeteria which operated in Building No. 18. 13/ It seems clear that conversion of such a manual cafeteria operation, with its hot, fresh food at reasonable prices, to a vending machine operation, despite all the marvels and advantages of automation, did constitute a change in working conditions for these employees and therefore, before such a change was effected, the Activity was obliged by the Order to bargain with FEMTC.

11/ The fact that FEMTC was not permitted to file a grievance under the Navy's grievance procedure indicates it would be an inappropriate procedure to resolve a dispute concerning the Respondent's obligation, under the Order, to bargain with FEMTC.

12/ There was some discussion whether the Complainant was limiting its allegations to failure to "consult and confer" or was attempting to add a failure to "negotiate." Section 19(a)(6) of the Order speaks of refusal to "consult, confer or negotiate." The differences with respect to the precise meanings of these terms is, no doubt, quite subtle, however, they are in these circumstances read to describe whether Respondent bargained with FEMTC, to the extent required.

13/ The record establishes that this cafeteria, although primarily used by white collar employees not represented by FEMTC, was used by some blue collar employees represented by FEMTC.

The record establishes that on April 30, the Activity advised all the unions, including FEMTC, that it had tentatively decided to issue instructions effectuating the conversion of the cafeteria in Building No. 18 effective May 7. FEMTC did not either ask to consult and confer concerning this proposal or ask for additional time to consider the proposed instructions. Rather it walked out of the meeting before the meeting was concluded and before it had ascertained, in any way, whether the Activity was willing to consult and confer about the proposed instructions.

At this point, the Activity had complied with its obligations under the Order and it was incumbent upon FEMTC to avail itself of this opportunity and to request either to "meet and confer" or to be granted more time to consider the proposed instructions. CF. U.S. Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR No. 289; F.A.A., National Aviation Facilities Experimental Center, A/SLMR No. 438.

The evidence establishes that prior to the April 30, 1973 meeting the Activity had not yet made any final decision with respect to the conversion of the Building No. 18 cafeteria and was still in a position to consider FEMTC suggestions. FEMTC apparently contends that, at the time of the April 30 meeting, Respondent had already reached full agreement with Servend to shut down the Building No. 18 cafeteria and therefore Activity was not in any position to meet and confer and FEMTC would have been engaging in a futile gesture if it had asked for such meetings or for additional time to consider the proposals. The record, however, fails to support or establish this. Although there is some indication that prior to the April 30 meeting, Servend had already given its employees two weeks notice, this was not established on the record, no Servend official testified that any final agreement between Servend and the Activity had, in fact, been reached prior to April 30, and there are many other explanations to explain such conduct other than Servend having reached full and final agreement with the Activity to end the cafeteria service in Building No. 18.

The record does establish that although there had been discussions between Servend and the Activity, and, even perhaps a tentative agreement might have been reached prior

to the April 30 meeting, no final decision was actually made until later that day, after the meeting, when the base commander signed the instructions.

In such circumstances after the Activity advised FEMTC of the proposed changes with respect to Building No. 18, it was FEMTC obligation to request either to bargain about the proposals or to be granted more time to consider them. Absent such request by FEMTC, the Activity did not violate Section 19(a)(6) by failing to consult and confer concerning the conversion of the manual cafeteria in Building No. 18. CF. U.S. Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, supra; and F.A.A., National Aviation Facilities Experimental Center, supra.

Sections 10 and 19(a)(6) of the Order establishes a collective bargaining representative's rights to be recognized and to represent its unit vis-a-vis "An Agency."

Nowhere does the Order give such a collective bargaining representative the right to be present or take part in an agency's negotiations with third parties (i.e. Servend). A collective bargaining representative is perhaps entitled, when working conditions are involved, to be consulted and conferred with concerning the position the Activity will take with a third party and what the Activity will ultimately agree to or attempt to obtain from the third party; but the Order grants it no right to be an actual party to, or be present at, the negotiations between the Activity and the third party.

Therefore, I am constrained to reject FEMTC contention that Respondent violated Section 19(a)(6) of the Order by refusing to allow FEMTC to be present and to take part in Respondent's meeting with Servend. In this regard it must be noted further that the record fails to establish that FEMTC ever asked to be present or to take part in meetings between Servend and Respondent, even after FEMTC was advised at the April 30, meeting of the proposed instructions.

With respect to the Restaurant Board, the record establishes that it was an advisory council unilaterally established by the base commander to advise him of what courses of action he should pursue with respect to the food serving operations. It was not a mechanism where union and management representatives met to bargain about

the restaurant policies; rather it was an advisory board set up by the base commander to assist and advise him. The fact that each union was given an opportunity to nominate a group of names from which the base commander chose a representative did not convert this to a collective bargaining mechanism. Rather, this procedure was merely a way for the base commander to choose his advisors. Therefore, a failure of the base commander to keep the Restaurant Board adequately advised did not constitute a failure to consult and confer with FEMTC, especially where FEMTC was specifically notified and advised at the April 30, meeting of the proposed changes in the Building No. 18 cafeteria operation. 14/

In summary, considering all of the evidence, it is concluded that Respondent, Portsmouth Naval Shipyard, did not fail in its obligation to meet and confer with FEMTC concerning the conversion of the cafeteria in Building No. 18 and therefore did not violate Section 19(a)(6) of the Order.

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14/ This failure to utilize the Restaurant Board and thereby change a prior practice might itself constitute a unilateral change of working condition and thereby violate Section 19(a)(6) of the Order. However, it was not alleged in the complaint, not contended or put forth by FEMTC, and not addressed by the Respondent. Further, such a violation is substantially different from the violation alleged, that Respondent failed to bargain concerning the conversion of the cafeteria in Building No. 18, and the remedies would be substantially different. In any event the Restaurant Board was advised of the various changes and negotiations and the chairman of the Restaurant Board was present during some Servend negotiations and was advised as to the proposed changes in Building No. 18.

Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends that the complaint herein be dismissed in its entirety.

  
 SAMUEL A CHAITOVITZ  
 Administrative Law Judge

Dated: February 7, 1975  
 Washington, D.C.

April 28, 1975

UNITED 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

TENNESSEE VALLEY AUTHORITY  
A/SLMR No. 509

This case involved unfair labor practice complaints filed by 75 individual employees of the Respondent alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by locking them out and, thereafter, discharging them because of their membership in Local 760 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. In addition, the Complainants alleged that certain steamfitters and welders employed by the Respondent at its Browns Ferry Nuclear Plant engaged in a walkout or strike on September 24, 1973, and that, thereafter, the Respondent locked out these employees and, subsequently, discharged certain of these employees including the Complainants, but allowed certain other employees who were not members of Local 760 to return to work. The Respondent contended with respect to certain of the Complainants who were entitled to veterans preference appeals to the Civil Service Commission that their complaints were barred under Section 19(d) of the Order. With regard to the remaining Complainants, the Respondent asserted that their rights are governed by the negotiated agreement between the Respondent and the Tennessee Valley Trades Council, their bargaining agent, which provides, among other things, for a joint investigative procedure in the event of a work stoppage. The contractual procedure provides for the investigation of the cause and responsibility in the event of a work stoppage, as well as a determination of the appropriate action to be taken against employees engaging in such action. In this instance, the Respondent asserts, a determination was made pursuant to the contractual procedure that Local 760 was responsible for the strike and that all employees who were members of Local 760 were to be terminated in accord with the recommendation of the Committee established pursuant to the negotiated procedure. On this basis, the Respondent asserts that the Assistant Secretary has no jurisdiction over this matter. Under these circumstances, the Respondent took the position that it would not participate in the hearing nor make any records or witnesses available.

The Administrative Law Judge concluded that the Respondent violated the Order with respect to certain of the complaints herein, and that the provisions of Section 19(d) of the Order precluded the Assistant Secretary from passing upon the allegations of certain other complaints herein. In reaching these conclusions, the Administrative Law Judge found, among other things, that the Respondent is an Agency of the United States Government and within the coverage of the Order; that with regard to those Complainants who enjoy veterans status, the availability of an appeals procedure concerning their status as employees precluded, under the provisions of Section 19(d) of the Order, the Assistant Secretary from passing upon the allegations of their complaints; and that the actions

of the Joint Committee, established under the provisions of the parties' negotiated agreement, to investigate the cause and responsibility for work stoppages, would not preclude the Assistant Secretary from determination of the issues raised by the complaints herein under the private sector Spielberg doctrine since the Committee's actions were not the result of fair and regular proceedings. Finally, with regard to the Complainants who did not enjoy veterans preference rights, he found that their discharge was attributable to their membership in Local 760 and not to their actions in walking off the job or striking, and that such discharges constituted violations of Section 19(a)(1) and (2).

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge with certain modifications. In so doing, the Assistant Secretary noted his agreement with the Administrative Law Judge that the Respondent, as a Government corporation, meets the definition of "Agency" as set forth in Section 2(a) of the Order, and does not qualify for exemption from the provisions of the Order based on paragraphs (b), (c) and (d) of Section 3. Moreover, the Assistant Secretary rejected the argument made by the Respondent that because there is an established grievance machinery in the parties' negotiated agreement the Assistant Secretary is precluded from asserting jurisdiction in this matter. In addition, the Assistant Secretary rejected the apparent holding of the Administrative Law Judge that the action of the Joint Committee herein was, in effect, part of an arbitration procedure which, if fair and regular and not repugnant to the Order, would have a binding effect under the Spielberg doctrine enunciated in the private sector. In the Assistant Secretary's view, the Joint Committee's investigatory procedure was not an arbitration type proceeding and, therefore, the Spielberg doctrine was not applicable in this matter. In adopting the remaining findings, conclusions and recommendations of the Administrative Law Judge, the Assistant Secretary noted that he was not in any way condoning the action of the Respondent's employees in engaging in a work stoppage or strike. Thus, he noted that such action on the part of employees is not only unprotected under the Order but also is unlawful, and employees who engage in such action are not protected by the Order from discipline by their agency or activity up to and including discharge. The Assistant Secretary further noted that an agency or activity is not required to effectuate the same discipline for all employees who engage in work stoppages or strikes, and that an agency or activity may assess different degrees of discipline based on a distinction in conduct or responsibility for the improper conduct. However, the Assistant Secretary indicated that, in his view, an agency or activity may not, with impunity, predicate its differentiation of discipline upon conduct which is protected under the order, i.e., membership in a labor organization.

Having found that the Respondent violated Section 19(a)(1) and (2) of the Order in certain respects, the Assistant Secretary ordered the Respondent to cease and desist from such actions and to take certain affirmative actions including the effectuation of a make whole remedy and an offer of full reinstatement. The Assistant Secretary also ordered the dismissal of those complaints filed by employees entitled to veterans preference appeals.

-2-

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

TENNESSEE VALLEY AUTHORITY

Respondent

and

Case Nos. 40-5399(CA)  
through  
40-5473(CA)

JAMES C. ALBRIGHT, et al. 1/

Complainants

and

LOCAL 760 OF UNITED ASSOCIATION OF  
JOURNEYMEN AND APPRENTICES OF THE  
PLUMBING AND PIPEFITTING INDUSTRY  
OF THE UNITED STATES AND CANADA

Party-in-Interest

and

UNITED ASSOCIATION OF JOURNEYMEN AND  
APPRENTICES OF THE PLUMBING AND  
PIPEFITTING INDUSTRY OF THE  
UNITED STATES AND CANADA

Party-in-Interest

and

TENNESSEE VALLEY TRADES AND  
LABOR COUNCIL

Party-in-Interest

1/ Separate complaints in Case Nos. 40-5399(CA) through 40-5473(CA) were filed against the Respondent by 75 individual Complainants. The name of each Complainant together with the case number of his respective complaint is attached hereto as "APPENDIX A".

On December 9, 1974, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled consolidated proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in certain of the complaints and that it had not engaged in certain unfair labor practices alleged in the other complaints. As more fully set forth in the attached Report and Recommendations, the Administrative Law Judge recommended that the Respondent take certain affirmative actions, and that certain complaints be dismissed.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in these cases, including the exceptions filed by the Respondent 2/ and the exceptions and supporting briefs filed by the Complainant and Party-in-Interest, Tennessee Valley Trades and Labor Council 3/, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge to the extent consistent herewith.

In agreement with the Administrative Law Judge, I find that the Respondent is subject to the jurisdiction of Executive Order 11491, as amended. Thus, as a Government corporation, the Respondent meets the definition of "Agency" as set forth in Section 2(a) of the Order. 4/ Nor does it qualify for exemption based on paragraphs (b), (c) and (d) of Section 3 of the Order. Moreover, I reject the argument made by the Respondent that, because there is established grievance machinery in the negotiated agreement between the Respondent and the Tennessee Valley Trades and Labor Council, the Assistant Secretary is precluded from

2/ The Respondent's letter of December 25, 1974, to former Secretary of Labor Peter J. Brennan was treated as exceptions to the Report and Recommendations of the Administrative Law Judge.

3/ The Motion contained in the exceptions filed by the Tennessee Valley Trades and Labor Council, seeking to set aside the Administrative Law Judge's Report and Recommendations and remand the case for further hearing based on an asserted failure to provide a full opportunity to participate in this matter, is hereby denied. Thus, the record discloses that the Council was served with a timely notice of hearing. Further, Council's request for postponement was denied by the Assistant Regional Director prior to the scheduled opening of the hearing, and the Council, thereafter, did not seek to renew such motion before the Administrative Law Judge. Indeed, it did not see fit to enter an appearance at the hearing. Under these circumstances, I find that the Council's rights herein were not improperly prejudiced.

4/ Section 2(a) of the Order states: "When used in this Order the term - (a) 'Agency' means an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office;"



asserting jurisdiction in this matter and considering allegations of unfair labor practices in connection with the Respondent's actions. Thus, in my view, the mere existence of grievance machinery in a negotiated agreement does not preclude the assertion of jurisdiction by the Assistant Secretary where it is alleged that Section 19 of the Order has been violated.

In addition, I reject the apparent holding of the Administrative Law Judge that the action of the Joint Committee herein was, in effect, part of an arbitration procedure which, if fair and regular and not repugnant to the Order, would have a binding effect under the Spielberg 5/ doctrine enunciated in the private sector. Thus, in my view, Supplementary Schedule No. H-XXIII of the parties' negotiated agreement does no more than establish contractually procedures for the investigation of work stoppage incidents, and is not an extension or part of the parties' contractually established grievance-arbitration system. Accordingly, as the Joint Committee's investigatory procedure in this regard was not viewed as an arbitration type proceeding, I find that the Spielberg doctrine is not applicable in this matter.

Finally, in adopting the remaining findings, conclusions and recommendations of the Administrative Law Judge, it should be noted particularly that I am not, in any way, condoning the action of the Respondent's employees in engaging in a work stoppage or strike. Such action on the part of employees is not only unprotected under the Order but also is unlawful, and employees who engage in such action are not, in my view, protected by the Order from discipline by their agency or activity up to, and including, discharge. Further, in my view, an agency or activity is not required to effectuate the same discipline for all employees who engage in a work stoppage or strike. Thus, an agency or activity may assess different degrees of discipline based on a distinction in conduct or responsibility for the improper conduct. However, in agreement with the Administrative Law Judge, I believe that an agency or activity may not, with impunity, predicate its differentiation of discipline upon conduct which is protected under the Order i.e. membership in a labor organization.

The instant case is a clear illustration of the latter exception to the general principle. Thus, in this case, the Respondent invoked disparate discipline against the employees who had engaged in an improper action, discharging some and merely warning others. The record discloses that the only basis for the disparate treatment was membership in a particular labor organization. It is this aspect of the Respondent's conduct which impels me to reach the same conclusion as that reached by the Administrative Law Judge - i.e. - that the Respondent, by its conduct herein, violated Section 19(a)(1) and (2) of the Order.

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5/ Spielberg Manufacturing Company, 112 NLRB 1080.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Tennessee Valley Authority shall:

1. Cease and desist from:

(a) Locking out, discharging, refusing to rehire or reinstate, or discriminating in any other manner against its employees, in regard to their hire and tenure of employment, or any other condition of employment, in order to discourage membership in Local 760 of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, or any other labor organization.

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

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

(a) Offer to all employees listed in "APPENDIX B" immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered, by reason of its discrimination, by paying to each employee a sum of money equal to the amount which each employee would have earned as wages from the date of the refusal to permit the employee to return to work to the date of the Respondent's offer of reinstatement, less any amounts earned by such employee through other employment during the above noted period.

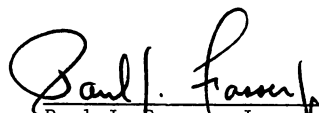
(b) Post at its facility at Brown's Ferry Nuclear Plant, Limestone County, Alabama, copies of the attached notice marked "APPENDIX C" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Also post, along with the attached notice, the listing of names contained in "APPENDIX B". Upon receipt of such forms they shall be signed by the Chairman of the Tennessee Valley Authority and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Chairman shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaints in the following cases be, and they hereby are, dismissed:

Case Nos. 40-5402(CA); 5406(CA); 5408(CA); 5410(CA); 5411(CA); 5414(CA); 5416(CA); 5418(CA); 5419(CA); 5421(CA); 5429(CA); 5430(CA); 5433(CA); 5434(CA); 5436(CA); 5437(CA); 5439(CA); 5441(CA); 5444(CA); 5445(CA); 5447(CA); 5448(CA); 5449(CA); 5451(CA); 5454(CA); 5456(CA); 5458(CA); 5463(CA); 5466(CA); 5467(CA); 5468(CA); 5471(CA); 5472(CA); and 5473(CA)

Dated, Washington, D.C.  
April 28, 1975

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

APPENDIX A

COMPLAINANTS

<u>Complainant</u>	<u>Case No.</u>
James C. Albright .....	40-5399(CA)
Ronald J. Albright .....	40-5400(CA)
Roy E. Albright, Jr. ....	40-5401(CA)
Albert Beckman .....	40-5402(CA)
Herschel T. Bergin .....	40-5403(CA)
Homer L. Bergin .....	40-5404(CA)
Kenneth E. Berry .....	40-5405(CA)
Will C. Berry .....	40-5406(CA)
Earl H. Black .....	40-5407(CA)
Joe W. Burks, Jr. ....	40-5408(CA)
Tony E. Burks .....	40-5409(CA)
James H. Burns .....	40-5410(CA)
Ervin H. Call .....	40-5411(CA)
H. Clayton Carpenter .....	40-5412(CA)
Jesse W. Casey .....	40-5413(CA)
Charlie W. Chaney .....	40-5414(CA)
Sam Chambers .....	40-5415(CA)
Therman Clark .....	40-5416(CA)
Grady H. Cole .....	40-5417(CA)
Lester A. Cox .....	40-5418(CA)
Oliver D. Cox .....	40-5419(CA)
George P. Crews .....	40-5420(CA)

<u>Complainant</u>	<u>Case No.</u>
John B. Earnest .....	40-5421(CA)
Homer W. Earnest .....	40-5422(CA)
Carse Eastep, Jr. ....	40-5423(CA)
C. L. Embry .....	40-5424(CA)
Jimmy W. Embry .....	40-5425(CA)
Elmer C. Emmons .....	40-5426(CA)
James M. Emmons .....	40-5427(CA)
William W. Emmons .....	40-5428(CA)
B. Arnold Goodwin .....	40-5429(CA)
William L. Good .....	40-5430(CA)
Robert C. Goss, Jr. ....	40-5431(CA)
William Jerry Hayes .....	40-5432(CA)
Martin L. Hayes, Jr. ....	40-5433(CA)
Dennies F. Hill, Jr. ....	40-5434(CA)
Kermit M. Hogan .....	40-5435(CA)
James R. Hopkins .....	40-5436(CA)
Stephen D. Hopkins .....	40-5437(CA)
Roy C. Hunt .....	40-5438(CA)
Ancil H. Huskey .....	40-5439(CA)
Dudley E. Kent .....	40-5440(CA)
Richard A. King .....	40-5441(CA)
J. M. McKinney .....	40-5442(CA)

<u>Complainant</u>	<u>Case No.</u>
William E. Moore .....	40-5443(CA)
David L. Murphy .....	40-5444(CA)
Karl Murphy .....	40-5445(CA)
Tony E. Muse .....	40-5446(CA)
Harold D. Neal, Jr. ....	40-5447(CA)
Chester C. Nix .....	40-5448(CA)
Johnnie M. Oswalt .....	40-5449(CA)
Allan R. Parker .....	40-5450(CA)
Oliver D. Parker .....	40-5451(CA)
Billy R. Poag .....	40-5452(CA)
Paul C. Poag, Sr. ....	40-5453(CA)
Durwood R. Posey .....	40-5454(CA)
Jackie R. Pounders .....	40-5455(CA)
Melvin Pounders .....	40-5456(CA)
Thomas G. Ragsdale .....	40-5457(CA)
Robert C. Rhodes .....	40-5458(CA)
John Winston Rice .....	40-5459(CA)
Guy E. Rickard .....	40-5460(CA)
E. Paul Sanderson .....	40-5461(CA)
Gaston B. Scott .....	40-5462(CA)
Preston H. Scott .....	40-5463(CA)
Roy O. Skipworth .....	40-5464(CA)
James Ezra Smith .....	40-5465(CA)

<u>Complainant</u>	<u>Case No.</u>
James H. Smith .....	40-5466(CA)
Edward E. Sneed, Jr. ....	40-5467(CA)
Owen W. Thurman .....	40-5468(CA)
Charley H. Truitt .....	40-5469(CA)
James R. Truitt .....	40-5470(CA)
Vance P. Williams .....	40-5471(CA)
Dale J. Willis .....	40-5472(CA)
Lloyd H. Worley .....	40-5473(CA)

James C. Albright  
 Ronald J. Albright  
 Roy E. Albright, Jr.  
 Herschel T. Bergin  
 Homer L. Bergin  
 Kenneth E. Berry  
 Earl H. Black  
 Tony E. Burks  
 H. Clayton Carpenter  
 Jesse W. Casey  
 Sam Chambers  
 Grady H. Cole  
 George P. Crews  
 Homer W. Earnest  
 Carse Eastep, Jr.  
 C. L. Embry  
 Jimmy W. Embry  
 Elmer C. Emmons  
 James M. Emmons  
 William W. Emmons  
 Robert C. Goss, Jr.

William Jerry Hayes  
 Kermit M. Hogan  
 Roy C. Hunt  
 Dudley E. Kent  
 J. M. McKinney  
 William E. Moore  
 Toney E. Muse  
 Allan R. Parker  
 Billy R. Poag  
 Paul C. Poag, Sr.  
 Jackie R. Pounders  
 Thomas G. Ragsdale  
 John Winston Rice  
 Guy E. Rickard  
 E. Paul Sanderson  
 Gaston B. Scott  
 Roy O. Skipworth  
 James Ezra Smith  
 Charley H. Truitt  
 James R. Truitt

APPENDIX C

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT discourage membership in Local 760 of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, or any other labor organization, by locking out, discharging, or refusing to rehire or reinstate, or by discriminating in regard to the hire or tenure of employment, or any other term or condition of employment, of any of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to form labor organizations, join or assist Local 760 of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, or any other labor organization, or to refrain from any such activities.

WE WILL OFFER to all employees listed immediate and full reinstatement of their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered, by reason of the discrimination, by paying to each employee a sum of money equal to an amount which each employee would have earned as wages from the date of the refusal to permit the employee to return to work to the date of Respondent's offer of reinstatement, less any amounts earned by such employee through other employment during the above noted period.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



.....  
In the Matter of :  
TENNESSEE VALLEY AUTHORITY :  
Respondent :  
and :  
JAMES C. ALBRIGHT et. al. :  
Complainants 1/ :  
and :  
Local 760 of UNITED ASSOCIATION OF :  
JOURNEYMEN AND APPRENTICES OF THE :  
PLUMBING AND PIPEFITTING INDUSTRY :  
of THE UNITED STATES AND CANADA, 2/ :  
and :  
UNITED ASSOCIATION OF JOURNEYMEN :  
AND APPRENTICES OF THE PLUMBING AND :  
PIPEFITTING INDUSTRY of THE UNITED STATES :  
AND CANADA 3/ :  
and :  
TENNESSEE VALLEY TRADES AND LABOR COUNCIL 4/ :  
Parties in Interest :  
.....

CASE NOS.  
40-5399  
through  
40-5473

Robert L. Potts, Esq.  
Earnest M. Blasingame, Jr. Esq.  
Potts & Young  
107 East College Street  
Florence, Alabama 35630

For the Complainants

Patrick C. O'Donahue, Esq.  
1912 Sutherland Place, N. W.  
Washington, D. C. 20016

For the United Association  
of Journeymen & Apprentices of  
the Plumbing & Pipefitting  
Industry of the U.S. & Canada

BEFORE: WILLIAM NAIMARK  
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

The instant proceeding arose under Executive Order 11491, as amended (herein called the Order), pursuant to a Notice of Hearing 5/ on complaints issued on July 17, 1974 by the Assistant Regional Director of the United States Department of Labor, Labor-Management Services Administration, Atlanta Region.

James C. Albright and 74 other individuals (herein called Complainants) filed separate complaints on May 23, 1974 against Tennessee Valley Authority (herein called TVA or Respondent). Each complainant, a member of Local 760, filed a complaint on his own behalf alleging discrimination by Respondent in violation of Section 19(a)(1)

5/ Cases 40-5399 thru 40-5473 were consolidated for hearing by Order dated July 17, 1974.

1/ Separate complaints in cases 40-5399 thru 40-5473 were filed against Respondent herein by 75 individuals. The names of each respective complainant, together with the appropriate case number for each complaint, appears on Appendix A.

2/ Herein called Local 760

3/ Herein called the International

4/ Herein called the Trades Council

and (2) of the Order. All complaints, in identical language, allege in substance that approximately 460 steamfitters and welders were employed at Browns Ferry Nuclear Plant; that 192 of such employees were members of Local 760; that on September 24, 1973 a strike by the steamfitters and welders took place at this plant; that on September 25 or 26, 1973 Respondent locked out these 460 steamfitters and welders; that thereafter, on or about October 5, 1973, Respondent discharged and refused to rehire all 192 steamfitters and welders, including Complainants, who were members of Local 760, apart from their being striking or non-striking employees; that the remaining steamfitters and welders, who were not members of Local 760, were not terminated but were in fact rehired by Respondent despite the fact they participated in the strike.

Respondent filed responses 6/ to the charges herein on May 9 and June 21, 1974. In denying a violation of the Order it contended that 36 of the Complainants were entitled to veterans preference appeals to the Civil Service Commission, and hence their complaints were barred under 19(d) of the Order. With respect to the remaining 39 Complainants, Respondent took the position that their rights are governed by the contract between the employees and the Tennessee Valley Trades Council. It is asserted that work stoppages are prohibited under Article II, Section 2 thereof. Further, that Schedule H-XXIII of the agreement sets forth a procedure, in the event of a stoppage, for the investigation of its cause and responsibility as well as a determination of appropriate action to be taken against striking employees. Hence, it is asserted the Department of Labor has no jurisdiction over the matter. In this instance, a determination was made that Local 760 was responsible for the strike, and thus all of said 39 Complainants - who were members of such local - were terminated in accord with the recommendation of the committee pursuant to the agreement.

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6/ Assistant Secretary's Exhibit D and Attachment

In a letter to Acting Area Director, D.C. Bedingfield, Atlanta, Georgia, dated September 6, 1974, Respondent's General Counsel 7/ reiterated its contention that the Department of Labor had no jurisdiction over the matter for reasons previously asserted. Further, counsel therein that Respondent would not participate in the hearing nor make any records or employees available thereat. 8/

A hearing was held before the undersigned on September 10, 1974 at Florence, Alabama. All 75 Complainants and the International were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, as well as examine and cross-examine witnesses. Respondent did not appear pro se or by counsel. 9/ Thereafter a brief was filed on behalf of all the Complainants which has been duly considered. 10/

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

Findings of Fact

1. Tennessee Valley Authority (TVA), the Respondent herein, is an agency of the United States Government and within the coverage of the Order.

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- 7/ The undersigned was administratively advised of said letter prior to the hearing herein.
  - 8/ On September 4, 1974, the Assistant Regional Director, Atlanta Region, granted, in part, complainant's motion to require the Production of Documents by Respondent.
  - 9/ No appearance was made by either Local 760 or the Trades Council at the hearing.
  - 10/ By motion dated October 9, 1974 Complainants moved to correct the transcript in certain respects. The motion is granted and those corrections are attached hereto as Appendix B.

2. At all times material herein, Respondent employed about 1500 various craft employees, including approximately 500 steamfitters and welders, at the Browns Ferry Nuclear Plant construction site in Limestone County, Alabama.

3. About 192 steamfitters and welders so employed, including Complainants herein, are, and have been at all times material herein, members of Local 760. The remaining steamfitters and welders were, "travelers" who were members of the International, but these individuals belonged to locals other than Local 760.

4. At all times material herein a collective bargaining agreement 11/ was in effect between Respondent and the Trades Council. Various international unions as members of said Council, including the International herein, were recognized under this agreement on a TVA wide basis as representatives of employees in their respective crafts, and all such unions were signatories to said agreement. 12/

5. It was an established practice under the aforesaid agreement for the international unions to assign jurisdiction to local unions over particular construction projects. Under this procedure the local unions supplied manpower for the job, designated stewards, and negotiated with TVA as to the matters pertaining to said project. In accordance with such practice Local 760, which had geographical jurisdiction over the Browns Ferry Nuclear Plant, was assigned by the International to, and did so, represent the steamfitters and welders at such plant in dealing with TVA concerning grievances and other matters affecting the work of such employees.

6. In June, 1973 13/ Respondent proposed to the Building and Construction Trades Department, AFL-CIO that local union jurisdiction over construction projects be abolished.

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11/ Complainant's Exhibit 4.

12/ The initial contract between TVA and the Council was executed in 1941 and has been renewed each year thereafter.

13/ All dates hereinafter mentioned are in 1973 unless otherwise indicated.

7. Article II (3) of the General Agreement herein provides, inter alia, as follows:

"The Council and its member organizations will not permit their members to engage in work stoppages or to refuse to perform work of their craft as assigned, nor sanction their leaving the service, pending settlement of issues and disputes."

8. Supplementary Schedule H-XXIII of the General Agreement herein provides, in substance, that if employees leave a job in violation of Article II of the agreement, TVA and the Council will jointly handles any such incident. Under this schedule said employee's employment status is to be held in suspense. The Council and TVA are to appoint joint committee members who will interview each employee who has left work. The committee, under the agreement, is obliged to determine (a) the cause of leaving work, (b) who was primarily responsible therefor, (c) whether and under what conditions employees who left work may return, (d) what statement, of the incident if any, should be placed in an employee's file, (e) decide upon appropriate action to be taken against individuals who left work or failed to prevent such action.

9. On September 24 Respondent hired two non-union welders who reported to the Browns Ferry Nuclear Plant on the morning of that day.

10. About 10:30 or 11:00 a.m. on September 24, and shortly after the two non-union welders appeared on the job site, Ralph Emmons, job steward of Local 760, walked off the job in protest of the hiring by Respondent of non-union employees.

11. Word spread thereafter among the other employees of the action taken by the job steward, as aforesaid, and the other welder and steamfitters "turned in their brass" 14/

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14/ Each employee's hat has affixed a decal with a number thereon. A round brass is issued to each worker with the same number thereon as appears on [continued on next page]



and left the Browns Ferry Nuclear Plant job site prior to the end of their shift on September 24. Except for about 25 individuals, approximately all 500 steamfitters and welders (members and non-members of Local 760) walked off the job in protest of the hiring by Respondent of two non-union welders.

12. Complainant Lester A. Cox, a member of Local 760, testified without contradiction and I find, that he was a steamfitter rigger foreman who did not walk off the job, or participate in the strike, on September 24, but remained till the end of his shift on that date. Cox further testified that he reported to the site on September 25th, attempted to get his brass and go to work, but was refused his brass and not permitted to go on the job. Thereafter, during the week of October 2, Cox was interviewed by the committee which investigated the strike, at which time he told the interviewer that he did not leave the job on September 24. On the basis of these facts I find that Lester A. Cox did not engage in, join, or participate in the strike or walkout on September 24.

13. Durwood Posey testified without contradiction, and I find, that he was a steamfitter foreman at the Browns Ferry Nuclear Plant site; that Posey urged his crew to remain at work but all non-members of Local 760, walked off the job on September 24; that Posey did not leave work or participate in the walkout but continued on the job till the end of his shift; that Posey was ill on September 25th and did not report on the job because of his illness; that Posey returned to work on September 26 and 'asked for his brass', but was refused it and denied the right to go back to work. On the basis of these facts I find that Durwood Posey did not engage in, join, or participate in the strike or walkout which occurred on September 24.

14. Allan R. Parker testified without contradiction, and I find, that he was a steamfitter-welder at Browns Ferry Nuclear Plant; that he had an ear infection on September 23 and obtained permission from his foreman,

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14/ - continued

the hat. Upon reporting to work each day the worker must ask for his brass by number.

Jim Smith, to be absent on September 24 and visit his doctor; that Parker visited the doctor on September 24 and did not report to work as a result thereof; that he gave a doctor's statement to J.A. Passeur, the assistant project manager, attesting to his illness; that he reported to work on September 25 but was advised that the brass of all employees not at work on September 24 had been flagged, and Parker was not permitted to return to his job. Further testimony by Parker reveals that he was interviewed by the investigating committee during the week of October 2, and that a member of the committee stated there was no reason to talk to Parker since the latter was not even there, or at work, when the strike occurred. On the basis of these facts, I find, that Allan Parker did not engage in, join, or participate in the strike or work stoppage which occurred on September 24.

15. Stephen Dale Hopkins testified without contradiction, and I find, that he was employed as a steamfitter-welder at the Browns Ferry Nuclear Plant; that on September 21 he obtained permission from his foreman, Dale Willis, to be absent from work on September 24 in order to take his grandmother to the doctor; that Hopkins was absent from work on September 24 at which time he brought his grandmother to her doctor's office; that Hopkins reported to the job on September 25, but Respondent refused him his brass and Hopkins was thereby prevented from returning to work. The record further reveals, and I find, that Hopkins was interviewed by the investigating committee during the week of October 2; that he told a representative of this body why he was absent on September 24; and that this representative then said there was no need to talk to this employee. On the basis of these facts I find that Stephen Dale Hopkins did not engage in, join, or participate in the walkout or work stoppage which occurred on September 24.

16. Grady H. Cole, A Complainant, testified without contradiction, and I find, that he was a steamfitter foreman at Browns Ferry Nuclear Plant; that on September 24 his crew left the job before the end of the shift to join the walkout, that he remained on the job until the end of the shift, 3:30 p.m.; that Cole taught apprentices on Monday nights and on September 24 he remained at the plant till 7:45 p.m. to teach his class; that Cole did not report for work on September 25 because he had no crew with which

to work although he did appear at the job site; that he returned on the 26th of September at the urgency of Local 760 and was told by his supervisor, William Whitehead, the men could not return to work. Record facts further show Cole was interviewed by the investigating committee during the week of October 2; that he told his interviewer he did not walk out on September 24 and explained the reason for his not reporting on the following day. On the basis of these facts I find that Grady H. Cole did not engage in, join, or participate in the walkout or work stoppage which occurred on September 24.

17. Richard A. King, a Complainant, testified without contradiction, and I find, that he was a steamfitter fireman at the Browns Ferry Nuclear Plant; that all members of his crew walked off the job to join the work stoppage on September 24, but King remained until the end of his shift; that he had an attack of sinus the night of September 24 and called his foreman, Cecil Thigpin, to inform him that King would not be at work the following day; that King reported to the job on September 26 but was not permitted to work. The record reflects that King was interviewed by the investigating committee during the week of October 2; that he explained he did not walk off the job on September 24 but was ill that evening and thus did not report to work the following day. King also spoke to Whitehead and Paseur and asked when the men would return to work. Whitehead stated he hated it, but that was the situation and the men had to be fired. On the basis of these facts I find that Richard A. King did not engage in, join, or participate in the walkout or work stoppage which occurred on September 24.

18. Steamfitter-welder Ronald J. Albright, a Complainant herein, testified without contradiction, and I find, that he joined the walkout and was interviewed by an investigating committee composed of three men during the week of October 2. Further, one of the committee members told Albright that the act of striking was an offense which could result in a prison sentence of a year and a \$10,000 fine.

19. The record reflects that Lester A. Cox testified that Owen Thurman, a Complainant herein, worked until the end of his shift and did not leave the job on September

24. Assistant Piping Superintendent Gleen L. Peters testified in an affidavit that both Owen Thurman and Guy Rickard, Complainants herein, did not walk out on said date but remained on the job. He further averred that Thurman asked permission to be absent on the 25th due to his wife's illness, and Peters granted his request to do so. On the 26th Thurman called to say he put his wife in the hospital and would be unable to return to the job that week. Peters states in his affidavit that he consented to Thurman's absence for that week.

20. Subsequent to the strike a joint committee was selected to investigate the cause and circumstances of the walkout pursuant to Supplementary Schedule H-XXIII of the Agreement herein. This Committee was composed 15/ of nine officials from TVA and 8 representatives from Trades Council Unions other than the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of U.S. and Canada. During the week of October 2 the Committee interviewed about 400 of the steamfitters and welders working at the Browns Ferry Nuclear Plant. The record reveals that many interviews were conducted by a group of three committee representatives who asked some employees who called the strike and the reason therefor.

21. Upon the completion of the interviews the Committee decided that Local 760 was responsible for the work stoppage. Accordingly, it recommended on October 5 all members of Local 760 who engaged in the stoppage be discharged; that non-members of Local 760 who went on strike return to work on October 8; that a letter be permanently placed in the personnel records of all employees who went on strike reciting that they did so; and that those strikers who are reemployed be placed on probation for two years for any further violation of the contract. The recommendations of the committee were adopted by Respondent on October 5.

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15/ Exhibit A/S D, attachment letter of October 12.

22. Record facts show, and I find, that all Complainants herein, except for Lester A. Cox, Durwood Posey, Allan R. Parker, Stephen Dale Hopkins, Grady H. Cole, Richard A. King, Owen Thurman, and Guy Rickard, engaged in the work stoppage or strike which occurred on September 24. Further, it is established in the record, and I find, that such strikers were discharged, terminated, and not rehired on October 8, because, in addition to engaging in a strike on the 24th, these Complainants were members of Local 760 at the time of the work stoppage. 16/

23. In respect to Complainants Lester A. Cox, Durwood Posey, Allan R. Parker, Stephen Dale Hopkins, Grady H. Cole, Richard A. King, Owen Thurman, and Guy Rickard, the record reveals, and I find, that Respondent believed they engaged in the work stoppage on September 24, and said Complainants were discharged, terminated, and not rehired on October 8, based on Respondent's belief that they struck in violation of the agreement and because they were members of Local 760.

24. Termination notices 17/ dated October 19 were sent to members of Local 760 who were employed in the steamfitter craft at Browns Ferry Nuclear Plant which notified them of their termination because they engaged in the work stoppage on September 23 in violation of Article II of the Agreement, and which stated they shared in the responsibility for the work stoppage by virtue of their membership in Local 760.

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16/ See Exhibit A/S D - attachment letter of October 12 from TVA to M.C. Hargett, Pres. of Trades Council and William D. Black, Administrator of Union-Management Relations, TVA.

17/ A/S Exhibit D (attachment letter from Respondent to Herschel T. Bergin). Although steamfitter-complainants who testified at the hearing received this letter, the record does not disclose whether it was also sent to all Complainants.

25. Record facts show, and I find, that the remaining 117 steamfitters or welders (non-complainants), who were members of Local 760, engaged in the work stoppage or strike on September 23; and, further, that such employees (unidentified herein) were discharged, terminated, and not rehired on about October 8 because they engaged in the said work stoppage and because they were members of Local 760.

26. It appears from the record, and I find, that all other steamfitters and welders who struck, and who were non-members of Local 760, were, as recommended by the Committee, rehired on October 8 and returned to work because, although they engaged in a work stoppage in violation of the Agreement, they were not Local 760 members at the time.

27. The record reveals, and I find, that 34 of the Complainants herein who were terminated by Respondent on or about October 5 were preference eligible employees and, under 5 U.S.C. 7511, 7701 and the Civil Service Regulations, Part 752, Subpart B, were entitled to appeal to the Civil Service Commission from an adverse action such as removal from employment. These Complainants so entitled to appeal are listed in Appendix C attached hereto.

28. The record reveals, and I find, that 41 of the Complainants herein who were terminated by Respondent on or about October 5 were not preference eligible employees, and said employees had no right of appeal to the Civil Service Commission, or to any other appellate body, in regard to their termination or removal from employment by Respondent. These Complainants, with no right of appeal, are listed in Appendix D attached hereto.

#### Conclusions

In his very able brief to the undersigned Counsel for Complainants urges, apart from his primary arguments respecting discriminatory treatment of the 75 Complainants, two collateral contentions deserving of consideration. It is argued, firstly, that the complaints are broad enough to encompass alleged violations as to all Local 760

employees who were terminated. Hence a finding should be made that the remaining 117 strikers, or steamfitters who were members of Local 760, were discriminated against by Respondent and thus entitled to a remedy. Secondly, it is contended that since Respondent did not appear at the hearing, no effect should be given to its defense that Section 19(d) of the Order precludes the assertion of jurisdiction as to the preference eligible employees. Further, it is asserted that a default judgment against Respondent should be granted.

(1) In respect to the assertion that all Local 760 steamfitters or welders who were terminated be deemed covered by the complaints herein, I reject this contention. The individual Complainants served charges against Respondent relating solely to their discrimination. Moreover, the 75 Complainants filed respective complaints against the employer reciting that, in each instance, the complaint was based on the failure to "accord due process" to the particular Complainant, and a remedy was requested of reinstatement and back pay just for said Complainant. In this posture, no investigation was made as to whether the remaining 117 steamfitters, who were Local 760 members, participated in the strike or whether any of them had a right of appeal to the Civil Service Commission. Accordingly, I conclude that the 75 individual complaints herein did not purport to, and should not, encompass the other steamfitters who were Local 760 members and terminated for engaging in the work stoppage.

(2) Respondent's action in refusing to furnish requested data to Complainants' counsel, as well as its decision not to appear based on a unilateral determination that no jurisdiction lies herein, may well constitute a classical lack of cooperation and not come within the spirit of the Order. Nevertheless, a response was filed by TVA, marked as an exhibit in the record, and is entitled to be considered. Further, Section 203.5(6) provides that the Complainant shall bear the burden of proof at all stages of the proceedings. Thus, I would deny the motion for a default judgment, although it should be noted that my report is based on the testimony and evidence adduced at the hearing, together with the exhibits received herein.

I. Applicability of 19(d) of the Order In Respect to the Preference Eligible Employees

The pertinent language of Section 19(d) of the Order provides that "Issues which can properly be raised under an appeals procedure may not be raised under this section". A review of the committee's Report and Recommendation antedating Executive Order 11491 indicates that such a provision was intended to avoid multiple litigation. Thus, the existence of an appeals procedure necessarily forecloses the filing of a complaint leading to a determination by the Assistant Secretary of the same issue which can be raised under said procedure.

It is also provided under 5 U.S.C. section 7701 that a preference eligible employee, as defined in Section 7511 of said title, is entitled to appeal to the Civil Service Commission from an adverse decision under Section 7512 of said title. The latter section provides that an agency may take adverse action against a preference eligible employee only for such cause "as will promote the efficiency of the service". Further, adverse action is defined in Section 7511 as meaning a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay.

In accord with the above, the Civil Service Commission's regulations provide similarly in 5 C.F.R. Part 752, Subpart B that a preference eligible may appeal his removal by an agency to the Civil Service Commission. Further, in Subpart A thereof it states that an agency may not take an adverse action against such an employee except for such cause as will promote the efficiency of the service.

Complainants view the foregoing statutory and regulatory provisions as precluding the consideration by the Civil Service Commission of an unfair labor practice issue based on anti-union motivation. They argue that it would establish a bad precedent to foreclose processing of unfair labor practice charges because a discharge by a federal agency is subject to an adverse action appeal under 752 of

the Civil Service Regulations. Such a policy, it is urged, would remove 92% of the federal employees from protection under the Order. Further, it is stressed that the Civil Service Commission is limited, under its regulations, to a determination of whether the discharge "will promote the efficiency of the service".

While the Assistant Secretary has not yet passed on this precise issue, several of his decisions may shed some light on its ultimate disposition. Thus, in U.S. Postal Service, Berwyn Post Office Illinois, A/SLMR No. 272 an adverse action appeals procedure in a contract between the employer and the union was found not to preclude consideration of discrimination based on union activities. This was true even though the contract clause made no reference to this type of discrimination. Note was taken by the Assistant Secretary that the agreement defined adverse decision - from which appeals lay - as a discharge from employment. Likewise in Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336 the appeals procedure of the Texas Code of Military Justice was held broad enough to encompass an appeal based on a denial of reenlistment due to discriminatory reasons under the Order. The applicable military code section made no express provision for appeals by an employee based on discriminatory action taken by the agency toward him. It bespoke of the right of an employee who believes he is wrong to complain to a higher officer when he is refused redress upon application to his commanding officer.

In the case at bar, similar to the appeals procedures in the cited cases, I find nothing in the statutory provision or regulations which forecloses consideration by the appellate body - the Civil Service Commission - of a termination or discharge based on discrimination under the Order. The action taken by Respondent herein with respect to the employees was indeed an "adverse action" - a removal from employment. The right of appeal accorded preference eligible employees under Section 7701 of the code and Part 752 of the regulations in no way delimits this right or confines it to adverse actions which do not involve removals based on discriminatory motivations.

Although complainants argue to the contrary, I do not conclude that appeals of this nature will necessarily result in the Commission's processing unfair labor practice charges. Decisions by the appellate body - and it is so provided in FPM 771.106 - are not deemed to be unfair labor practice decisions under the Order by the Assistant Secretary. They may result, it is true, in the Commission concluding that the Employer was discriminatorily motivated in its action of removing the preference eligible employees. Nevertheless, any appeals procedure would impose upon the appellate body a duty to inquire as to the reasons for such removal. The fact that such inquiry yields a finding that the Employer terminated employees for union activities - if such be the case - does not clothe the Commission with authority to render unfair labor practice decision. The findings in that regard are merely an integral part of the ultimate conclusion as to the basis for the Employer's actions. Further, the admonition that bars any adverse action by an agency, except as it promotes the efficiency of the service, does not, in my opinion, affect the scope of authority of the Commission. It may be assumed that such a qualification will be considered by the appellate body in making its determination in respect to the propriety of the Employer's adverse actions. But I cannot agree that the qualifying language in the statute or regulation precludes the Commission from considering whether the employees were discriminatorily removed from their jobs.

Accordingly, and in view of the foregoing, I would find that the preference eligible employees, listed on Appendix C attached hereto, were entitled to appeal their discharges, or refusals of rehire, by Respondent to the Civil Service Commission. Further, I conclude the Commission could, in its consideration of the appeal, examine the motivation for Respondent's actions and determine the issue of whether these complainants were terminated, or denied rehire, for discriminatory reasons. Thus, I consider that since the validity of such adverse actions is an issue properly raised upon appeal, the Assistant Secretary is precluded under 19(d) from passing upon whether such actions were violative of the Order.

II. Discrimination As to  
Complainants With No  
Rights of Appeal - Strikers  
and Non-Strikers

In effecting removal of the members of Local 760 Respondent decided that the agreement covering the employees at Browns Ferry Plant governed the rights of the employees and their employer. It justified its conduct upon two premises: (1) the employees were not permitted to strike under Article II(3) of the Agreement, and thus all strikers lost the right to their jobs, (2) the contract sets up, under Supplementary Schedule H-XXIII, a joint committee procedure for handling work stoppages which provided for investigation by this body of the causes of any strike, a finding of responsibility therefor, and recommended that all strikers 18/ who were members of said local should be terminated from employment and not rehired. It recommended the rehiring of all strikers who were not members of Local 760 and that they be put on probation for two years. Therefore, it is argued by the employer that it merely implemented the recommendation 19/ of the committee and the decision of the latter, under the contractual procedure, is determinative and binding on all parties.

A. The Effect of the Joint Committee's  
Decision Upon The Proceeding Herein

Complainants contend that the decision of the joint committee, which assessed responsibility for the strike and recommended to Respondent termination of all Local 760

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18/ The committee found that all complainants herein engaged in the work stoppage were members of Local 760, and thus subject to termination.

19/ While the committee's decision, under the contract, was stated to be final, the record reflects that [continued on next page]

members, including the 75 complainants, should not bar a determination of the merits by the Assistant Secretary. They urge that the Spielberg doctrine, enunciated in the private sector, is not applicable since the committee's proceedings were neither fair nor regular, and, further, were repugnant to the Order.

The lead case decided by the National Labor Relations Board in 1955, Spielberg Manufacturing Company, 112 NLRB 1080, held that the Board would be bound by an arbitration award, and dismiss a complaint involving the same issue determined by the arbitrator, in certain circumstances. It declared that it would honor an award where the parties agreed to be bound by the arbitration, providing the arbitral proceedings were fair and regular and not repugnant to the National Labor Relations Act.

I am persuaded that the investigation and recommendation of the joint committee herein would not meet the tests laid down in the Spielberg case, supra, so as to make the committee's actions binding on the Assistant Secretary. The interviews conducted by the three man committee clearly did not resemble an arbitral process. Not only was there no representation of the complainants thereat, but the investigative procedure scarcely afforded them full and complete participation which is typical in arbitration hearings. In one instance, an employee was threatened by the committee members with criminal action because of his work stoppage. Others were spoken to for a few minutes on a very informal basis, and such employees were not given the opportunity to 'present their case' as part and parcel of an arbitral procedure. Further, I agree with Complainants that the committee did not, - and obviously could not - decide the issue which is presented herein, i.e., whether the termination of the employees ran afoul of the Order. Such issue arose subsequent to the inquiry and was not a subject of the review

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19/ - continued

Schedule H-XXIII of the contract was amended to provide that the Committee's decision would constitute merely a recommendation.

conducted by the committee. Accordingly, I find that, with respect to (a) whether the particular employees engaged in a strike on September 24 or joined the stoppage thereafter, and (b) whether those who did so were properly terminated under the Order, the Committee's decision and recommendation was not the product of a fair and regular procedure and should not foreclose a determination by the Assistant Secretary of the complaints herein. See Wagoner Transportation Co., 177 NLRB 452; John Klann Moving and Trucking Co., 170 NLRB 1207.

B. Respondent's Termination of  
Non-Strikers With No  
Right of Appeal

Respondent asserted that is justifiably terminated Grady H. Cole, Allan R. Parker, and Guy Rickard, employees, because they participated in the strike and were members of Local 760. However, the undenied testimony at the hearing herein reflects, and I have found, that none of these complainants engaged in, or joined, the work stoppage. Thus, unless Respondent is saved by the joint committee's decision, it must be concluded that these individuals were terminated in violation of the Order since there is no factual basis for said termination and they had no right of appeal to the Commission or other body. See Wagoner Transportation Co., supra. Having determine hereinabove that the committee's inquiry was not a fair and regular procedure which is an integral part of the arbitral process, I am constrained to also conclude that any finding by such committee that these employees were strikers is not binding on the Assistant Secretary.

While it is true Respondent may have believed that Cole, Grady and Parker did take part in the stoppage, such a belief should not avail the employer as a defense to its adverse action toward them. In the private sector the well established rule rejects a defense based on a belief of employee misconduct where the latter has engaged in protected activity to the employer's knowledge and, in fact, the employee did not actually engage in such misconduct. Burnup and Sims, Inc., 379 US 211, Rubin Bros. Footwear,

Inc., 99 NLRB 610. In the case at bar, the aforesaid named employees did not actually participate in the strike, and therefore I would reject any defense predicated on a belief to the contrary held by Respondent.

It follows, therefore, that the only remaining basis for the termination of those three employees is their membership in Local 760, which was a matter of record and known to the employer. Accordingly, I find that the discharge of Grady H. Cole, Allan R. Parker and Guy Rickard, non-strikers, was discriminatory and in violation of Section 19(a)(1) and (2) of the Order.

C. Respondent's Termination  
of Strikers Who Were Local 760 Members  
With No Right of Appeal <sup>20/</sup>

The strike which occurred on September 24 was clearly in violation of Article II(3) of the contract prohibiting work stoppages pending settlement of issues and disputes. Thus, those employees who participated in such a stoppage were engaged in unprotected activity for which they may be disciplined or discharged. Moreover, the employer would not, by virtue of such discharges, normally be violating the Order. Further, the interdiction against a union's calling or engaging in a strike, or failing to take affirmative action to prevent or stop it, is set forth in 19(b)(4) of the Order.

<sup>20/</sup> Although Section 22 of the Order specifies that each employee in the competitive service may appeal an adverse action to the Civil Service Commission, TVA employees are not deemed to be competitive civil service employees. 16 U.S.C. 831(b). Therefore, unless the employees herein were preference eligibles - and thus granted a right of appeal under the statutes and regulations heretofore mentioned - those discharged by Respondent could not appeal such adverse actions.

While these general principles of labor law are applicable to the case at bar, additional factors are present herein which give rise to a serious question concerning the conduct of Respondent in discharging the strikers who were members of Local 760. It may well be that an employer is entitled to select which employees he will rehire where all of them engage in a stoppage that is an unprotected activity. Certainly he may punish the leaders or instigators and refuse to reinstate those individuals. But the query is raised - which is the central issue involving these particular complainants - whether an employer may pick and choose striking employees for termination based on their union membership while rehiring or reinstating strikers who were non-members of said union.

The record does not establish, beyond a determination by the committee investigating the walkout, that Local 760 instigated or called the stoppage. I do not consider the committee's finding in this regard evidentiary as to the union's responsibility therefor. As heretofore indicated, the inquiry and recommendations of the committee were not an integral part of an arbitral procedure which could be construed as essentially fair and regular. Further, there is no evidence to reflect the basis for the committee's finding in this regard, and the union was not represented at this investigation to offer evidence that it was not so responsible. Accordingly, I am unable to conclude that Local 760 did indeed call or engage in the strike herein. Nor does it appear that the union either forced or induced steamfitters and welders employed by TVA, who were non-members of the local, to strike or join the work stoppage.

Not only may an employer, with impunity, punish the instigators of a walkout - including the union officials - but it is entitled to distinguish between strikers in administering such punishment. Kohler Co. 128 NLRB 1062, 1105. However, when Respondent distinguishes between strikers based on membership in the union, the focus is no longer upon the unprotected strike activity of the employees but upon their union membership. To rehire all strikers who were non-union, as here, and then discharge or refuse to reemploy all strikers who were union members, is

tantamount to a condonation of the strike itself. While it may not constitute actual condonation as to complainants herein, Respondent's rehiring non-union strikers does, in effect, condone the unprotected activity engaged in by these employees. Since such activity was the same as that partaken by the union strikers, one may reasonably conclude that it was not the activity (strike) engaged in by strikers which prompted the punishment, but their membership in the union herein.

A review of prior cases in both the private and public sector reveals no case dealing with this specific issue. However, in Poloron Products of Indiana, Inc. 177 NLRB 435 Trial Examiner Frederick U. Reel 21/ stated at page 437 as follows:

"The parties agree, and the record is clear, that the walkout of July 1 enjoyed no statutory protection. The Company was free, without offending the statute, to discharge employees for having participated in the walkout. But the Company could not lawfully differentiate in the discipline it invoked on that occasion if the basis for the differentiation was an activity protected by the Act. To take an obvious illustration, the Company could not lawfully say that because all employees participated in an unprotected strike, it would discharge those who were union members and merely suspend the rest. (underscoring supplied)

The quoted language appears applicable to the case at hand. The refusal by Respondent to recall the strikers who were Local 760 members and to discharge them - while rehiring the non-union strikers - is to differentiate on the basis of an activity protected by the Order, i.e., membership in a labor organization. In my opinion such a differentiation is a discriminatory selection not countenanced by the Order. Accordingly, I conclude that the

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21/ The Board affirmed the Trial Examiner's decision and adopted his findings, conclusions and recommendations.



discharge of, and refusal to rehire, the 38 complainants listed in Appendix D, was motivated 22/ by their membership in Local 760, rather than by their having engaged in the walkout on September 24. As such, Respondent's adverse action toward such complainants was violative of Section 19(a)(1) and (2) of the Order.

#### The Remedy

Having found that the strikers listed in Appendix D, who were members of Local 760, were discharged and denied reinstatement because of their union membership - and not by reason of their having participated in the strike - I do not recommend that the remedy of reinstatement, as to them, be contingent upon an application on their behalf for reinstatement. Respondent did not require that non-members of Local 760, who were recalled after the strike, make an application for reinstatement, and there should be no differentiation between these two groups of strikers in this respect.

In respect to employee Grady H. Cole, Allan R. Parker and Guy Rickard, I have found that such individuals did not engage in, or join, the walkout, and no factual basis existed for their discharge. Hence, their discharge for being union members was clearly discriminatory, and Respondent is ordered to reinstate them with back pay from the date of discrimination.

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22/ The facts are distinguishable from a strike in violation of 8(d) of the NLRA where, under the statutory provision, an employee who strikes within a proscribed 60-day period loses his status as an employee for nearly all purposes. In such an instance, the motive in discharging such a striker is deemed irrelevant. But, contrary to the case at bar, such a striker loses all protection for having engaged in an unlawful strike. See Fort Smith Chair 143 NLRB 514, 518.

#### RECOMMENDATIONS

Having found that Respondent has engaged in conduct which is in violation of Section 19(a)(1) and (2) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purpose of Executive Order 11491, as amended.

In respect to the complaints filed by those individual employees listed in Appendix C, who have rights of appeal to the Civil Service Commission as preference eligible employees, it is recommended that the complaints filed by such individual employees be dismissed.

#### RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby order that Tennessee Valley Authority shall:

1. Cease and desist from:

(a) Discharging, refusing to rehire or reinstate, or discriminating in any other manner against its employees, in regard to their hire and tenure of employment, or any other condition of employment to discourage membership in Local 760 of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U. S. and Canada, or any other labor organization.

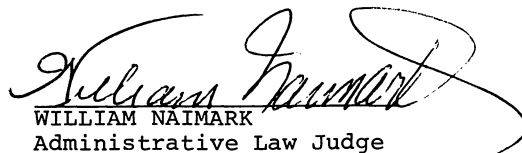
(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

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

(a) Offer to non-striking employees, Grady H. Cole, Allan R. Parker and Guy Rickard and to all employees listed in Appendix D immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered, by reason of its discrimination by paying to each employee a sum of money equal to the amount which each employee would have earned as wages from the date of his discharge to the date of Respondent's offer of reinstatement, less his net earnings during such period; the sum so paid to draw interest at the rate of 6 per cent per annum until payment.

(b) Post at its facility at Brown's Ferry Nuclear Plant, Limestone County, Alabama 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 Personnel 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 Director of Personnel shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing, within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

  
WILLIAM NAIMARK  
Administrative Law Judge

DATED: December 9, 1974  
Washington, D. C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effecuate 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 Local 760, of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, or any other labor organization, by discharging or refusing to reinstate, or by discriminating in regard to the hire or tenure of employment, or any other term or condition of employment, of any of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to form labor organizations, join or assist Local 760, of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, or any other labor organization, or to refrain from any such activities.

WE WILL OFFER to Grady H. Cole, Allan R. Parker, and Guy Rickard, and to all employees listed on Appendix D, immediate and full reinstatement ot their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered, by reason of the discrimination by paying to each employee a sum of money equal to an amount which each employee would have earned as wages from the date of his discharge to the date of Respondent's offer of reinstatement, less his net earnings during such period, the sum so paid to draw interest at the rate of 6 per cent per annum until payment.

APPENDIX A  
COMPLAINANTS

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, U.S. Department of Labor, whose address is 1371 Peachtree Street, N. E. Atlanta, Georgia.

<u>Complainant</u>	<u>Case No.</u>
James C. Albright .....	40-5399 (CA)
Ronald J. Albright .....	40-5400 (CA)
Roy E. Albright, Jr. ....	40-5401 (CA)
Albert Beckman .....	40-5402 (CA)
Herschel T. Bergin .....	40-5403 (CA)
Homer L. Bergin .....	40-5404 (CA)
Kenneth E. Berry .....	40-5405 (CA)
Will C. Berry .....	40-5406 (CA)
Earl H. Black .....	40-5407 (CA)
Joe W. Burks, Jr. ....	40-5408 (CA)
Tony E. Burks .....	40-5409 (CA)
James H. Burns .....	40-5410 (CA)
Ervin H. Call .....	40-5411 (CA)
H. Clayton Carpenter .....	40-5412 (CA)
Jesse W. Casey .....	40-5413 (CA)
Charlie W. Chaney .....	40-5414 (CA)
Sam Chambers .....	40-5415 (CA)
Therman Clark .....	40-5416 (CA)
Grady H. Cole .....	40-5417 (CA)
Lester A. Cox .....	40-5418 (CA)

<u>Complainant</u>	<u>Case No.</u>
Oliver D. Cox .....	40-5419 (CA)
George P. Crews .....	40-5420 (CA)
John B. Earnest .....	40-5421 (CA)
Homer W. Earnest .....	40-5422 (CA)
Carse Eastep, Jr. ....	40-5423 (CA)
C. L. Embry .....	40-5424 (CA)
Jimmy W. Embry .....	40-5425 (CA)
Elmer C. Emmons .....	40-5426 (CA)
James M. Emmons .....	40-5427 (CA)
William W. Emmons .....	40-5428 (CA)
B. Arnold Goodwin .....	40-5429 (CA)
William L. Good .....	40-5430 (CA)
Robert C. Goss, Jr. ....	40-5431 (CA)
William Jerry Hayes .....	40-5432 (CA)
Martin L. Hayes, Jr. ....	40-5433 (CA)
Dennies F. Hill, Jr. ....	40-5434 (CA)
Kermit M. Hogan .....	40-5435 (CA)
James R. Hopkins .....	40-5436 (CA)
Stephen D. Hopkins .....	40-5437 (CA)
Roy C. Hunt .....	40-5438 (CA)
Ancil H. Huskey .....	40-5439 (CA)

<u>Complainant</u>	<u>Case No.</u>
Dudley E. Kent .....	40-5440 (CA)
Richard A. King .....	40-5441 (CA)
J. M. McKinney .....	40-5442 (CA)
William E. Moore .....	40-5443 (CA)
David L. Murphy .....	40-5444 (CA)
Karl Murphy .....	40-5445 (CA)
Tony E. Muse .....	40-5446 (CA)
Harold D. Neal, Jr. ....	40-5447 (CA)
Chester C. Nix .....	40-5448 (CA)
Johnnie M. Oswalt .....	40-5449 (CA)
Allan R. Parker .....	40-5450 (CA)
Oliver D. Parker .....	40-5451 (CA)
Billy R. Poag .....	40-5452 (CA)
Paul C. Poag, Sr. ....	40-5453 (CA)
Durwood R. Posey .....	40-5454 (CA)
Jackie R. Pounders .....	40-5455 (CA)
Melvin Pounders .....	40-5456 (CA)
Thomas G. Ragsdale .....	40-5457 (CA)
Robert C. Rhodes .....	40-5458 (CA)
John Winston Rice .....	40-5459 (CA)
Guy E. Rickard .....	40-5460 (CA)

<u>Complainant</u>	<u>Case No.</u>			<u>CORRECTIONS IN THE TRANSCRIPT</u>	
		<u>Page</u>	<u>Line</u>	<u>Appears As</u>	<u>Change To</u>
E. Paul Sanderson .....	40-5461 (CA)				
Gaston B. Scott .....	40-5462 (CA)				
Preston H. Scott .....	40-5463 (CA)	9	13	their attorney is present	their attorney is <u>not</u> present
Roy O. Skipworth .....	40-5464 (CA)	9	24	Joseph Sleiger	Joseph Jacobs
James Ezra Smith .....	40-5465 (CA)	16	1	jurisdiction to control	jurisdiction <u>and</u> control
James H. Smith .....	40-5466 (CA)	17	1	been a discharge for this type of conduct	<u>never</u> been a discharge for this type of conduct
Edward E. Sneed, Jr. ....	40-5467 (CA)	18	5	on the labor side	on the <u>management</u> side
Charley H. Truitt .....	40-5469 (CA)	24	22	definitive	defensive
James R. Truitt .....	40-5470 (CA)	26	2	committed	submitted
Vance P. Williams .....	40-5471 (CA)	27	23	for you	for you, but <u>none</u> could raise unfair <u>labor practice issues on those appeals, and none have prevailed on those appeals.</u>
Dale J. Willis .....	40-5472 (CA)	28	8	document	documents
Lloyd H. Worley .....	40-5473 (CA)	62	2	Hargett	Hathcoate
		63	17	Williams	Willis
		68	11	work around one thirty	<u>know</u> around one thirty
		76	3	Pigpin	Thigpen

PREFERENCE ELIGIBLE COMPLAINANTS  
WITH RIGHTS OF APPEAL TO  
CIVIL SERVICE COMMISSION

<u>Page</u>	<u>Line</u>	<u>Appears As</u>	<u>Change To</u>		
83	9	in light of TVA's nonappearance to severely	in light of TVA's nonappearance to severely <u>limit</u>		
104	15	there were more 760 people	there were more <u>non</u> 760 people	Albert Beckman*	Richard A. King*
118	17	grace reservations	<u>grave</u> reservations	Will C. Berry	David L. Murphy
127	9	were not retained	<u>did not retain</u>	Joe W. Burks, Jr.*	Karl Murphy
128	14	after	<u>add to</u>	James H. Burns	Harold D. Neal, Jr.*
128	21	after	<u>add to</u>	Ervin H. Call	Chester C. Nix
135	13	Steel Bearing	<u>Spielberg</u>	Charlie W. Chaney*	Johnnie M. Oswald
135	18	revenue	<u>remedy</u>	Therman Clark	Oliver D. Parker*
				Lester A. Cox	Durwood R. Posey*
				Oliver D. Cox	Melvin Pounders
				John B. Ernest	Robert C. Rhodes*
				William L. Good*	Preston H. Scott
				B. Arnold Goodwin*	James H. Smith*
				Martin L. Hayes, Jr.*	Edward E. Sneed, Jr.
				Dennies F. Hill, Jr.*	Owen W. Thurman*
				James R. Hopkins	Vance P. Williams
				Stephen D. Hopkins	Dale S. Willis
				Ancil H. Huskey*	Lloyd H. Worley

\* Complainants who were preference eligible and who filed appeals, which are pending, with the Civil Service Commission.

COMPLAINANTS WHO ARE NON-PREFERENCE ELIGIBLES  
WITHOUT RIGHT OF APPEAL TO  
CIVIL SERVICE COMMISSION OR OTHER BODY

UNITED 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

James C. Albright	William Jerry Hayes
Ronald J. Albright	Kermit M. Hogan
Roy E. Albright, Jr.	Roy C. Hunt
Herschel T. Bergin	Dudley E. Kent
Homer L. Bergin	J. M. McKinney
Kenneth E. Berry	William E. Moore
Earl H. Black	Tony E. Muse
Tony E. Burks	Allan R. Parker*
H. Clayton Carpenter	Billy R. Poag
Jesse W. Casey	Paul C. Poag, Sr.
Sam Chambers	Jackie R. Pounders
Grady H. Cole*	Thomas G. Ragsdale
George P. Crews	John Winston Rice
Homer W. Earnest	Guy E. Rickard*
Carse Eastep, Jr.	E. Paul Sanderson
C. L. Embry	Gaston B. Scott
Jimmy W. Embry	Roy O. Skipworth
Elmer C. Emmons	James Ezra Smith
James M. Emmons	Charley H. Truitt
William W. Emmons	James R. Truitt
Robert C. Goss, Jr.	

DEPARTMENT OF NAVY,  
DALLAS NAVAL AIR STATION,  
DALLAS, TEXAS  
A/SLMR No. 510

This unfair labor practice proceeding involved a complaint filed by American Federation of Government Employees, Local Union 2427, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by submitting false and misleading information in reply to the AFGE's inquiry concerning the possibility of filling a posted job position vacancy.

The AFGE is the exclusive representative of all of the Respondent's direct hire civilian employees. On April 2, 1974, the AFGE's President, in behalf of a unit employee who had filed for the vacancy, requested information from the "ranking person" in the Respondent's personnel office with respect to whether a posted job was going to be filled. The AFGE's President was informed that due to certain variables in program ceilings and money problems the matter of filling the job was subject to a "conditional hold" or "in limbo." However, intentionally or otherwise, the AFGE President was not informed that a member of the military had been selected for the posted position and that the Respondent was awaiting action on a waiver request to the Civil Service Commission (CSC). The request for the waiver required the Respondent to certify to the CSC that no eligible qualified civilians were currently employed. On June 4, 1974, the former military person was hired. Thereafter, following a grievance by the employee who had filed for the vacancy and notification to the CSC, the CSC advised the Respondent that its conduct had been improper in its manner of filling the position and it was ordered to terminate the appointment. In reaching its decision, the CSC noted that although the employee represented by the AFGE had filed for the position and had undergone a job interview, the Respondent had filed a waiver which stated that no career employees were available for the position.

The Administrative Law Judge found that inasmuch as the information withheld by the Respondent from the AFGE was necessary for intelligent representation or bargaining, the Respondent's action in failing to supply and/or withholding information requested by the AFGE fell short of the good faith consultation envisioned by the Executive Order and, therefore, was violative of Section 19(a)(6). He found also that the same conduct inherently interfered with, restrained and coerced unit employees in their right to have their exclusive representative act for and represent their interests in matters concerning grievances, personnel policies and practices as assured by Section 10(e) of the Order

\* Complainants who did not engage in the strike or work stoppage on September 24.

in violation of Section 19(a)(1). However, the Administrative Law Judge concluded further that in the absence of evidence that the Respondent's actions were in any way related to the employee-applicant's union membership or other protected activities there was insufficient basis to find a violation of Section 19(a)(2) of the Order.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the matter, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and issued an appropriate remedial order.

A/SLMR No. 510

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF NAVY,  
DALLAS NAVAL AIR STATION,  
DALLAS, TEXAS

Respondent

and

Case No. 63-5089(CA)

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES  
LOCAL UNION 2427, AFL-CIO

Complainant

DECISION AND ORDER

On March 4, 1975, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions, as set forth in the attached Administrative Law Judge's Report and Recommendations. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

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

ORDER

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

1. Cease and desist from:

(a) Withholding or failing to provide, upon request by American Federation of Government Employees, Local Union 2427, AFL-CIO, any information bearing upon hiring, promotions or any other conditions of employment



which is necessary to enable American Federation of Government Employees, Local Union 2427, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Executive Order by denying American Federation of Government Employees, Local Union 2427, AFL-CIO, information necessary to enable such labor organization as the exclusive representative to discharge its obligation to represent effectively all employees in the exclusively recognized unit.

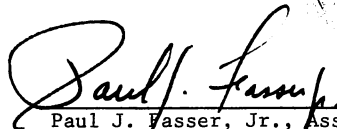
(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

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

(a) Post at its facility at the Dallas Naval Air Station, Dallas, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commander of the Naval Air Station, Dallas, Texas, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C.  
April 29, 1975

  
\_\_\_\_\_  
Paul J. Passer, 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 withhold or fail to provide, upon request by American Federation of Government Employees, Local Union 2427, AFL-CIO, any information bearing upon hiring, promotions or any other conditions of employment which is necessary to enable American Federation of Government Employees, Local Union 2427, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

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

WE WILL, upon request, make available to American Federation of Government Employees, Local Union 2427, AFL-CIO, all information bearing upon hiring, promotions or any other conditions of employment which is necessary to enable American Federation of Government Employees, Local Union 2427, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

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



Statement of the Case

Pursuant to a complaint filed on September 6, 1974, under Executive Order 11491, as amended, by Local 2427, American Federation of Government Employees, (hereinafter called the Union), against the Dallas Naval Air Station, Dallas, Texas, (hereinafter called the Respondent or Agency), an Amended Notice of Hearing on Complaint was issued by the Regional Director for the Kansas City, Missouri Region on November 5, 1974.

The complaint alleges, in substance, that the Respondent submitted false and misleading information in reply to the Union's inquiry concerning the possibility of filling a posted job position vacancy in violation of Sections 19 (a) (1), (2) and (6) of the Executive Order.

A hearing was held in the captioned matter on January 14, 1975, in Dallas, Texas. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations:

Findings of Fact

The Union is the exclusive representative of "all non-supervisory graded and ungraded direct hire civilian employees of the Naval Air Station, Dallas, Texas" and signatory to a collective bargaining agreement with such Agency. Mr. Hill Read, Jr., is the president of the local Union.

On April 2, 1974, pursuant to an inquiry from employee Green concerning a posted job announcement for an "arresting gear mechanic", Union President Read approached Mrs. Marialyce Grubbs, the then "ranking person" in the personnel office and requested information with respect to the posted job, i. e. whether it was going to be filled. 1/ In addition to being the

1/ According to Read, there had been a prior posting of the job of "arresting gear mechanic" with no specific action being taken thereon. Employee Green, who had been an applicant for the prior posting, was concerned that

..... :  
In the Matter of :  
 :  
DEPARTMENT OF NAVY :  
DALLAS NAVAL AIR STATION :  
DALLAS, TEXAS :  
 :  
Respondent :  
 :  
and :  
 :  
AMERICAN FEDERATION OF :  
GOVERNMENT EMPLOYEES :  
LOCAL UNION 2427, AFL-CIO :  
 :  
Complainant :  
 :  
..... :

Case No. 63-5089 (CA)

Mr. Elbert C. Newton  
Labor Relations' Advisor  
Regional Office of Civilian Manpower  
Management  
Box 88, Naval Air Station  
Jacksonville, Florida 32212

For the Respondent

Mr. Pete Evans  
National Representative  
American Federation of Government  
Employees  
4347 South Hampton Road  
Dallas, Texas 75232

Mr. George Schoel  
President of Local 2427  
Naval Air Station  
Dallas, Texas 75211

For the Complainant

Before: BURTON S. STERNBURG  
Administrative Law Judge

"ranking person" in personnel, Grubbs also served on the Joint Union/Management Committee which regularly considered "policies, programs and procedures related to working conditions which are within the discretion of the Employer".

In response to Read's inquiry, Grubbs proceeded to explain the Agency's two hiring programs, i. e. regular hiring and civilian substitution, and the fact that both programs had "ceiling" and "money" problems. Additionally, Grubbs informed Read that due to the aforementioned variables, the matter of filling the posted job was subject to a "conditional hold" or, as recollected by Read, "in limbo".

Grubbs, however, intentionally or otherwise, neglected to inform Read that the Agency had already selected a member of the military by the name of Robert Argo for the posted position and was currently awaiting action on a waiver submitted by the Agency to the United States Civil Service Commission before taking further action with respect to the posted position vacancy. According to the record, prior to filling any posted civilian position with former military personnel, such personnel must have been separated from the Armed Services for a period of at least 180 days. In the absence of such 180 day separation period, it is incumbent upon an Agency seeking to hire former military personnel to certify to the Civil Service Commission that no other eligible qualified civilians are currently employed and request a waiver of the 180 day separation period.

On June 4, 1974, the Agency hired Robert Argo for the posted position. Subsequently, following a grievance filed by employee Green and notification to the Civil Service Commission, the Agency, by letter dated September 10, 1974, was advised by the Civil Service Commission that the Agency was in violation of Section 3326 (c) (1), Title 5, U. S. C. by virtue of the manner in which it had filled the posted vacancy. The Commission ordered the Agency to terminate the appointment of Robert Argo within forty-five days. In reaching its decision the Commission noted that despite the fact that Mr. Green had filed for the vacancy and underwent a job interview on March 21, 1974, the Agency submitted a waiver dated March 22, 1974, which stated that no career employees were available.

Footnote continued from previous page.

1/ similar action might be taken with respect to the current posting. Green, not being able to completely comprehend Grubbs' explanation as to the status of the posted job, requested Read to contact Grubbs for clarification of the matter.

Discussion and Conclusions

Section 10 (e) of the Executive Order provides as follows:

- When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

In interpreting the aforementioned provision of the Order, the Assistant Secretary has concluded that such provision confers a responsibility upon a labor organization for representing the interests of all employees in the unit. The Assistant Secretary has further concluded that "clearly, it (a labor organization) cannot meet this responsibility if it is prevented from obtaining relevant and necessary information in connection with the processing of grievances." Accordingly, the refusal of an Agency to make available such relevant and necessary information, barring any statute or government regulation prohibiting the disclosure of same, constitutes a violation of Sections 19 (a) (1) and (6) of the Executive Order. 2/

The Assistant Secretary and the Federal Labor Relations Council have further held that while Section 12 (b) (2) of the Executive Order reserves to Agencies the exclusive power "to hire, promote, transfer...", "there is no implication that such reservation of decision making and action authority is intended to bar negotiations of procedures... which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved." 3/

2/ Department of Defense, State of New Jersey, A/SLMR No. 323; Department of Health, Education and Welfare, S. S. A., Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411.

In the instant case the Union, pursuant to the authority granted, and responsibility imposed, by the Executive Order, sought information with respect to the Agency's intent and/or proposed action in the matter of the posted vacancy for a position within the unit it represented. The Agency, in response to the Union's inquiry, failed and/or neglected to mention that it had already determined to fill the vacancy and had gone so far as to make a selection and seek the required waiver. By such action, the Agency deprived the Union of relevant information necessary to formulate a decision on a possible grievance or a request for consultation on the manner in which the selection was to be made.

Inasmuch as the information withheld from the Union was necessary for intelligent representation or bargaining, I find that the Respondent's action in failing to supply and/or withholding the relevant information falls short of the good faith consultation envisioned by the Executive Order and is therefore violative of Section 19 (a) (6). Moreover, I further conclude that by this same conduct, Respondent violated Section 19 (a) (1) of the Executive Order in that such conduct inherently interferes with restrains and coerces unit employees in their right to have their exclusive representative act for and represent their interests in matters concerning grievances, personnel policies and practices as assured by Section 10 (e) of the Order. 4/

Lastly, in the absence of any evidence whatsoever that the Respondent's actions, as described above, were in any way related to employee Green's union membership or other protected activities, insufficient basis exists for a 19 (a) (2) finding. Accordingly, I shall recommend dismissal of this allegation of the complaint.

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Footnote carried over from page 3.

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

Recommendation

Having found that Respondent has engaged in certain conduct prohibited by Sections 19 (a) (1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Order. I also recommend that the Section 19 (a) (2) allegation of the complaint be dismissed.

Recommended Order

Pursuant to Section 6 (b) of Executive Order 11491, as amended, and Section 203.25 (b) of the Regulations, The Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Navy, Dallas Naval Air Station, Dallas, Texas, shall:

1. Cease and desist from:

(a) Withholding or failing to provide, upon request by Local 2427, American Federation of Government Employees, any information bearing upon hiring, promotions or any other conditions of employment which is necessary to enable Local 2427, American Federation of Government Employees to discharge its obligation to effectively represent all employees in the bargaining unit.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Executive Order by denying Local 2427, American Federation of Government Employees information necessary to enable such labor organization to discharge its obligation to effectively represent all employees in the bargaining unit.

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Footnote carried over from page 4.

4 / Army and Airforce Exchange Service, Pacific Exchange System, Hawaii Regional Exchange A/SLMR, No. 454.

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


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

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

(a) Upon request, make available to Local 2427, American Federation of Government Employees any information bearing upon hiring, promotions, or any other condition of employment which is necessary to enable Local 2427, American Federation of Government Employees to discharge its obligation to effectively represent all employees in the bargaining unit.

(b) Post at the Dallas Naval Air Station, Dallas, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commander of the Naval Air Station, and they shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Commander of the Naval Air Station shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other materials.

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

  
BURTON S. STERNBURG  
Administrative Law Judge

Dated: March 4, 1975  
Washington, D. C.

WE WILL NOT withhold or fail to supply, upon request by Local 2427, American Federation of Government Employees any information bearing upon hiring, promotions or any other conditions of employment which is necessary to enable Local 2427, American Federation of Government Employees to discharge its obligation to effectively represent all employees in the bargaining unit.

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

WE WILL, upon request, make available to Local 2427, American Federation of Government Employees all information bearing upon hiring, promotions or any other conditions of employment which is necessary to enable Local 2427, American Federation of Government Employees to discharge its obligation to effectively represent all employees in the bargaining unit.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

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

UNITED 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

DUGWAY PROVING GROUND,  
DEPARTMENT OF THE ARMY,  
DEPARTMENT OF DEFENSE,  
DUGWAY, UTAH  
A/SLMR No. 511

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This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Ind., Local 1239 (NFFE), alleging that the Respondent violated Section 19(a)(1), (5) and (6) of the Executive Order by unilaterally changing the reporting station of guards.

On November 3, 1970, the Respondent and the Complainant entered into a Memorandum of Understanding whereby the Respondent agreed to maintain the reporting station for the guards in the exclusively recognized unit near the main gate of the Proving Ground. The Memorandum of Understanding did not contain a term of duration, nor did the record indicate that it was ever reviewed or approved by a higher level of management. The arrangement under the Memorandum of Understanding remained in effect for approximately two years. In the meantime, the parties entered into a negotiated agreement effective September 12, 1972, which replaced an earlier agreement. This negotiated agreement made no reference to the Memorandum of Understanding. In November 1972, the Respondent experienced a budget reduction and decided to move the reporting station. The Respondent notified the NFFE of its intention and several meetings were held in November and December 1972, concerning this matter, during which the parties exchanged proposals and discussed various means by which operating costs could be reduced, including the relocation of the reporting station. The parties were unable to agree, and the NFFE's National President was advised on January 17, 1973, that in the "near future" the reporting station would be moved. Thereafter, on February 1, 1973, the Respondent announced in a memorandum to the NFFE and the employees that the reporting station would be moved and that other measures would be adopted to reduce operating costs. The relocation of the reporting station was accomplished on February 28, 1973.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint should be dismissed in its entirety. In this regard, the Assistant Secretary agreed with the Administrative Law Judge's conclusion that, contrary to the Respondent's contention, the complaint, filed November 9, 1973, was timely filed within the nine-month period prescribed by the Assistant Secretary's Regulations inasmuch as the alleged unfair labor practice occurred on February 28, 1973. He also agreed with the Administrative Law Judge's findings that the Memorandum of Understanding was only a written recording or memorialization of an employment practice and not a negotiated agreement within the meaning of the Order; that the Memorandum of Understanding was not incorporated into the parties' negotiated agreement of 1972, nor was it discussed when the new agreement was negotiated; that

the evidence failed to support the NFFE's contention that the Respondent approached discussion of the change with a closed mind; and that the NFFE was given ample opportunity not only to consider and discuss the Respondent's proposals, but to have its own suggestions considered.

Accordingly, and noting particularly that no exceptions had been filed, the Assistant Secretary ordered that the unfair labor practice complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DUGWAY PROVING GROUND,  
DEPARTMENT OF THE ARMY,  
DEPARTMENT OF DEFENSE,  
DUGWAY, UTAH

Respondent

and

Case No. 61-2235(CA)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, IND., LOCAL 1239

Complainant

DECISION AND ORDER

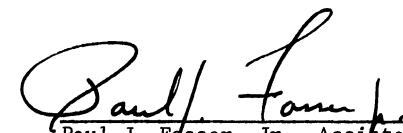
On February 24, 1975, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, 1/ conclusions and recommendation of the Administrative Law Judge.

1/ With respect to the Administrative Law Judge's statement in footnote 8 of his Report and Recommendation that "the Assistant Secretary has not previously addressed the question of agreements of indefinite duration," see Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45; National Center for Mental Health Services, Training and Research, A/SLMR No. 55; Veterans Administration Hospital, Leech Farm Road, Pittsburgh, Pennsylvania, A/SLMR No. 104; Veterans Administration, A/SLMR No. 240; and Department of Housing and Urban Development, Region II, A/SLMR No. 270.

IT IS HEREBY ORDERED that the complaint in Case No. 61-2235(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
April 30, 1975

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



DECISION

Preliminary Statement

.....  
 In the Matter of :  
 :  
 Dugway Proving Ground :  
 Department of the Army :  
 Department of Defense :  
 Dugway, Utah :  
 Respondent :  
 :  
 and :  
 :  
 National Federation of Federal :  
 Employees, Ind., Local 1239 :  
 :  
 Complainant :  
 .....

CASE NO. 61-2235 (CA)

This proceeding heard in Dugway, Utah on June 4, 1974, arises under Executive Order 11491, as amended (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary for Labor-Management Relations (hereafter called the Assistant Secretary), a Notice of Hearing on Complaint issued on April 12, 1974, with reference to alleged violations of Sections 19(a)(1)(5) and (6) of the Order as set forth in a complaint filed by National Federation of Federal Employees, Ind., Local 1239 (hereafter called the Union or Complainant) against Dugway Proving Ground, Department of the Army, Department of Defense, Dugway, Utah (hereafter called the Activity or Respondent). In its complaint the Union alleged that the Activity violated the Order with regard to changing the reporting station for security guards.

At the hearing both parties were represented by counsel and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Oral argument was waived and briefs were filed by the parties.

Upon the entire record in this matter, from my reading of the briefs and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

At all times material hereto the Union has been the exclusive collective bargaining representative of all non-supervisory security guards employed by the Activity's Provost Marshal Division. There are approximately 885 civilian employees employed at the facility of which 33 are unit employees. The Activity is engaged in chemical-biological research at a large rural area located approximately 80 miles from Salt Lake City.

In November 1970 due to various budget restrictions the Activity proposed to the Union that the reporting station for civilian security guards be changed from the English Village area at the facility to the Ditto area in order to

Roger A. Culbert, Captain, JAGC  
Office of the Staff Judge Advocate  
Dugway Proving Ground  
Dugway, Utah 84022

and

Brian X. Bush, Captain, JAGC  
Office of the Post Judge Advocate  
Dugway Proving Ground  
Dugway, Utah 84022  
on the brief

For Respondent

George Tilton, Esquire  
Associate General Counsel  
National Federation of Federal  
Employees, Ind.  
1737 H Street, N. W.  
Washington, D. C. 20006  
For Complainant

BEFORE: SALVATORE J. ARRIGO  
Administrative Law Judge



reduce the amount of overtime paid to guards. At that time guards reported for duty at an office in English Village, which is located near the main gate, and thereafter were taken to their various posts throughout the facility. At the end of the workday guards reported back to the reporting station prior to going off duty. Ditto area is approximately eleven miles from English Village and is more centrally located than English Village with regard to proximity to the actual situs of guards' places of work.

The Union was opposed to the move to the Ditto area preferring instead to retain the reporting station at English Village. After some negotiation on the matter the parties agreed to keep the reporting station at English Village but reduce the amount of overtime paid to unit employees by approximately one-half. The agreement was reduced to writing in a Memorandum of Understanding dated 3 November 1970. That memorandum states as follows:

" MEMORANDUM OF UNDERSTANDING

PROVOST MARSHAL BRANCH

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1239

"In recognition of the responsibilities of labor and management to provide the federal government with the highest standards of work, based on equitable policies negotiated by both parties, it has been agreed that the following measures will be in effect for the Provost Marshal Branch, DTC, Dugway Proving Ground, Utah.

"Both parties recognizing the need for substantial savings of overtime hereby consent to the necessity of the following reduction in position regular overtime.

<u>Position</u>	<u>Old Rate</u>	<u>New Rate</u>
a. Shift Supervisor	30 minutes	30 minutes
b. Desk Sergeant	30 minutes	30 minutes

<u>Position</u>	<u>Old Rate</u>	<u>New Rate</u>
c. Carr Security Gate	1 hour	30 minutes
d. Carr Security Patrol	1 hour	30 minutes
e. West Area Gate	1 hour	30 minutes
f. West Area Patrol	1 hour	30 minutes
g. Ditto Patrol	1 hour	30 minutes
h. Building 100, Ft. Douglas	30 minutes	15 minutes

"The above regular overtime reductions are based on calculations established from a simulated relocation of the centralized reporting point, from the Provost Marshal Office, Building 5438, English Village, to an undisclosed point located within Ditto Technical Center. However, based on a Union proposal and Management's acknowledgement of the additional cost that the Ditto relocation would impose upon individual NFFE members, as well as increased managerial burdens, it is agreed that Building 5438, English Village, will continue to be utilized as the centralized reporting point. Management and labor further agree to take all necessary actions to ensure personnel posting, inspection, briefing, and weapon requirements are carried out as efficiently and quickly as possible within the allowed time. The new regular overtime rates will be effective as of 8 November 1970.

/s/ ROBERT W. PEGG, II  
Major, MPC  
Chief, Provost Marshal Branch

/s/ JAMES A. FERGUSON  
President  
NFFE Local No. 1239

/s/ DUANE A. GELSTER  
LTC, CmlC  
Chief, Security Division

/s/ HAROLD W. STEWART  
Chief, Management-  
Employee Relations Branch

/s/ MAX ETKIN  
Colonel, CM  
Commanding"

After November 1970 the parties fully complied with the terms of the Memorandum. 1/ However, in October or early November 1972 the Activity was again forced to reduce operating expenditures due to a budget curtailment. After considering the overall problem, the Activity's Commanding Officer decided that as part of an overall program to reduce operating costs the guards' reporting station should be moved to Ditto area, thereby reducing the amount of overtime worked by guards. He thereupon directed the Civilian Personnel Officer to enter into consultation with the Union on the matter.

Sometime in early November 1972, the Activity notified the Union that because of substantial reductions in available funds certain measures would have to be adopted in order to produce cost reductions in the security program. The Activity suggested relocating the guards' reporting station from English Village to Ditto area as well as other actions to effect savings.

The Union objected to the Activity's cost reduction proposals and thereafter met with the Activity on November 15 and November 20, 1972. At the November 15 meeting the Activity had prepared, in written form, two sets of proposals entitled "Proposal I" and "Proposal II" with regard to reduction of Provost Marshal Division operating costs. The Union and Activity representatives discussed the proposals and the reasons therefor but the Union opposed any action which would decrease the amount of overtime then being earned by guards. The Union was informed that the proposed changes were to take affect within the next few months. During the meeting the President of Local 1239 requested and was accorded time to consider the matter and later present counter-proposals. The Union contended that the 1970 Memorandum of Understanding with regard to the location of the reporting station and overtime could not be disturbed. The Activity contended

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1/ In 1972, the parties negotiated a collective bargaining agreement to replace the prior collective bargaining agreement which was negotiated in 1969. The 1972 agreement was approved by the Director of Civilian Personnel for the Department of the Army and became effective on September 12, 1972. The agreement made no mention of the 1970 Memorandum of Understanding and during the negotiations leading to the 1972 agreement there was neither discussion nor mention of the Memorandum.

that the present Commanding Officer of the facility was not bound by the agreement of the prior Commanding Officer.

The parties subsequently met again by mutual agreement on November 20, 1972. At this meeting the parties again discussed the Activity's proposals, both sides offering supporting reasons for their positions. The Activity's arguments centered around the need for cost reduction and the Union brought forth arguments relative to the difficulties and the expenses involved in relocating and establishing a new reporting station. The Union also pointed to the adverse affect on morale and the additional costs which would be incurred by guards in driving their personal automobiles eleven extra miles to the new reporting station. The parties remained adamant in their positions on the applicability of the 1970 Memorandum of Understanding. Neither side having persuaded the other, no definite conclusions were reached at that meeting and the matter was to be taken to the Activity's Commanding Officer for consideration. At some undisclosed time thereafter, the Commanding Officer disapproved the Union's recommendation to keep the reporting station at English Village.

On two occasions in December 1972 the local Union's President, Darrell Coffman, had additional conversations with Captain Robert Tait, Chief of the Provost Marshal Division, relative to relocating the reporting station. 2/ At the second of the December conversations, Tait informed Coffman that if the Union had wished the 1970 Memorandum of Understanding to remain in effect they should have had it incorporated into the agreement during the negotiations in 1972.

The matter of relocating the reporting station was also of the subject of a telegram dated 22 December 1972 sent to the Activity's Commander Officer by N.T. Wolkomir, President of the National Federation of Federal Employees. The Commanding Officer's response to Wolkomir dated 17 January 1973, stated, inter alia: "The 3 November 1970 Memorandum of Understanding between the former Deseret Test Center Commander and the former President of Local 1239 is

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2/ Coffman and Tait were the parties chief spokesmen at the November 1972 meetings described above.

considered applicable only so long as the Security Guard reporting station remains at the Provost Marshal Division in English Village. In the near future the reporting station will be moved to a location in Ditto Technical Center. This move is necessitated for reasons of economy, increased security, and improved management. Upon completion of the move the agreement will no longer be applicable."

On February 1, 1973, the Activity issued a memorandum to all Provost Marshal Division personnel which provided, among other things, for a reduction in force, consolidation of duties, the relocation of the guards' reporting station to Ditto area and other actions to reduce operating costs. The announcement, a copy of which was given to the Union, also provided that the relocation would be effective as of February 17, 1973. Due to difficulties in obtaining a suitable building to house the new security guards' reporting station in the Ditto area, the relocation was not actually effectuated until February 28, 1973.

Positions of the Parties

The Union contends that the 1970 Memorandum of Understanding was a valid contract and if the Activity desired to change the terms of the agreement such could only be achieved through negotiations with the Union. According to the Union, the Memorandum constituted a contract of indefinite duration and would remain in effect until both parties agreed that the terms of the memorandum should be changed. The Union also contends that the Activity's decision to relocate the reporting station, thereby abrogating the Memorandum, was made prior to consultation with the Union and was unalterable and accordingly no meaningful negotiations or consultation could occur.

Respondent makes the following contentions: (1) the 1970 Memorandum of Understanding is not a contractual agreement, but rather is a recordation of an informal agreement; (2) a change of a work reporting site is not a proper issue for negotiation within the meaning of Sections 11 and 12 of the Order; and (3) in any event the Activity fully negotiated with the Union with regard to changing the

work reporting site. Moreover, Respondent contends that the unfair labor practice complaint herein was untimely filed. 3/

Discussion and Conclusions

Respondent's position with regard to untimeliness of the complaint is based upon its assessment that if an unfair labor practice occurred herein, it took place when, on January 17, 1973, President Wolkomir was notified by the Commanding Officer that a "final decision" to move the work reporting site had been made. I reject Respondent's contention. The words "final decision" were not used in the January 17, 1973 letter to Wolkomir and indeed the Commanding Officer testified at the hearing that the decision to move the reporting station could have been rescinded at any time prior to February 28, 1973, the date of the actual relocation. Moreover, if a unilateral change occurred in the situation presented herein, it would be possible to find a violation as to both the announcement to unit employees of the pending unilateral change and the actual effectuation of the change, announcing the pending change being a violation of Section 19(a)(1) of the Order and the implementation violating 19(a)(6) and (1). Accordingly, since the complaint herein, filed on November 9, 1973, was filed within nine months from the relocation of the station on February 28, 1973, I find Respondent's contention as to the untimeliness of the complaint to be without merit. 4/

With regard to the central issue herein, I do not find that Respondent's actions violated the Order.

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3/ At the hearing I dismissed Respondent's motion to dismiss based upon this contention. In its brief Respondent has renewed its motion to dismiss for reasons of untimeliness.

4/ Section 203.2(b)(3) of the Regulations.

If a term or condition of employment is embodied in a negotiated agreement, the parties to that agreement would be required to adhere to that condition of employment until the expiration of the agreement or the parties mutually agreed to deviate therefrom. However, in the case of a personnel policy, practice or condition of employment which is not embodied in a negotiated agreement, an activity may, after due notice and affording an exclusive collective bargaining representative an opportunity to meet and confer on the matter, change the policy, practice or condition of employment even absent agreement of the employees exclusive representative. Any discussions, of course, must be carried out in circumstances which would indicate good faith in the activity's dealings with the exclusive representative on the matter.

From my review of the document and the circumstances surrounding its execution, I find that the 1970 Memorandum of Agreement is not a negotiated agreement within the meaning of the Order. Thus, the Memorandum was never approved by the agency head as required by Section 15 of the Order. 5/ Further, the Memorandum makes no reference to the negotiated agreement which was in effect at the time 6/ nor is there

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5/ Sec. 15. Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved if it conforms to applicable laws, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations.

6/ The Activity argues in its brief that a clause in the agreement negotiated in 1969 is relevant to the disposition of the issue herein. However, neither that agreement nor the specific clause the Activity relies upon was offered in evidence at the hearing. Accordingly, such clause is not a part of the record herein and may not be considered in resolving this case.

any evidence that the parties ever discussed whether the Memorandum was to be considered an amendment to the agreement negotiated in 1969. Moreover, the testimony of James Ferguson, the Union's President in 1970, discloses that during the discussions which gave rise to the 1970 Memorandum there was no mention of how the Memorandum could be changed or terminated. 7/ Nor was there any discussion with regard to the duration of the Memorandum. 8/

In all the circumstances, I find that the 1970 Memorandum of Understanding is not a negotiated agreement within the meaning of the Order. Rather, I find that the Memorandum is a written recording or memorialization of a practice or condition of employment. I further find that the discussions and communications between the Activity and the Union with regard to changing the security guards' reporting station fulfilled the Activity's responsibility to meet and confer before effectuating the change.

I also find that the evidence fails to support Complainant's contention that the Activity approached discussions on the change with a closed mind. Thus, the relocation of the reporting station was initially presented to the Union as a proposal, first orally then in writing.

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7/ Ferguson testified that it was his intention to incorporate the Memorandum into the negotiated agreement when it was renegotiated. However, Ferguson was no longer the Union's President when the 1972 agreement was negotiated and the Memorandum was not discussed or mentioned in any manner during the negotiations for the 1972 agreement.

8/ Complainant contends that since the Memorandum was not for a specific term it is a contract of indefinite duration and remains in effect until changed by mutual agreement. While the Assistant Secretary has not previously addressed the question of agreements of indefinite duration, it is generally the rule that a contract for an indefinite period, which by its nature is not deemed to be perpetual, may be terminated at will after giving reasonable notice 17A C.J.S., Contracts, §398; Boeing Airplane Co., et.al. v. National Labor Relations Board, 174 F.2d 988, 991.

See 75A-86  
Cross  
reference

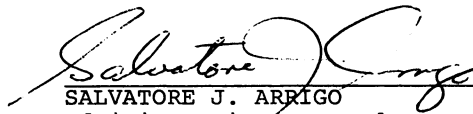
UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

The Activity thereafter gave the Union ample opportunity not only to consider and discuss the Activity's proposals but to bring forth and have considered any Union suggestions as well. Although the Activity approached discussions with a position on the matter, this does not mean that the Activity's position was unalterable. All that has been shown is that the arguments advanced by the Union did not persuade the Activity that it should not proceed with changing the reporting station in its effort to reduce costs. Such conduct on the part of the Activity does not give rise to a violation of the Order. 9/

DEPARTMENT OF THE ARMY,  
PICATINNY ARSENAL,  
DOVER, NEW JERSEY  
A/SLMR No. 512

Recommendation

Based upon the foregoing findings and conclusions, I recommend that the complaint herein be dismissed.

  
SALVATORE J. ARRIGO  
Administrative Law Judge

DATED: February 24, 1975  
Washington, D.C.

This case involved an unfair labor practice complaint filed by American Federation of Government Employees (AFL-CIO), Local Union 225 (Complainant) alleging that the Respondent had violated Section 19(a)(1) and (2) of the Executive Order by discriminating against the Complainant's Vice-President based on her union activity. It was alleged that such discrimination "was established verbally" at a meeting in which it was indicated, among other things, that the employee's request for training would be approved only if she would give up the previously agreed upon use of one-third of her working day (two hours and forty minutes) for representational activities during the period of such training, and by her Branch Chief's indicating by memorandum that the Branch could not endorse "both lengthy training and union involvement during the same work day to the extent that the employee's availability to perform in his or her primary job responsibility is seriously impaired."

The Administrative Law Judge found that the preponderance of evidence did not support the allegations in the complaint and that, therefore, the Respondent's conduct did not violate Section 19(a)(1) and (2) of the Order. The Assistant Secretary disagreed with the Administrative Law Judge's recommended dismissal of the Section 19(a)(1) violation. In this regard, he noted that while it had been found previously that the use of official time for the conduct of union business is not an inherent matter of right under the Executive Order, the Order does not preclude an agency or activity and an exclusive representative from negotiating an agreement with respect to the use of official time by union representatives in certain situations.

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that the Respondent's conduct violated Section 19(a)(1) of the Order by virtue of its proposals at the meeting with the employee involved and her representative, in connection with her requested training, among which was the suggestion that she give up the one-third of time allotted for "authorized labor/management business" under the parties' negotiated Memorandum of Understanding. The Assistant Secretary also determined that the memorandum of the employee's Branch Chief violated Section 19(a)(1) of the Order in that it indicated that her training opportunities would be limited so long as she continued to perform her authorized union representational duties.

With respect to the Section 19(a)(2) allegation, the Assistant Secretary agreed with the Administrative Law Judge that dismissal was warranted as the evidence established that the employee's request for training was, in fact, eventually approved.

9/ In view of the above disposition, I find it unnecessary to address the other contentions raised by Respondent.

GPO 890-250

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
PICATINNY ARSENAL,  
DOVER, NEW JERSEY

Respondent

and

Case No. 32-3626(CA)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES (AFL-CIO),  
LOCAL UNION 225

Complainant

DECISION AND ORDER

On December 11, 1974, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendations.

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

The Administrative Law Judge concluded that the Complainant had not sustained its burden of proof in support of its allegations that the Respondent violated Section 19(a)(1) and (2) of the Order by discriminating against Ms. Genevieve Nancy McAleney, the Complainant's Vice-President, based on her union activity and, therefore, he recommended that the complaint be dismissed in its entirety. I do not agree.

The complaint alleged essentially that the discrimination "was established verbally" at a meeting held with Ms. McAleney concerning her request for training under the Respondent's Upward Mobility Program, and

in a memorandum from her Branch Chief, Mr. Albert G. Nash. <sup>1/</sup> The record reveals that at a meeting held on April 16, 1974, between management representatives and Ms. McAleney and her representative, management made several alternative proposals, in connection with Ms. McAleney's request for training, for the purpose of assuring that Ms. McAleney would perform her daily "assigned duties" for an uninterrupted period of approximately four hours. In this regard, it was suggested, among other things, that she give up the two hours and forty minutes, allotted on a daily basis for representational duties, during the period in which she planned to be enrolled in the training courses. No satisfactory agreement was reached at this meeting, and as a follow-up, Mr. Nash, the same day, forwarded a memorandum to the Chief, Training and Development Division, Civilian Personnel Office, in which he stated:

In the case of Mrs. McAleney, a special situation exists in that Mrs. McAleney is Executive Vice President of the local AFGE and in this capacity spends one-third of her work day performing Union Activities. If Mrs. McAleney were to take the cited courses during the day (four days a week), and in addition spend one-third of her remaining time working on Union Activities, it would leave little remaining time to perform her primary job responsibility as Clerk-Typist in the Fuze Engineering Branch of AD&ED.

In summary, the Fuze Engineering Branch strongly supports employee training. It cannot, however, endorse both lengthy training and union involvement during the same work day to the extent that the employee's availability to perform in his or her primary job responsibility is seriously impaired. <sup>2/</sup>

The record reveals that pursuant to a negotiated Memorandum of Understanding between the Complainant, which is the exclusively recognized representative, and the Respondent, Ms. McAleney was entitled, as the Vice-President of the Complainant, to the use of one-third of her working day (two hours and forty minutes) to perform "authorized labor/management business." The Memorandum did not require that the prescribed two hours and forty minutes be utilized in a manner which would assure that the remaining duty time be uninterrupted and continuous work time. The Memorandum did provide that the Complainant could appoint, if it so desired,

<sup>1/</sup> As the evidence establishes that Ms. McAleney's request for training was, in fact, eventually approved, in agreement with the Administrative Law Judge, I find no basis to support the Complainant's 19(a)(2) allegation.

<sup>2/</sup> Ms. McAleney received this memorandum shortly after the meeting held on April 16, 1974.

"during scheduled leave (e.g. vacation, hospitalization, maternity, medical appointments)---" a substitute officer for the position of President or Executive Vice-President who would be entitled to the same use of official time.

It has been found previously that the use of official time for the conduct of union business is not an inherent matter of right under the Executive Order, but that the Order does not preclude an agency or activity and an exclusive representative from negotiating an agreement with respect to the use of official time by union representatives in certain situations. 3/

In the subject case it is undisputed that the parties' Memorandum of Understanding permitted Ms. McAleney the use of up to one-third of her working day (two hours and forty minutes) to perform certain of her representational duties. There is no indication in the Memorandum of Understanding that Ms. McAleney was required to surrender this right in order to obtain other benefits of her employment. Under these circumstances, I find that the Respondent's conduct at the April 16, 1974, meeting in connection with Ms. McAleney's request for training was violative of the Order. Thus, in my view, by proposing that Ms. McAleney either abandon or adjust her authorized union representational duties, in the time frame which had been negotiated previously by the Respondent and the Complainant, as a condition to obtaining the training she desired, I find that the Respondent interfered with, restrained, and coerced Ms. McAleney in the exercise of her rights assured by the Order to join and assist a labor organization. Moreover, I find that Mr. Nash's memorandum of April 16, 1974, also violated the Order in that it indicated that Ms. McAleney's training opportunities would be limited so long as she continued to perform her authorized union representational duties. Accordingly, I find that the Respondent's conduct in each of the above noted instances was violative of Section 19(a)(1) of the Order. 4/

#### REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I shall order that the Respondent cease and desist therefrom and take certain specific affirmative actions, as set forth below, designed to effectuate the purposes and policies of the Order. Having found also that the Respondent did not engage in certain other conduct prohibited by Section 19(a)(2) of the Order, I shall order that the Section 19(a)(2) portion of the complaint be dismissed.

3/ See Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485.

4/ The Administrative Law Judge found, and I agree, that the time spent on union representational matters pursuant to the parties' Memorandum of Understanding must be credited as work time.

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Army, Picatinny Arsenal, Dover, New Jersey, shall:

#### 1. Cease and desist from:

Interfering with, restraining, or coercing Ms. Genevieve Nancy McAleney, or any other employee, in the exercise of their rights assured by Executive Order 11491, as amended, to join and assist a labor organization.

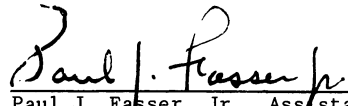
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at its facility at Picatinny Arsenal copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, Picatinny Arsenal, Dover, New Jersey, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

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

Dated, Washington, D.C.  
May 16, 1975

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

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce Ms. Genevieve Nancy McAleney, or any other employee, in the exercise of their rights assured by Executive Order 11491, as amended, to join and assist a labor organization.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515, 1515 Broadway, New York, New York 10036.

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



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In the Matter of :  
  
DEPARTMENT OF THE ARMY :  
PICATINNY ARSENAL :  
DOVER, NEW JERSEY :  
Respondent :  
  
and : CASE NO. 32-3626 (CA)  
:  
AMERICAN FEDERATION OF :  
GOVERNMENT EMPLOYEES (AFL-CIO), :  
LOCAL UNION 225 :  
Complainant :  
.....

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George Kelly, Vice President  
AFGE Local Union 225  
Picatinny Arsenal, Building 1610  
Dover, New Jersey 07801  
For the Complainant

BEFORE: RHEA M. BURROW  
Administrative Law Judge



REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arose upon the filing of an unfair labor practice complaint on June 6, 1974 by George A. Kelly, Vice-President, Classification Act Employees, American Federation of Government Employees, AFL-CIO, Local Union 225, (hereinafter referred to as Complainant and/or Union) against the Picatinny Arsenal, Department of the Army (hereinafter referred to as Respondent), alleging that the Respondent engaged in certain conduct on April 16, 1974 violative of Sections 19(a)(1) and (2) of Executive Order 11491, as amended, (hereinafter referred to as the Order.). The Complaint alleged

"...the Management of Picatinny Arsenal by its agent, Mr. Albert G. Nash, Chief of the Fuze Engineering Branch, ADED, discriminated against an official of this Local, Ms. Genevieve Nancy McAleney, because of her union affiliation.

"... It was established verbally at a meeting concerning Ms. McAleney's Request for Training, under the Upward Mobility Program, when Mr. Nash stated that he would consider approving leave time for attending the courses only if Ms. McAleney would give up her use of the 1/3 time for union activities. It was also established in writing by Mr. Nash himself in a memo to the Chief of the Training Branch stating:

'In the case of Mrs. McAleney, a special situation exists in that Mrs. McAleney is Executive Vice President of the local AFGE and in this capacity spends one-third of her work day performing union activities. If Mrs. McAleney were to take the cited courses during the day (four days a week) and in addition spend one-third of her remaining time working on union activities, it would leave little remaining time to perform her primary job responsibility as a clerk-typist in the Fuze Engineering Branch of ADED. . . . In summary, the Fuze Engineering

Branch strongly supports employee training. It cannot, however, endorse both lengthy training and union involvement during the same work day to the extent that the employee's availability to perform in his or her primary job responsibility is seriously impaired.'"

The April 16, 1974 incident was the only one cited as being in violation of the Order but reference was made to five prior alleged incidents occurring from July 1, 1972 to January 1974 as depicting a pattern of conduct imposed by Mr. Nash on Ms. McAleney because of her union activities.

A hearing was held in the above captioned matter on October 22 and 23, 1974 at Dover, New Jersey. The parties through their counsel were afforded the opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues herein and to present oral argument and file briefs in support of their positions. There were no timely briefs submitted by either party for consideration of the undersigned.

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

I

Basic Issue and Pertinent Provisions of the Executive Order

The basic issue as stated by Counsel for the Complainant Union concerns whether Nancy McAleney, a Local Union Vice-President and employee at Respondent's Picatinny Arsenal was discriminated against by management representative, Albert Nash because of her union affiliation in violation of Section 19(a)(1) and (2) of the Order.

The Respondent denied the Union allegations of discrimination against Nancy McAleney and asserted that the Complainant misquoted Mr. Nash when it stated that he conditioned his approval for the Upward Mobility Program courses "Only if Ms. McAleney would give up her use of the one-third time for union activities."

Section 19 of the Order relating to Unfair Labor Practices provides:

(a) Agency management shall not -

- (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;
- (2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

Under Section 1(a) of the Order, "Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority. The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization.

"(b) Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, . . . , or by an employee when the participation or activity would result in a conflict of interest or otherwise be incompatible with law or with the official duties of the employee." (underscoring supplied).

II

Findings of Fact

Nancy McAleney was employed as a GS-2 clerk-typist in a Fuze Engineering Branch at Picatinny Arsenal beginning in 1967. She was later promoted to GS-3 and thereafter left the branch to accept a promotion in the Photo Laboratory. She was not happy in this assignment and in 1969 Albert Nash, Chief, Fuze Engineering Branch, assisted in arranging for her return as a GS-3 to the Fuze Engineering Branch where she has since been employed. After her return she was promoted to GS-4 and she is currently working as a clerk-typist in that grade. Except for the brief period with the Photo Laboratory, Albert Nash has been her first or second level supervisor during her entire tenure of employment at the Arsenal. Nancy McAleney's status or membership in the Union is not indicated prior to July 1972 when she became Executive Vice-President of AFGE Local 225; she was elected President of this Local in July 1974. An agreement or understanding reached about the time Nancy became Vice-President provided that one-third of the working time each day (2 hours and 40 minutes) be allowed to the President or Vice-President of AFGE Local 225 to perform authorized labor-management duties. <sup>1/</sup> She has utilized the authorized time since she became Vice-President of the Union and at all times material to this proceeding. Since about August 1, 1974, she has been working only 13 hours per week the remaining time being devoted to Union activity. There has been no change in the Union-management agreement providing for the additional hours being spent on Union matters.

In January 1974, Robert E. Matisko, President, AFGE Local 225 forwarded a letter with attached memorandum to the Commanding Officer of Picatinny Arsenal citing several

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<sup>1/</sup> Complainant Exhibit No. 7. It also provided that in the event of absence of the President and Vice-President the Union could appoint a substitute officer who was entitled to use of the official time.

incidents of alleged harrassment since July 1972 against Nancy McAleney by Branch Chief, Albert G. Nash of the Fuze Engineering Branch. It was stated that no single incident justified a formal complaint but there appeared to be a developing pattern of harrassment. I find that the enumerated incidents 2/ do not constitute background information supporting the allegation of harrassment. In this connection, it is noted that when Mr. Nash attempted to set up a meeting on January 22, 1974 with her and G. Kelly, Executive Vice-President of Local 225 where they could discuss the matter, Nancy, felt that a discussion

2/ The enumerated incidents include:

(a) In the summer of 1972 Nancy McAleney applied to take three college courses off the Arsenal premises under the Upward Mobility Program. Branch policy in the past had been limited to two courses with any request for more having to be justified as not interferring with job duties. Since Nancy's application was the first received under the Upward Mobility Program, there was some delay before final approval of the three courses. Her training was not jeopardized and the delay was occasioned by her supervisor, Albert Nash, having to familiarize himself with the new program, ascertain whether her request complied with its requirements and clear her program with training personnel.

(b) The alleged criticism of dress in March 1973 attributed to Mr. Nash was not established by credible evidence at the hearing. (c) Her relief from regular and additionally assigned duties were not due to actions by Albert Nash as claimed. For the additionally assigned duties she was temporarily performing with other clerk-typists duties of a person who had retired; a job freeze had precluded immediate replacement. Her regularly assigned duty change resulted from consolidation of four branch sections to three that had been ordered at a higher level than Mr. Nash.

(d) The merit promotion evaluation review made by Albert Nash in January 1974 is shown to have been based on credible evidentiary findings without discrimination. In this connection she sought a merit rating as distinguished from her [continued on next page]

would serve no purpose and did not appear. Her transfer was recommended 3/ but no effort was made to have it effected. The recommendation was not a coercive measure to discriminate against her by reason of her activities on behalf of a labor-organization but one often practiced to alleviate friction that has developed between an employee and her supervisor.

Nancy McAleney was the first applicant for training under the Upward Mobility Program in the Fuze Engineering Branch at Picatinny Arsenal. As a participant in the program, all of her training prior to March 1974 had been taken in the evening or off duty time. In late March 1974 she applied to take the following non-government facility courses at Morris County College during the summer of 1974. 4/

2/ - continued

regular yearly appraisal and this comprehends extra ordinary or meritorious performance. Her sick leave record was satisfactory but not extra-ordinary or meritorious and it was taken in one day periods. No attempt was made to refute the one day pattern finding but only that her total leave was less than she had taken in previous years. The evaluation was one in the judgment area of her management supervisor and is not shown to have been erroneous or to have been handled differently than any other employee.

3/ In his memorandum in January 1974, (Complainant Exhibit No. 14), Albert Nash stated. . . . "Although I hold Ms. McAleney in high esteem, obviously she feels harrassed and unwilling to discuss the matter. This attitude will place me in a very awkward position as a supervisor in that any criticism, actual or imagined, can be construed as harrassment. As a supervisor it is my responsibility sometimes to criticize, to review, to approve and sometimes deny. To have all actions or inactions construed as harassment is certainly not a desirable situation.

"I therefore, regretfully recommend that Ms. McAleney be reassigned to some other organization in a fully comparable position. She is a capable employee."

4/ Complainants' Exhibit No. 8.

	<u>Course Title</u>	<u>Credits</u>	<u>Beginning Date and Time</u>	<u>Ending Date and Time</u>	<u>Government Time</u>
(1)	Biology of Man and his Environment	4	June 17, 1974 8:30 a.m.	July 18, 1974 12:30 p.m.	none
(2)	Principles of Finance	3	July 22, 1974 10:30 a.m.	August 22, 1974 12:20 p.m.	none

The Biology course was scheduled to meet four hours per day, (8:30 a.m. to 12:30 p.m.) four days per week and the Finance course three hours per day, four days per week.<sup>5/</sup> The application for Principles of Finance was approved by Albert Nash on March 28, 1974. Later when Elber Stearns apprised Nash that the scheduled courses were to be taken on government time rather than off duty hours, they were concerned about her hours of availability to perform her work as a clerk-typist. <sup>6/</sup> The two scheduled a meeting on April 16, 1974 with Nancy to discuss the situation; George Kelly attended the meeting as Nancy's union representative.

Basically, Mr. Nash and Stearns sought to find a block of about four hours that Nancy could work during the day without interruption to permit a favorable working relationship and at the same time allow her to take the courses for which she had applied. There were a number of suggestions made and discussed including (1) staggering of her hours

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<sup>5/</sup> See Transcript P. 31.

<sup>6/</sup> In addition to time scheduled for training, Nancy McAleney testified as follows in answer to the Administrative Law Judges question as to what hours she was spending on Union duties:

"The Witness: I normally went at 12:00, which is when my lunch began.

[continued on next page]

where she came in earlier or stayed later in the afternoon; (2) one of the courses was offered in the evening and she could perhaps take it on off duty time; (3) during the period she was in school training she might be willing to give up the two hours forty minutes allotted to her Union activities<sup>7/</sup>; and (4) she might schedule her vacation during the period she was enrolled for the training courses. Despite discussion of various suggestions offered a mutually satisfactory agreement was not reached at the meeting. In a memorandum dated April 16, 1974 from Albert G. Nash to the Chief, Training and Development Section, Civilian Personnel Office he states: "...the Fuse Engineering Branch

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<sup>6/</sup> - continued

Judge Burrow: And stayed how long?

The Witness: Two hours and forty minutes, plus my 30-minute lunch period, which means I was back, I believe, at ten after three.

Judge Burrow: Now, then, that's the time that you were spending that amount of time or more

The Witness: I was taking that amount of time, to the letter.

Judge Burrow: In April 1974

The Witness: Correct." (Transcript P.101).

<sup>7/</sup> The following relates to Nancy McAleney's testimony on cross-examination:

"Q. You have stated that Mr. Nash said he would approve these courses and speaking now of these summer of 1974 courses, if you 'Would give up you Union activities.'

Is that your recollection of this discussion?

"A. Not if I would give up my Union activities per se, but if I would give up my time during the time that I was going to school." (Transcript P. 70)

strongly supports employee training. It cannot, however, endorse both lengthy training and Union involvement during the same work day to the extent that the employees availability to perform in his or her primary job responsibility is seriously impaired."

Later, her training for the two courses was approved with administrative or excused leave being granted to take the Biology of Man course and the course on Principles of Finance being taken on annual leave. According to Nancy McAleney, she made arrangements to complete her school attendance and Union activity by about One 0'clock p.m. and worked as clerk-typist until 5 p.m.

From the foregoing, I find that the purpose of the April 16, 1974 meeting between Albert Nash, and Elber Stearns as supervisors for Respondent and Nancy McAleney and George Kelly was to discuss ways and means and arrange a work schedule for Nancy McAleney that would permit approval for the two Upward Mobility courses for which she had applied to take during regular working hours.

Secondly, I find that as of April 16, 1974 the Biology course for which she had applied to take between June 17 and July 18, 1974 from 8:30 a.m. to 12:30 p.m. permitted little, if any, available working time during the morning hours; her Union involvement by her own testimony required her attention until ten minutes past three - 0'clock leaving a balance of fifty minutes to be devoted to her duties as a clerk-typist before usual closing time. Her availability to perform her primary job would be so limited and restricted in time as to seriously impair her job responsibility.

Third, the allegation in the complaint that Mr. Nash stated he would consider approving leave time for attending the courses only if Ms. McAleney would give up her use of 1/3 time for Union activities is exaggerated. Mrs. McAleney testified at the hearing that he stated that she consider giving up the time she spent on Union activity during the period she was to take the courses for which she applied during the summer of 1974. Other testimony established that this was one of several suggestions made at the meeting

and that there was no statement or condition that approval would be based on her giving up use of 1/3 of her time for Union activities. I find that the preponderance of the evidence does not support the allegation in the complaint that Mr. Nash stated that he would consider approving leave time for attending the courses only if Ms. McAleney would give up her use of the 1/3 time for Union activities.

III

Discussion and Conclusions

The Complainant sought to utilize certain alleged incidents occurring between July 1, 1972 and January 1974 as establishing a developmental pattern of harrassment by Albert Nash, Respondent's Chief of Fuze Engineering Branch, Picatinny Arsenal against then Local Union 225 Vice-President Nancy McAleney. I have previously found that the enumerated incidents do not constitute background information supporting the allegation of harrassment.

The Assistant Secretary In National Labor Relations Board, Region 17 and National Labor Relations Board A/SLMR, No. 295 held:

"While a complaint must be filed within a certain specified time period. . . events occurring outside such periods may properly be introduced to provide background information and to shed light on events occurring within the time period. . ."

In Veterans Administration, Veterans Administration Hospital, A/SLMR No. 301, it was held that the Assistant Secretary would only view acts outside the statutory period as background information and would base no violation on such acts.

I conclude that the evidence does not establish that the enumerated incidents, either singly or combined, demonstrated a pattern of disparate or discriminatory treatment

by Respondent's Managerial Officer Albert Nash against Nancy McAleney. Also I conclude that the eunumerated incidents were not violations of Sections 19(a)(1) and (2) of the Order.

There remains for consideration the question of whether the suggestion attributed to Mr. Nash at the meeting on April 16, 1974 and the statement contained in his memorandum to the Chief of Training Branch on the same day constituted a violation of Section 19(a)(1) and (2) of the Order. 8/

As heretofore found the allegation in the complaint that Mr. Nash would consider approving leave time for Ms. McAleney to attend the 1974 summer courses only if she gave up her use of the 1/3 time for union activities was exaggerated. The evidence establishes that as one of several suggestions made at the meeting Ms. McAleney was requested to consider giving up her Union involvement during the period she would be in training for the two courses. The problem confronting management was whether it was justified in recommending approval of training for Nancy McAleney to take educational training courses that consummated essentially all of her morning work hours when her union activities consummated her afternoon hours until 3:10 p.m. There remained only 50 minutes to devote to her primary job responsibility 9/ during normal working hours.

Section 1(b) of the Order expressly states that Section 1(a) does not authorize participation in the management of a labor organization or acting as a representative of such a organization by an employee when the participation or activity would result in a conflict of interest or otherwise be incompatible with law or with the official duties of the employee.

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8/ See p. 4., supra.

9/ It later developed that the full four hours was not required for the Biology Course but this was not definite when application had been made or at the meeting on April 16, 1974.

A Department of Defense Directive entitled Labor Management Relations in the Department of Defense 10/ provides:

"No employee shall carry on any activities as an officer or agent of a labor organization which will conflict or give the appearance of conflicting with the proper exercise of, or be incompatible with, his official duties or responsibilities. . ."

The Collective Bargaining Agreement provided that in the event of absence of the President and Vice-President the Union could appoint a substitute officer who was entitled to use of the official time. A memorandum of understanding relating to the agreement stated t' it:

"For each actual work day that the employees are scheduled for duty, and report for duty, each employee will work at their assigned Government position for at least five hours and 20 minutes. The remaining time may be used for authorized labor/management business."

Section 12(b) of the Order also provides in part that Agency management officials retain the right, in accordance with applicable law and regulations to direct employees of the Agency; to hire, promote, transfer, assign and retain employees in positions within the Agency, and to suspend, demote, discharge, or take other disciplinary action against employees; to maintain the efficiency of Government operations entrusted to them; and, to determine the methods, means, and personnel by which such operations are to be conducted.

Viewing the circumstances and situation as they existed on April 16, 1974 there was little or no substantial time for Nancy to devote to her primary job responsibility apart from the time required for her training courses and union involvement.

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10/ Civilian and Personnel Regulation, CPR 700-711 (Chapter 9), Par. V, E. 2.

Counsel for Complainant cited Environmental Protection Agency, Perrine Primate Laboratory, A/SLMR No. 136 and Western Division of Naval Facilities Engineering Command, San Bruno, California, A/SLMR No. 264 in support of its claim that Respondent violated Sections 19(a)(1) and (2) of the Order. In the former case, the Assistant Secretary adopted the findings and conclusions of the Hearing Examiner that certain actions of Respondent (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) and that in such circumstances the aforementioned actions inherently would tend to discourage membership in a labor organization and there is no need to prove actual discouragement.

In the latter case, the Complainant specifically alleged that Respondent had interfered with, restrained, or coerced its employees by the action of its supervisor in inserting in an appraisal form of Joseph Gorgane the remark "active in the union."

The two cases are differentiated from the one in issue on a factual basis. There was no docking of pay or low performance rating in the case in issue as was present in A/SLMR No. 136 and time for job performance and an appraisal referring to union activity were not involved in A/SLMR No. 264.

The evidence at the hearing established a long standing policy of not permitting extensive college training off the Arsenal premises during normal work hours. Nancy McAleney's application for training and request for approval of the two specified courses under the Upward Mobility Program is not shown to have been considered in any different manner than those of any other union or non-union employee. I conclude there was no discrimination against Nancy McAleney in this respect.

The April 16, 1974 conference was held in an attempt to reach a satisfactory arrangement whereby Nancy McAleney would spend sufficient time on her job as would justify the courses of training under the Upward Mobility Program

for which she had applied. At that conference Albert Nash agreed that approval could be granted if the courses were taken on annual leave. Numerous suggestions were made but not mutually satisfactory agreement was then reached. It was a bargaining session designed to reach a satisfactory agreement with no final position of the parties being established.

Basically the Respondent's position throughout has been that to justify taking a 4-hour college course or courses under an approved educational program, off the Arsenal premises, there should be about four hours in the primary job during the day for an employee to work in an uninterrupted status. As of April 16, 1974 Nancy's planned work scheduled while taking the summer courses did not include as much as four hours in an uninterrupted status even if her union involvement time was included. I find no reason to disagree with Respondent's basic standard of justification. However, in my opinion, Respondent on April 16, 1974 should have credited the time allotted for Nancy's Union involvement or activities as being working time; the Agency position was based on uninterrupted hours of work in its final position, rather than time spent in union involvement and such is not found to constitute a violation of Section 19(a)(1). 11/ Approval in the final analysis was granted for the two courses when it developed that four hours were not required for the Biology course and she could complete her school attendance and Union involvement schedule by 1:00 p.m. The Finance course required even less time.

The Complainant's counsel urged in closing argument that a violation of the Order be found and that some punitive or corrective penalty such as admonition or reprimand

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11/ Had the Respondent disapproved the training or denied it on the basis of Union involvement rather than the number of hours worked, such would have resulted in improperly penalizing an employee, who as a Union representative was exercising rights assured under the Order and contained in the negotiated agreement. See United States Army Tank Automotive Command, Warren, Michigan and Local 1658, American Federation of Government Employees, AFL-CIO, A/SLMR No. 447.


be directed against Respondent's Agent, Albert Nash.

The record does not warrant such action. There appears to have been good faith bargaining on the part of Respondent throughout the period Nancy's application for training was under consideration and approval of her training was granted just as soon as time for job performance permitted.

In view of the foregoing, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated Section 19(a)(1) and (2) of the Order by discriminating against Nancy McAleney because of her Union activity.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Section 19(a)(1) and (2) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.

  
RHEA M. BURROW  
Administrative Law Judge

DATED: December 11, 1974  
Washington, D. C.

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

OFFICE OF FEDERAL HIGHWAY PROJECTS,  
FEDERAL HIGHWAY ADMINISTRATION,  
DEPARTMENT OF TRANSPORTATION  
A/SLMR No. 513

This case involves an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1348, alleging that the Respondent violated Sections 19(a)(1) and (6) of the Order by: (1) the failure of the Respondent's chief spokesman to attend mediation sessions on August 24 and 28, 1973; (2) a statement by the Activity head on September 17, 1973, that the Activity would not negotiate while mediation was in progress; and (3) the alleged refusal by the Respondent in December 1973, to agree upon the order in which negotiated articles should be arranged and reduced to writing.

As to the first allegation, the Administrative Law Judge found that the Respondent's chief spokesman returned to Washington, D. C., upon conclusion of the negotiations with the Complainant in June 1973, after vesting another individual with full authority as the Respondent's chief spokesman and that the Respondent's chief spokesman orally informed the Complainant of this change. By such actions, the Administrative Law Judge concluded that the Respondent did not improperly fail to meet in good faith with the Complainant.

With regard to the allegation that the Respondent indicated that it would not bargain during mediation, the Administrative Law Judge found that the Respondent's representative met with the Complainant's chief spokesman on September 17, 1973, to consider an unfair labor practice charge brought against the Respondent on May 25, 1973; that the September 17 meeting was neither a mediation nor a negotiation session; that the subject of the May 25, 1973, unfair labor practice charge also was a topic being discussed during bargaining negotiations; and that Respondent's representative's determination at the September 17 meeting, not to deal with the subject matter of the unfair labor practice charge independent of bargaining negotiations, was proper. Under these circumstances, the Administrative Law Judge concluded that the Respondent did not improperly refuse to negotiate with the Complainant during mediation.



With regard to the allegation that the Respondent refused to reduce agreed-on articles to writing, the Administrative Law Judge concluded that, as the record evidence shows, the Respondent did not attempt to change or renege on articles already agreed upon by the parties, and that the Respondent's opposition to other changes suggested by the Complainant did not demonstrate bad faith.

Under all of these circumstances, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OFFICE OF FEDERAL HIGHWAY PROJECTS,  
FEDERAL HIGHWAY ADMINISTRATION,  
DEPARTMENT OF TRANSPORTATION,  
VANCOUVER, WASHINGTON

Respondent

and

Case No. 71-2949

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1348

Complainant

DECISION AND ORDER

On December 23, 1974, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. <sup>1/</sup> Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendations, and the Respondent filed an answering brief to the Complainant's exceptions.

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

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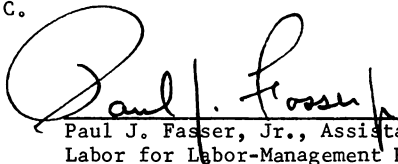
<sup>1/</sup> The complaint originally alleged violations of Sections 19(a)(1), (2), and (6). At the hearing the Complainant requested withdrawal of the 19(a)(2) allegation. The Administrative Law Judge's recommendation that such request be approved is hereby adopted. While recommending dismissal of the 19(a)(6) allegation, the Administrative Law Judge inadvertently omitted recommending the dismissal of the derivative 19(a)(1) allegation. This inadvertent error is hereby corrected.

In agreement with the Administrative Law Judge, I find that the September 17, 1973, meeting between the parties was neither a continuation of formal bargaining nor a mediation session between the parties. Thus, as the Administrative Law Judge noted, the meeting was confined to the May 25, 1973, unfair labor practice charge, the subject matter of which involved the precise issue being discussed during bargaining negotiations 2/ and the Respondent was under no obligation to deal with such matter independent of the bargaining negotiations. Moreover, the Administrative Law Judge found that in early December 1973, the parties agreed that during the term of their agreement, administrative leave would be granted to employees "to attend union functions /conventions/ for training purposes." Accordingly, in agreement with the Administrative Law Judge, I find that, under the circumstances of this case, the Respondent did not improperly fail to meet and confer in good faith with the Complainant.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-2949 be, and it hereby is, dismissed.

Dated, Washington, D. C.  
May 23, 1975

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

2/ It was noted that on page 12 of his Report and Recommendations the Administrative Law Judge inadvertently referred to "the denial of administrative leave to union members for negotiating" as the subject matter of the unfair labor practice charge of May 25, 1973. As noted on page 6 of the Report and Recommendations the subject of the May 25 charge was the "denial of administrative leave to union members, who were employees, to attend a union convention." This inadvertent error is hereby corrected.

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



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In the Matter of :  
  
OFFICE OF FEDERAL HIGHWAY PROJECTS :  
FEDERAL HIGHWAY ADMINISTRATION :  
DEPARTMENT OF TRANSPORTATION : CASE NO. 71-2949  
  
Respondent :  
  
and :  
  
NATIONAL FEDERATION OF FEDERAL :  
EMPLOYEES, Local 1348 :  
  
Complainant :  
.....

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For the Complainant

BEFORE: WILLIAM NAIMARK  
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arose under Executive Order 11491, as amended (herein called the Order, pursuant to a Notice of Hearing on Complaint issued on September 17, 1974 by the Assistant Regional Director of the United

States Department of Labor, Labor-Management Services Administration, San Francisco Region.

On May 8, 1974 National Federation of Federal Employees, Local 1348 (herein called the Complainant) filed a complaint against Department of Transportation, Office of Federal Highway Projects, Federal Highway Administration (herein called the Respondent). The complaint alleged violations by Respondent of 19(a)(1)(2) and (6) of the Order 1/ based on (a) the absence, after June 1973, of the Respondent's chief spokesman from bargaining sessions until April 16, 1974; (b) the refusal by the Respondent's representatives to discuss negotiable items during mediation sessions in September, 1973 or reduce agreed upon matters to writing for presentation to the Federal Impasse Panel; (c) Respondent's stating, on September 17, 1973, that it would no longer negotiate while the matter was in mediation.

Respondent denies the aforesaid allegations of the complaint. It contends that it appointed an acting spokesman during the absence of its chief negotiator with full authority to negotiate for Respondent. Further, the Employer maintains it reduced to writing the agreed upon provisions, and that the union insisted upon changes to clauses previously consented to by both parties. In respect to its alleged refusal to negotiate during mediation, Respondent avers that its Director refused to deal 'personally' with the union, but the Employer insists it did not refuse to negotiate.

Prior to the hearing Respondent moved to dismiss the complaint on the ground that the Rules and Regulations had been violated, in that (a) Complainant failed to file the charge within six months of the unfair labor practice as required by 203.2(a)(2); (b) neither the charge nor the complaint contains a clear and concise statement of facts under 203.2(a)(3); (c) there was no investigation of the facts, nor an entire report of investigation filed with

1/ At the hearing Complainant requested a withdrawal of the 19(a)(2) allegation. It is recommended that such request be approved.

the complaint, as required by 203.2(a)(4) and 203.3(b); (d) the complaint was not filed within nine months of the unfair labor practice or within sixty days of Respondent's final decision thereon, as set forth in 203.2(b)(3). The motion was referred to the Administrative Law Judge by the Assistant Regional Director, San Francisco Region in a directive dated September 30, 1973.

A hearing was held before the undersigned on October 8, 1974 at Portland, Oregon. Both parties were represented by counsel and afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter both parties filed briefs which have been duly considered.

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

Findings of Fact

1. At all times material herein Complainant was the exclusive bargaining representative of all professional and nonprofessional employees who were employed by Respondent at Vancouver, Washington. Both Complainant and Respondent were parties to a collective bargaining agreement dated June 21, 1971, which, by its terms covered said employees, and was effective for two years from the date of its approval, June 30, 1971.

2. By letter dated April 15, 1973 2/ Complainant's President, William M. McLoughlin, notified John E. Mors, Respondent's Director, that the union desired to modify the existing agreement and meet with the employer to discuss the matter.

3. By letter dated May 25, Complainant charged Respondent with violating 19(a)(5) by refusing to grant

2/ Unless otherwise indicated, all dates herein-after mentioned are in 1973.

administrative leave to members of Complainant union to attend a union convention meeting.

4. Negotiations between the parties commenced on June 7, and thereafter further bargaining sessions were held on June 8, 9, and 13. Chief spokesman for Respondent at all those meetings was John S. Beard, Chief, Personnel Programs, FHA. Other employer representatives who attended thereat were Richard O. Wright, administrative officer, and Howard G. Bedell, Assistant for Construction Operations at Vancouver. Representing Complainant at those sessions were McLoughlin, Earl King, employed by Respondent as a designer, and Roy P. Fry, a national representative of NFFE.

5. Ground rules 3/ for the negotiations, which were prepared by Respondent, were discussed at the initial meeting on June 7. McLoughlin testified, and I find, that while some rules were agreed to, the parties did not agree to have the same representatives present throughout the negotiations.

6. At the termination of the negotiating session on June 13, there remained only two issues which had not been resolved by the parties. These matters were: (a) time for training--this involved granting administrative leave by Respondent to certain union members to attend a union regional conference, thereby receiving training in the organization's activities; (b) time for contract negotiations--this involved granting administrative leave by Respondent to employee members of the union to attend contract negotiations between the parties. The employer and union were at an impasse with respect to those two issues. All other matters were agreed upon, but the parties had not initialed clauses dealing with grievance procedure, consultation rights of employees with management during the agreement, and duration of the agreement itself, 4/

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3/ Complainant's Exhibit 2.

4/ McLoughlin testified there were four matters not agreed upon by the parties at the last bargaining session, [continued on next page]

Beard offered to concede as to one of the two main disputed issues if the union withdraw its demands as to the other. McLoughlin refused and stated that unless the employer conceded as to both matters they would go to mediation.

7. Record facts show Beard decided to, and did, return to Washington since direct negotiations were concluded with the union. Prior to his departure he talked to Mors and suggested that Wright be the chief spokesman during future meetings. The Director approved the replacement, and Beard conferred with Wright who had been trained to continue negotiations. Both Beard and Mors testified, and I find, that Respondent vested in Wright full authority to act as the chief negotiator in Beard's absence, to make binding proposals and counter proposals to the union, and to make commitments as well as an agreement on Respondent's behalf. While Wright informed the union orally of his authority, no written communication to that effect was sent to the bargaining representative by Respondent.

8. On June 13, McLoughlin, on behalf of the union, wrote to the Federal Mediation and Conciliation Service stating that the parties were at an impasse on two articles and that four others were being held in abeyance pending settlement of the impasse issues. The letter also advised the mediation service that the contract expired June 30.

9. Commissioner Eugene R. Neill held mediation sessions on August 24 and 28, 1973 with the parties. Wright and Bedell represented Respondent thereat, and the

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4/ - continued

and, further, that resolution thereof hinged on settling the two main unresolved issues. He did not recall those four issues. Since Beard's testimony in this respect was precise, his version is credited. However, I do find that three or four items were tabled pending disposition of the two disputed issues.

union representatives were McLoughlin and King. The parties discussed the articles in the proposed new agreement as well as the issues not agreed upon. The employer refused to change articles which had been consented to previously, and would not grant concessions it had refused earlier. At the August 28 meeting Respondent offered twelve hours administrative leave to each union representative attending negotiating sessions - not to exceed the number of management representatives - if the union would sign an agreement containing the clauses agreed upon. The Complainant refused this offer.

10. On September 17, McLoughlin met with Mors and Wright regarding the unfair labor practice which Complainant charged against Respondent on May 25. This pertained to the denial of administrative leave to union members, who were employees, to attend a union convention. McLoughlin testified Mors said he would not negotiate during mediation. Both Mors and Wright testified that Mors felt, and stated, that since this matter of administrative leave was the subject of negotiations - and a principal unresolved issue - it should be dealt with at the formal mediation sessions and not handled separately by the Director. Mors sent a letter 5/ dated November 8, to McLoughlin referring to the alleged violation by Respondent of the Order charged on May 25. The Director reminded the union President therein of the September 17 meeting at which time he was informed there would be no further negotiation on the matter while in the process of mediation.

While there is not necessarily a conflict as to the discussion which occurred at this September 17 meeting, I find and conclude it was held to consider the charge of an unfair labor practice levelled by Complainant against Respondent; that the subject of the charge was one of the remaining issues as yet unresolved during negotiations; that Mors did refuse to discuss the matter outside of meetings attended by representative of both parties; and, further, that this September 17 meeting was neither a negotiation nor a mediation session.

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5/ Complainant's Exhibit 3.

11. The clauses agreed upon by both parties were put together in a proposed agreement by Wright, and by letter 6/ dated October 17, Bedell sent the agreement to Neill. A copy was also furnished McLoughlin.

12. At the instance of Jerry Ross of Federal Mediation and Conciliation Service, Beard met with Ross and Michael Forscey, National NFFE representative, in early December at Washington, D.C. to discuss the two unresolved issues. After some discussion thereon it was agreed that the union would withdraw its demand that employee - members be granted leave to attend bargaining meetings. Further, the parties agreed that Respondent would prepare a letter stating that, during the contract term, leave would be granted to employees to attend union functions for training purposes. Both Beard and Forscey consented to recommend acceptance of these terms. Beard testified he believe that a contract had finally been negotiated.

13. The principal officials of both parties at Portland were advised of the results of the meeting held in Washington, D.C. between Beard and Forscey. On December 13, Mors, Peter L. Stemple, Procurement Officer, FHA and McLoughlin met to discuss the results of the Washington meeting, but at that time the union representatives had not received the written draft of the agreement reached by Beard and Forscey. The parties met again on December 14 at the request of McLoughlin to iron out minor difficulties. Mors stated the two issues had been resolved, as indicated hereinabove, and it was agreed that Bedell and King would meet to put together the articles agreed upon by the parties. Mors suggested the parties reduce to writing the terms agreed upon without regard to any order or arrangement. Some disagreement existed as to the proper sequence of the articles, and Mors stated at the meeting that he "didn't care about order." He testified that no changes were to be made, just set forth the provisions agreed upon so parties could know where they stood at the time when negotiations had been terminated.

14. On December 17 Bedell and King met to commence drafting the agreement. King requested an arbitration

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6/ Respondent's Exhibit No. 9.

clause be added to the grievance procedure, and Bedell objected that it was new matter. The union also wanted a clause in the contract that membership in the union was open to those not in the union. King advised that unless these two requests were granted he doubted the membership would approve the contract.

According to a memo prepared by Bedell dated December 19 which summarized the meeting held on December 17 with King, the latter wanted to combine certain clauses into one article. Bedell remarked this was really editing and beyond their assigned task of drafting the agreement. It was King's suggestion to number the articles, but Bedell stated they were not numbered during the discussion of them and it might be advisable to leave them in that fashion. Bedell testified that on the following day, December 18, King spoke to him and said "the thing was all off" since the union was disgusted with the way things had been going.

15. Several days after the December 17 meeting McLoughlin brought to Stemple's office the proposed contract, which he had previously received from Bedell, and tore it up at Stemple's desk. At the same time McLoughlin gave Stemple a letter 7/ reciting that Respondent was attempting to give the union a contract which would shame it, and a "state of war" existed between the parties.

16. In the Spring of 1974 McLoughlin proposed the parties "scratch everything" and start negotiations anew. Beard refused, stating that they had reached agreement on nearly all matters and had initialed them.

17. At the request of Commissioner Neill the parties met with him at two further mediation sessions in April, 1974. The employer was represented by Beard, as chief spokesman, and by Bedell and Wright. McLoughlin again appeared as the chief representative of the union and was assisted by King. Both McLoughlin and Beard corroborate the fact that the union made new proposals. The management spokesman testified that McLoughlin said he didn't feel

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7/ Respondent's Exhibit No. 12.

bound by previous commitments; that the union representative raised twelve articles for consideration, some of which involved changes and others were in fact, new matters. McLoughlin's testimony reflects that he raised 8/ the issue of having payroll deductions of dues irrespective of whether office making payment was San Francisco or Washington. This proposal stemmed from Respondent's refusing to withhold dues of employees paid out of Washington. Beard suggested continuing the former agreement, which was unacceptable to the union. He then remarked that an agreement was reached in Washington, but McLoughlin replied the local agents don't work for the national office and, if anything, the reverse was true. Whereupon the mediator concluded the parties were at such odds it was pointless to continue the sessions, and Neill terminated mediation of the dispute.

Conclusions 9/

Complainant concedes that Respondent bargained in good faith during the June negotiations. It contends, however, that the Employer violated its duty under Section 11(a) of the Order to confer in good faith concerning working conditions. It predicates this contention upon the following allegation: (a) the failure of Beard, as chief spokesman, to attend the mediation sessions on August 24, and 28; (b) a statement by Mors on September 17 that the employer would not negotiate while mediation

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8/ McLoughlin averred that the matter was suggested in September, but he did not recall what management stated regarding the proposal.

9/ The motion to dismiss on procedural grounds is hereby denied. In respect to the alleged failure to aver clear and concise facts in the complaint, I find no insufficiency present. The claimed failure to investigate the facts, or attach a report thereof to the complaint, presents a matter for administrative determination. Since a notice of hearing issued I do not feel obliged to go [continued on next page]

was in progress; (c) the refusal by management in December to agree upon the order in which the articles negotiated should be arranged and reduced to writing.

(1) Section 11(a) of the Order declares that an agency and a labor organization shall meet at reasonable times and confer in good faith with respect to working conditions. Moreover, it is contemplated thereunder that the parties may negotiate an agreement which will be reduced to writing. This imposed obligation carries with it concomitant duties, expressed in both the public and private sectors, not to engage in dilatory tactics in respect to arranging meetings, and also to provide respective representatives with sufficient authority to negotiate and consummate an agreement on behalf of their principals. Air National Guard Bureau, State of Vermont, A/SLMR No. 396; Army and Air Force Exchange Service, Keesler Consolidated Exchange, A/SLMR No. 144; Chevron Oil Co., 182 NLRB 445; Beverage Air Co., 164 NLRB 1127.

Complainant urges that Beard's absence at the August mediation sessions demonstrates a lack of good faith required of management in collective bargaining, and it insists that his replacement, Wright, lacked sufficient authority to negotiate and bind Respondent. The record, however, does not support this contention. Beard left Portland after the final negotiating session on June

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9/ - continued

behind the implied finding by the Assistant Regional Director that the matter was properly investigated. In respect to the remaining contentions, I conclude the charge and complaint were timely filed. The alleged unfair labor practices occurred within six months of the filing of the charge. It is alleged that, by reason of Beard's absence from the mediation sessions in August, 1973, Respondent's failure to bargain continued to April, 1974 since Wright did not have authority to bind Respondent. Thus, Complainant alleges a continuing act within the six months period. Further, the complaint was filed within sixty days of Respondent's final decision of March 12, 1974.

13 because the parties were at an impasse over two principal issues. There is no claim, nor does the evidence show, that the chief spokesman for management went to Washington with the intent of breaking off negotiations or attempting to avoid bargaining with the union. At the time of Beard's departure in June no further meetings between the parties were scheduled, nor did the employer refuse to continue meeting with Complainant's representatives.

While continuity in bargaining may have been better served had Beard attended the mediation sessions in August, I am not persuaded that substituting Wright, as chief spokesman for these two meetings, warrants the conclusions that such substitution disclosed bad faith on the part of Respondent. The record reveals Wright was clothed with full authority to make binding commitments for the employer during mediation. He had attended the initial bargaining meetings, was trained to take part in negotiations, and had been designated by management to act at these August sessions as its chief spokesman. While no written communication had been sent to Complainant regarding such designation, the union was so informed at the August 24 meeting.

Note is taken, moreover, that the parties failed to consent to the bargaining ground rule which provided for the same bargaining representative to be present throughout negotiations. Apart from this consideration, the absence of Beard from the initial mediation sessions does not demonstrate a desire on Respondent's part to engage in bad faith bargaining either through delaying tactics or futile meetings with the union. Cf. Mississippi Steel Corp. 169 NLRB 647. The record reflects an effort on Wright's part, during his attendance at the mediation sessions in August, to resolve the disputed issues in good faith. A specific offer was made by Respondent of twelve hours administrative leave for employees, as union representatives, to attend negotiating session. On the whole, I find that Beard did not absent himself from the mediation sessions in August to escape the obligations of Respondent under 11(a) of the Order.

(2) It is quite clear that an employer is not relieved of its duty to bargain after the parties resort to mediation because of their being at impasse. An

intention to escape such obligation would flout the Order in this regard, since the mediation process itself involves a continuation of collective bargaining. Good faith on the part of an employer in meeting and conferring with a union would not be suspended during mediation.

In respect to Mors' statement on September 17 that he would not negotiate while mediation was in progress - which complainants insists is violative of the Order - I do not construe the Director's remark as a refusal to meet and confer with the union. Record testimony indicates that on this date McLoughlin met with Mors and Wright to discuss the charge previously filed by Complainant against the Respondent for refusing to grant administrative leave to its members to attend a union convention. Further, Mors stated at this meeting he felt that since the issues was being discussed at negotiations, and dealt with in mediation, he would not negotiate the matter separately.

While the letter of November 8, taken alone, might lead McLoughlin to infer that the subject would not be discussed during mediation, it must be viewed in conjunction with the discussion on September 17. That meeting was not, as the record discloses, a continuation of formal bargaining nor a mediation session between the parties. Rather was it confined to the May 25 charge which subject matter (the denial of administrative leave to union members for negotiating) involved the precise issue being discussed during bargaining negotiations. In this posture the statement by Mors was referable to a determination on his part not to deal with the matter independently of bargaining negotiations. Further, the record establishes that Respondent did discuss this issue of administrative leave for negotiations at regular bargaining meetings before and after September 17, and, moreover, during mediation in August it offered twelve hours administrative leave for the requested purpose in order to reach an agreement. Accordingly, I find and conclude Respondent did not, by declaration or conduct, refuse to negotiate with Complainant during mediation.

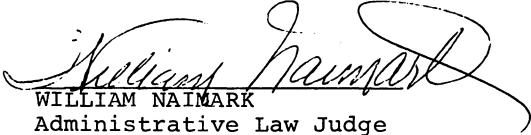
(3) The language in 11(a) of the Order clearly contemplates the reduction to writing of terms agreed upon by the parties. Complainant asserts this was rendered

impossible by virtue of Bedell's objection to the arrangement of the articles agreed upon and to the numbering of said provisions in the draft of the agreement. However, the suggestions advanced by Bedell on December 17 regarding the listing of articles separately did not, in my opinion, evince a desire to frustrate the preparation of the draft. This proposal was a reasonable one and stemmed from Bedell's concern about any revision or editing of the agreed upon terms. Nor do I conclude that Bedell's voicing objection to numbering the articles is tantamount to a refusal to confer or negotiate. It was an objection more akin to form than substance, and there was no attempt by Bedell to change the articles or renege as to those already acknowledged by both parties. In truth, it was the union which introduced new proposals during the conference between Bedell and King on December 17. Although Bedell may have disagreed with the manner in which King proposed to set forth the articles in the drafted agreement, such disagreement does not support a finding of bad faith bargaining or give rise to a conclusion that Respondent was attempting to evade its obligations under the Order.

Under all the circumstances herein, I find and conclude that Respondent did not refuse to meet and confer with Complainant as required under the Order, and that Respondent did not violate 19(a)(6) hereof.

Recommendation

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

  
WILLIAM NAIMARK  
Administrative Law Judge

DATED: December 23, 1974  
Washington, D. C.



May 23, 1975

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

ARMY AND AIR FORCE EXCHANGE SERVICE,  
MACDILL AIR FORCE BASE EXCHANGE,  
MACDILL AIR FORCE BASE, FLORIDA  
A/SLMR No. 514

This proceeding arose upon the filing of an unfair labor practice complaint by the American Federation of Government Employees, AFL-CIO, Local 2624, (Complainant) which alleged that the Respondent violated Section 19(a)(1) and (5) of the Order by its unilateral decision to revoke dues authorization for three employees who had been members of a unit represented exclusively by the Complainant at the MacDill Air Force Base Exchange prior to being transferred to a new organizational entity, the Central Florida Area Exchange, within the Southeast Exchange Region of the Army and Air Force Exchange Service, Continental United States (AAFES-CONUS).

On August 26, 1973, a new administrative level was established in the Southeast Exchange Region, the Central Florida Area Exchange (Area Exchange) with headquarters at MacDill Air Force Base. This new managerial level consolidated certain administrative functions previously performed at three Base Exchanges, including the Respondent, which reported directly to the Southeast Exchange Region. The Area Exchange was staffed predominantly with former employees of the MacDill Air Force Base Exchange with only two supervisory employees from the other Exchanges accepting transfers. The Complainant, the exclusive representative for a unit of all nonsupervisory employees at the MacDill Air Force Base Exchange, was notified on December 7, 1973, that dues deductions were being suspended as of December 15, 1973, for the only three employees who had transferred administratively from the MacDill Air Force Base Exchange and who were on checkoff status.

The Administrative Law Judge concluded that the Respondent's conduct violated Section 19(a)(1) and (5) of the Order. The Assistant Secretary agreed noting that, as found by the Administrative Law Judge, the record reflects that the three unit employees whose dues withholding privileges were suspended were maintenance employees who continued to perform the same jobs they had previously performed, in the same work areas, under the same supervision, and at essentially the same rates of pay and schedule of benefits as before their administrative transfer to the Area Exchange. Under these circumstances, the Assistant Secretary concluded that the Area Exchange maintenance employees who were the subject of the complaint herein had remained within the unit represented exclusively by the Complainant, and that, accordingly, they continued to be represented by the Complainant in the exclusively recognized bargaining unit subsequent to the establishment of the Area Exchange. He found, therefore, that under the circumstances of this case, the Respondent's conduct constituted an improper withdrawal of recognition from the Complainant in derogation of the Respondent's obligation "to accord appropriate recognition to a labor

organization qualified for such recognition" and thereby constituted a violation of Section 19(a)(5) of the Order. Moreover, the Assistant Secretary found that by such conduct the Respondent interfered with, restrained, or coerced employees in the exercise of their rights assured by the Order in violation of Section 19(a)(1).

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions consistent with his decision.

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,  
 MACDILL AIR FORCE BASE EXCHANGE,  
 MACDILL AIR FORCE BASE, FLORIDA

Respondent

and

Case No. 42-2541(CA)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, AFL-CIO, LOCAL 2624

Complainant

## DECISION AND ORDER

On January 15, 1975, Administrative Law Judge Francis E. Dowd issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

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

The instant complaint alleged essentially that the Respondent violated Section 19(a)(1) and (5) of the Order by its unilateral decision to revoke dues authorization for three employees who had been members of a unit represented exclusively by the Complainant at the MacDill Air Force Base Exchange prior to being transferred to a new organizational entity, the Central Florida Area Exchange, within the Southeast Exchange Region of the Army and Air Force Exchange Service, Continental United States (AAFES-CONUS).

The essential facts are not in dispute and I shall repeat them only to the extent deemed necessary.

At all times material herein, the Southeast Exchange Region was one of five exchange regions within AAFES-CONUS. Prior to August 26, 1973, the MacDill Air Force Base Exchange, the McCoy Air Force Base Exchange,

and the Patrick Air Force Base Exchange were independent entities which reported directly to the Southeast Exchange Region of AAFES-CONUS. On August 26, 1973, a new administrative level, the Central Florida Area Exchange, herein called the Area Exchange, was established with headquarters at MacDill Air Force Base. The imposition of this new managerial level, which consolidated certain administrative functions previously performed at the MacDill, McCoy and Patrick Air Force Base Exchanges, was consistent with AAFES's desire for the centralization of such services. On January 26, 1974, the Homestead Air Force Base Exchange came under the aegis of the Area Exchange, and in February 1974, the McCoy Air Force Base Exchange was transferred administratively from AAFES control to the Navy Exchange system. As a result of these changes, the Area Exchange maintained managerial control over three base exchanges.

The Area Exchange was staffed predominantly with former employees of the MacDill Air Force Base Exchange. Thus, the record revealed that nine supervisory employees and 24 employees from the bargaining unit represented by the Complainant were reassigned from the MacDill Air Force Base Exchange to the Area Exchange. The record also revealed that only two other employees, one supervisor from the Patrick Air Force Base Exchange and one supervisor from the Homestead Air Force Base Exchange, accepted transfers to the Area Exchange as a result of the reorganization, although an unidentified number of both supervisory and nonsupervisory positions were eliminated at the three exchanges involved, leading to the reassignment or downgrading of certain employees. The Complainant was notified on December 7, 1973, that dues deductions were being suspended as of December 15, 1973, for three employees who had been transferred administratively from the MacDill Air Force Base Exchange to the Area Exchange. <sup>1/</sup>

The Complainant contends that the three affected employees are performing the same job functions under the same conditions as prevailed prior to the reorganization, that any changes in job functions made as a result of reorganization were at the managerial level, that the unit represented exclusively by the Complainant retains its identity, and that, under these circumstances, the Respondent acted arbitrarily in not continuing to recognize the Complainant as the exclusive representative of the transferred unit employees. The Respondent, on the other hand, asserts, among other things, that in view of the reorganization, it acted properly at the time that it suspended dues withholding for the three affected employees as they were no longer part of the exclusive bargaining unit represented by the Complainant.

As noted above, 24 employees were transferred from the bargaining unit at the MacDill Air Force Base Exchange represented by the Complainant to the Area Exchange. The record reflects that the three unit employees whose dues withholding privileges were suspended were maintenance employees. As found by the Administrative Law Judge, the record reveals further that the maintenance employees continued to perform the same jobs they had previously performed, in the same work areas, under the same

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<sup>1/</sup> This action involved the only three employees transferred administratively from the MacDill Air Force Base Exchange who were in check-off status.

supervision, and at essentially the same rates of pay and schedule of benefits as before their administrative transfer to the Area Exchange.

Under the circumstances outlined above, I find that the Area Exchange maintenance employees who are the subject of the instant complaint have remained within the unit exclusively represented by the Complainant, and that, accordingly, they continue to be represented by the Complainant in the exclusively recognized bargaining unit subsequent to the establishment of the Area Exchange. Therefore, I find that the Respondent's conduct herein constituted an improper withdrawal of recognition from the Complainant in derogation of the Respondent's obligation "to accord appropriate recognition to a labor organization qualified for such recognition" and thereby constituted a violation of Section 19(a)(5) of the Order. Moreover, I find that by such conduct the Respondent interfered with, restrained, or coerced employees in the exercise of their rights assured by the Order in violation of Section 19(a)(1).

ORDER

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

1. Cease and desist from:

(a) Refusing to accord appropriate recognition to American Federation of Government Employees, AFL-CIO, Local 2624, as the exclusive representative of unit employees Floyd Owen, Bernard Titak and Cabel Jessup.

(b) Refusing to honor all of the terms of the existing negotiated agreement with American Federation of Government Employees, AFL-CIO, Local 2624, as it pertains to unit employees Floyd Owen, Bernard Titak and Cabel Jessup.

(c) Interfering with, restraining, or coercing unit employees Floyd Owen, Bernard Titak and Cabel Jessup by refusing to recognize their exclusive representative, American Federation of Government Employees, AFL-CIO, Local 2624; by refusing to honor the existing negotiated agreement with that labor organization; and by cancelling dues withholding authorizations executed on behalf of that labor organization.

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

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

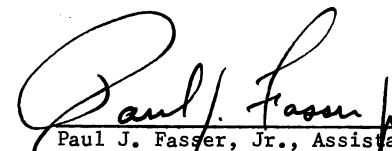
(a) Upon request, accord appropriate recognition to American Federation of Government Employees, AFL-CIO, Local 2624, as the exclusive representative of unit employees Floyd Owen, Bernard Titak and Cabel Jessup.

(b) Honor all of the terms of the existing negotiated agreement with American Federation of Government Employees, AFL-CIO, Local 2624, with respect to the certified bargaining unit at MacDill Air Force Base Exchange, including Floyd Owen, Bernard Titak and Cabel Jessup.

(c) Post at its facility at the MacDill Air Force Base, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the General Manager, Army and Air Force Exchange Service, MacDill Air Force Base Exchange, Tampa, Florida, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The General Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
May 23, 1975

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

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to accord appropriate recognition to American Federation of Government Employees, AFL-CIO, Local 2624, as the exclusive representative of unit employees Floyd Owen, Bernard Titak and Cabel Jessup.

WE WILL NOT refuse to honor all of the terms of the existing negotiated agreement with American Federation of Government Employees, AFL-CIO, Local 2624, as it pertains to unit employees Floyd Owen, Bernard Titak and Cabel Jessup.

WE WILL NOT interfere with, restrain, or coerce unit employees Floyd Owen, Bernard Titak and Cabel Jessup by refusing to recognize their exclusive bargaining representative, American Federation of Government Employees, AFL-CIO, Local 2624; by refusing to honor the existing negotiated agreement with that labor organization; and by cancelling dues withholding authorizations executed on behalf of that labor organization.

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

(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.



In the Matter of : ARMY AND AIR FORCE EXCHANGE SERVICE, : MACDILL AIR FORCE BASE EXCHANGE, : MACDILL AIR FORCE BASE, FLORIDA : Respondent : Case No. 42-2541 (CA) : and : AMERICAN FEDERATION OF GOVERNMENT : EMPLOYEES, AFL-CIO, Local 2624 : Complainant

Robert E. Edwards Assistant General Counsel Labor Relations Branch Army and Air Force Exchange Service Dallas, Texas 75222

For the Respondent

William Mudgett National Representative American Federation of Government Employees (AFL-CIO) 1014 Island Drive Delray Beach, Florida 33444

For the Complainant

O'Donghue & O'Donoghue, By Robert Matisoff, Esq. 1912 Sunderland Place, N.W. Washington, D.C. 20036

For the Federal Employees' Metal Trades Council, AFL-CIO, Fort Benning, Ga.

Before: FRANCIS E. DOWD Administrative Law Judge

This proceeding under Executive Order 11491, as amended (hereafter referred to as the Order) arises pursuant to a Notice of Hearing on Complaint issued by the Regional Administrator of the U.S. Department of Labor, Labor-Management Services Administration, Atlanta Region. The proceeding was initiated by the filing of a Complaint by Local 2624 of the American Federation of Government Employees (hereafter referred to as the Union or Complainant) against the Army and Air Force Exchange Service, MacDill Air Force Base Exchange, MacDill Air Force Base, Florida (hereafter referred to as the Activity or Respondent) on June 13, 1974.

The Complaint alleged that the Respondent violated Sections 19(a)(1) and (5) of the Order by its unilateral decision to withhold dues deductions for three employees in the MacDill Exchange bargaining unit who had been transferred to the Florida Area Exchange. Prior to the issuance of the Notice of Hearing, the Assistant Regional Director approved a request to withdraw a Section 19(a)(6) allegation in the Complaint.

At the hearing, Respondent was represented by counsel and Complainant was represented by the American Federation of Government Employees, AFL-CIO. Both parties were afforded an opportunity to be heard, to present evidence, to examine and cross-examine witnesses, and to make oral argument. Both parties filed post-hearing briefs. In addition, an amicus curiae brief was filed by the Federal Employees' Metal Trades Council, AFL-CIO, based upon its written request of October 21, and my approval granted on October 29. All briefs have been fully considered by me in deciding this case.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, and pursuant to Section 203.22(a) of the Assistant Secretary's Rules and Regulations, I make the following findings, conclusions and recommendations.

#### Findings of Fact

1. The Army and Air Force Exchange Service (AAFES) is a non-appropriated fund activity of the Department of Defense. Its mission is to:

a. Provide to authorized patrons at uniformly low prices merchandise and services of necessity and convenience which are not furnished from appropriated funds.

b. Generate reasonable earnings to supplement appropriated funds for the support of the Army and Air Force welfare and recreational programs.

2. The Southeast Exchange Region is one of five exchange regions in AAFES-CONUS, all of which answer to Headquarters, AAFES, Dallas, Texas. At all times pertinent to this case the Southeast Exchange Region Consisted of the following area exchanges:

- a. Central Alabama Area Exchange
- b. Gulf Coast Area Exchange
- c. Mississippi Area Exchange
- d. Blue Ridge Area Exchange
- e. Piedmont Area Exchange
- f. Central Florida Area Exchange, sometimes referred to as Florida Area Exchange
- g. Atlanta Area Exchange

3. The Central Florida Area Exchange, headquartered at MacDill AFB, Florida came into existence August 26, 1973 and consisted of exchanges at the following Air Force Bases in Florida: MacDill, McCoy and Patrick. Since then, the operation of the McCoy exchange has been transferred to the Navy and on January 26, 1974, Homestead Air Force Base, Florida, was added to the Central Florida Exchange.

4. At all times pertinent to this case, MacDill Air Force Base Exchange employed about 389 employees; Patrick Air Force Base Exchange employed approximately 269 employees; and Homestead Air Force Base Exchange employed approximately 342 employees.

5. The bargaining unit at MacDill consisted of approximately 300 employees. As of August 26, 1973, approximately 24 hourly employees, all located at MacDill Air Force Base exchange were transferred into what is now known as the Central Florida Area Exchange. These 24 employees, together with about 9 supervisory people, comprise the Central Florida Area Exchange which performs the administrative support duties for MacDill, Homestead and Patrick Air Force Base Exchanges. This group of people furnishes administrative support in areas of personnel, retail operations, food service, equipment and facilities, and maintenance. The record indicates that the specific job classifications of the transferred employees are as follows:

<u>Supervisory</u>	<u>Hourly Paid</u>
1 General Manager	1 Secretary, Grade 7
1 Retail Operations Mgr.	1 ROM clerk, Grade 5

<u>Supervisory Cont'd</u>	<u>Hourly Paid Cont'd</u>
1 Service Operations Mgr.	1 SOM clerk, Grade 5
1 Equipment & Facilities Mgr.	1 E & F clerk, Grade 5
1 Food Operations Mgr.	1 Displayer, Grade 5
1 Accounting Mgr.	4 Accounting clerks, Grades 5
1 Personnel Mgr.	4 Clerk typists, Grade 3
1 Personnel Supervisor	4 General Clerks, Grade 3
1 Maintenance Supervisor	1 Courier, Grade 3
<u>9</u>	1 Vending machine attendant, Grade 3
	1 Custodian
	1 Maintenance worker, Grade 4
	1 Painter, Grade 5
	1 Carpenter, Grade 6
	<u>1</u> Electrician, Grade 6
	<u>24</u>

6. A labor agreement dated June 5, 1972, between AFGE, Local 2624 and MacDill Air Force Base Exchange was in effect at all times pertinent to this case, and it contained a voluntary dues deduction provision.

7. Effective December 15, 1973, after duly notifying the international representative of the Union, dues deduction were cancelled for employees Owen, Titak and Jessup. Although other employees at Central Florida were originally part of the MacDill bargaining unit, only these three employees were subject to the dues checkoff.

8. Bernard Titak and Cabel Jessup, two of the three former MacDill Exchange employees whose dues deductions were terminated upon their transfer to the Florida Area Exchange, testified at the hearing with respect to their job functions before and after their transfer from MacDill to Central Florida. The facts disclosed by their testimony are not in dispute and are as follows:

a. Bernard Titak, a MacDill employee for five years, performs maintenance work in several buildings at the MacDill Air Force Base, including the Wherry Cafeteria and Store. His base of operations is the maintenance shop and there has been no change in his daily work routine since his transfer. He has been in the same maintenance crew for three years and under the same supervisor for two years.

His pay and other benefits are unchanged and he receives his checks from the same personnel office locally, although they actually originate at AAFES Headquarters in Dallas.

b. Cabel C. Jessup is a painter but he also performs maintenance duties. Like Titak, he works out of the maintenance shop and his work takes him to the warehouse, the main store, the main cafeteria, and the branches of the main store and cafeteria. There has been no change in his duties, his supervision, or his work since his transfer. He still has the same personnel office and he receives his pay checks in the same manner as before the transfer.

c. Both Titak and Jessup now receive pay checks bearing a new fiscal identification number on the check stub. When Central Florida was established it apparently was assigned its own fiscal code number which, of course, would be different from MacDill. While this fact may be consistent with the transfer, it is not a significant factor upon which to predicate any finding that these employees no longer have a community of interest with the employees in the MacDill Exchange bargaining unit.

9. Respondent's only witness was Patricia Holler, one of the managerial employees transferred from MacDill to Central Florida. Both before and after her transfer she was a personnel manager, a position she has held for seven years. Her duties relate to promotions, hiring, retirement and other personnel work and, as a result of the reorganization, her responsibilities also include Patrick and Homestead. Her testimony revealed the following:

a. The "area exchange concept" was an administrative reorganization previously intended to eliminate separate autonomous administrative staffs at each AFB Exchange by consolidating certain managerial and supervisory functions on a geographical area basis. She stated that the General Manager of the Central Florida Area Exchange reports to the chief of the Southeast Region who in turn reports to AAFES headquarters in Dallas.

b. Although all clericals and most other employees of Central Florida came directly from MacDill, there were two individuals at the managerial level who transferred from Patrick and Homestead, respectively. As part of the reorganization certain managerial and clerical positions were eliminated,

including the accounting managers and personnel managers at both Patrick and Homestead, as well as the food operations manager, retail operations manager and service operations manager at Homestead.

c. According to personnel manager Holler, the salaries of the maintenance employees come out of the Central Florida budget even though their actual work is performed exclusively at MacDill. In contrast, the duties of the personnel manager relate to all three AFB Exchanges under Central Florida. Nor is this discrepancy resolved by the testimony of Holler that the maintenance employees at Central Florida are "subject to" being detailed to Patrick or Homestead. The fact of the matter is that they have not been detailed to other bases. Moreover there are employees at Patrick and Homestead classified as maintenance workers who actually perform carpentry, painting and electrical work. What all this demonstrates, of course, is that each AFB Exchange needs to have employees skilled in these trades physically located at or near the Exchange premises.

d. Holler also testified that both Patrick and Homestead have a "personnel supervisor," the same job classification of one of the Central Florida managerial employees. These bases also have a service vending supervisor who makes daily runs to check the machines and monitor the concessions.

10. The establishment of the Central Florida Area Exchange has not resulted in the filing of any petition for representative, for decertification, or for unit clarification.

11. The following exchanges are represented by the following unions as of the dates specified:

a. MacDill AFB Exchange - American Federation of Government Employees, Local 2624, certified February 22, 1972.

b. Homestead AFB Exchange - American Federation of Government Employees, Local 316, March 1, 1970.

c. Patrick AFB Exchange, Retail Clerks International Association, Local No. 16, originally recognized November 10, 1967.

Statement of the Issues Presented

Whether Respondent violated Sections 19(a)(1) and (5) of Executive Order 11491 by (a) unilaterally discontinuing the dues withholding privileges of certain employees who were

administratively transferred from one component organization to another of the same agency, but who continued to perform the same tasks, at the same locations, under the same supervision; and by (b) refusing to accord recognition to the incumbent certified labor organization vis-a-vis the transferred employees.

Positions of the Parties

The Complainant: The Union argues that there has been no material change in the duties of the bargaining unit employees transferred to Central Florida, as illustrated by the testimony concerning the maintenance employees, and that the reorganization was at a higher level. Accordingly, the Union contends that the termination of dues withholding was a unilateral change that an Activity cannot legally make. Indeed, the Union asserts that under the Executive Order it is only the Assistant Secretary of Labor who decides questions concerning the appropriate unit and that the Respondent cannot arbitrarily eliminate employees from a certified bargaining unit and unilaterally deprive them of the benefits of a contract. The Union further contends that if an Activity wishes to question the appropriateness of a unit, it may file a petition with the Department of Labor seeking unit clarification. The Union did not specify when such petition should be filed.

The Exchange: The grouping of Homestead, MacDill and Patrick Air Force Base Exchanges as part of a reorganization which resulted in the formation of the Central Florida Area Exchange was one of some 31 like groupings and reorganizations which took place in AAFES-CONUS beginning in August of 1973. The resultant entities (area exchanges) were bona fide organizational entities, each in its own right susceptible to organization. At the time that the area exchange concept for the Army and Air Force Exchange Service was being implemented there was no controlling law on the point as to whether it was necessary to seek clarification upon such reorganization and if so, as to which of the parties, as between the Agency and the Union, was to go to the Assistant Secretary to seek clarification. Respondent concedes that it acted unilaterally to the extent that it interpreted the results of the reorganization to mean that a separate entity was created, which "belonged neither to the Unions that represent MacDill, Patrick or Homestead..." As noted above, however, Respondent disagrees that it had any obligation to file a petition for clarification of the unit.

Position of the Federal Employees'  
Metal Trades Council, AFL-CIO

The amicus brief submitted by the Council asserts that the purpose of the Executive Order "is to promote the efficiency of administration of the Government through the maintenance of bargaining relationships, without agency interference to encourage or discourage union membership." Accordingly, it is argued that a finding by the Administrative Law Judge that Respondent's conduct was violative of the Order would be fully consistent with the purpose of the Order as set forth in the Preamble to the Order for a number of reasons which are more fully detailed below.

"First, such a finding would promote efficiency of agency administration by stabilizing labor relations within the agency. It is obvious that an agency, like the Department of Defense, must be permitted to conduct periodic reorganizations designed to accomplish its mission more effectively and efficiently. However, it is equally obvious that if an agency were permitted, in its sole discretion, to destroy existing bargaining relationships through such unilateral reorganizations, stability of labor relations, employee faith in management and, consequently, employee morale, would necessarily suffer. As labor relations stability and employee morale thus dissolve, so also does employee efficiency decrease and the efficiency of agency administration diminish. A finding that Respondent's conduct was violative of the Order would avoid these disruptive results by clearly establishing that bargaining relationships cannot be unilaterally destroyed by unilateral reorganizations, at least where the existing bargaining unit has remained intact and the employment relationship of the employees involved has not changed in any significant way.

"Second, such a finding would be consistent with the Order's policy of "maintenance of constructive and cooperative relationships between labor organizations and management officials." Implicit in this policy is the realization that effective labor relations requires painstaking development; and once mutual respect, confidence and cooperation are achieved, it is in the best interest of all parties to maintain the cooperative relationship. Clearly, to permit mere administrative reorganizations such as the one affected by AAFES in this

case, to take employees out of established bargaining units, would destroy that hard-earned cooperative relationship, and would thereby undercut an important aim of the Order.

"Finally, a finding that Respondent violated the Order would guard against prohibited agency interference resulting in the discouragement of membership in labor organizations. It is not alleged here that the Department of Defense or AAFES intended such discouragement when the Area Exchange concept was inaugurated. However, regardless of motivation, when recognition is refused under these circumstances, when an incumbent labor organization is denied the right to represent employees it has previously represented, and when the negotiated agreement is made a nullity, the necessary effect will be discouragement of membership in labor organizations. An employee would see no purpose at all in joining a labor organization if he knew that at any time his employer, through a mere administrative reorganization, could unilaterally take away the practical benefits of his membership.

"In sum, Respondent's conduct can only serve to diminish and discourage stability in labor relations, employee morale and efficiency, and cooperative bargaining relationships, all important aims and policies of the Executive Order."

For the reasons stated above, the Federal Employees Metal Trades Council, AFL-CIO, urged in its amicus brief that Respondent be found to have violated Sections 19(a)(1) and (5) of the Order.

Discussion and Conclusions of Law

This case does not present an issue as to whether an agency must seek the prior approval of the Assistant Secretary before undergoing an administrative reorganization.<sup>1/</sup> The Respondent's action that is being questioned in this case is what it did four months after the reorganization took place.

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<sup>1/</sup> Contrary to assertions by Respondent in its brief, Section 12(b) of the Executive Order--the so called management rights section--is not being specifically challenged in this proceeding.



Specifically, what is being challenged is the right of an agency to unilaterally determine that a reorganization has resulted, in its opinion, in the creation of a new entity and that the employees of the new entity are no longer part of a previously existing bargaining unit certified by the Assistant Secretary.

When Respondent herein took it upon itself to determine that a new entity existed and that it could therefore unilaterally cease to withhold dues from the three employees in question, Respondent in my opinion usurped the authority of the Assistant Secretary of Labor who has sole power under the Order to determine questions of representation and the appropriateness of a particular unit.

What Respondent should have done, instead, was to first recognize that the reorganization did in fact raise a serious and legitimate question concerning its effect upon the existing bargaining unit and the transferred employees and, then, file a unit clarification petition with the Assistant Secretary of Labor, through the appropriate Regional Office. By choosing not to follow this course of action and instead unilaterally resolving this issue, the Respondent acted at is peril and assumed the risk that its decision might later be determined unlawful.<sup>2/</sup> The fact that its decision may have been made in good faith is really beside the point since Respondent was not the proper authority to be making the decision.

We therefore now turn to the facts surrounding the reorganization and its effects upon the employees in order to determine what is essentially a representation question, namely, whether the transfer of employees from MacDill to Central Florida extinguished the community of interest existing between those employees and the other bargaining unit employees at MacDill.

The creation of the Central Florida Area Exchange and the subsequent transfer of certain MacDill AFB Exchange employees to this new organization constituted, in my opinion, a mere administrative reorganization within AAFES. Even after

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<sup>2/</sup> See Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, February 28, 1974, where the Respondent also acted at its peril and failed to avail itself of the representative procedures offered by the Executive Order "to resolve legitimate questions as to the correct bargaining unit."

their transfer, the employees involved continued to perform the same jobs they had previously performed, at the same work areas, under the same supervision, and at essentially the same rates of pay and schedule of benefits. Thus, since nothing in the employer-employee relationship of these employees had changed except the name of the organization to which they directly reported, it is argued that no changes should be allowed to occur in the contractually established labor-management relations environment in which they worked.

What effect such an administrative reorganization might have upon established labor-management relations was a question directly addressed by the Assistant Secretary in the Aberdeen case cited in footnote 2 herein. In my opinion, the mere fact that the Federal Labor Relations Council is now reviewing the Assistant Secretary's decision on appeal (FLRC No. 74A-22, June 24, 1974), does not provide any basis for my delaying the issuance of this decision. I regard the decisions of the Assistant Secretary as binding upon me until such time as they may be overruled by the Federal Labor Relations Council.

In Aberdeen, 15 employees of the Department of the Army who performed property disposal functions were transferred to the Defense Supply Agency ("DSA"), another component organization within the Department of Defense. However, the transfer was merely an administrative "transfer-in-place", in that the employees involved continued to perform essentially the same duties as before, at the same duty stations, and at the same classifications and grades. The complainant in the case, the International Association of Machinists and Aerospace Workers ("IAMAW"), was the certified exclusive representative for the unit from which the 15 employees were transferred. When the DSA advised the complainant that the dues withholding privileges of these employees would be cut off, the complainant filed an unfair labor practice complaint, alleging that the Respondent DSA had violated Sections 19(a)(1), (2), (5) and (6) of the Executive Order by refusing to apply the terms and conditions of the existing agreement covering these employees. The Assistant Secretary determined that where an exclusively recognized unit remained intact following an administrative transfer of employees by a parent agency from one component organization to another, the two component organizations were "co-employers" vis-a-vis the unit employees, and both must continue to accord recognition to the incumbent labor organization and to maintain the same terms and conditions of employment of all unit employees. Accordingly, the Assistant Secretary found that in threatening to discontinue dues withholding privileges, the DSA, as a "co-employer" along with the Department of the Army of the 15 transferred employees, had violated

Sections 19(a)(1) and (5), which provide:

Sec. 19. Unfair Labor Practices. (a) Agency management shall not -

(1) interfere with, restrain, or coerce and employee in the exercise of the rights assured by this Order;

(5) refuse to accord appropriate recognition to a labor organization qualified for such recognition....

It may be argued that Aberdeen is distinguishable from the factual situation presented in this case, on the grounds that in Aberdeen, two co-equal agencies within the Department of Defense were involved, while both the MacDill AFB Exchange and the Central Florida Area Exchange are merely components of the same single agency within the Department of Defense, AAFES. I would find no merit in this argument. The Assistant Secretary used the term "co-employer" in Aberdeen, not "co-agency", and thus there is no logical reason to confine the theory of that decision to situations where the two employers involved are two separate and distinct agencies. If anything, the underlying reasoning of Aberdeen seems to have even greater validity in a "single agency" context, such as the one presented in this case. In the absence of other considerations, an agency to which employees have been transferred from another separate and distinct agency might reasonably question its obligation to maintain existing terms and conditions of employment under an agreement in which it had no role or of which it had no knowledge. However, as pointed out by the amicus in this case, "one arm of a single agency should not be heard to disclaim all knowledge of or responsibility for the actions of merely another branch of that very same agency."

As in Aberdeen, the bargaining unit involved in this case has remained intact. The employees involved here have continued after transfer to perform the same job functions, at the same work areas, under the same supervision, and at the same grades and classifications. Their community of interest with other unit employees has not been destroyed by their transfer. And, as in Aberdeen, that "transfer" was a mere administrative "transfer-in-place." Thus, in the light of Aberdeen, I conclude that the Central Florida Area Exchange is a "co-employer" of the MacDill AFB Exchange, and by unilaterally discontinuing to withhold union dues for three

employees in the bargaining unit, the Respondent unilaterally changed existing terms and conditions of employment and thereby violated Sections 19(a)(1) and (5) of the Order. Aslo, I find that Respondent's conduct herein constituted an independent violation of Section 19(a)(1) of the Order. Thus, it has been held previously that the right to form, join and assist a labor organization as provided for in the Executive Order would be rendered meaningless where, as here, agency management fails to recognize a labor organization and, with that action, negates the benefits which flow from the selection of an exclusive representative, e.g., a negotiated agreement.<sup>3/</sup>

Recommendation

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (5) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is, designed to effectuate the purposes and policies of the Executive Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby order that the Army Air Force Base Exchange Service, MacDill Air Force Base, Tampa, Florida:

1. Cease and desist from:

(a) Refusing to recognize Local 2624, American Federation of Government Employees, AFL-CIO, as collective bargaining representative of all maintenance employees of Central Florida Area Exchange, including Floyd Owen, Bernard Titak and Cabel Jessup.<sup>4/</sup>

<sup>3/</sup> Defense Supply Agency, supra, at page 8.

<sup>4/</sup> Respondent witness Holler testified that in addition to the maintenance employees whose duties and status were litigated at the hearing, a number of other hourly employees transferred to Central Florida were also part of the Union's bargaining unit and had they also signed dues checkoff authorizations, Respondent would have discontinued withholding dues from them also. Whether or not Central Florida is a co-employer as to these employees cannot be resolved on the basis of the present record since their status was not challenged by the Union and their duties subsequent to the reorganization were not litigated.

(b) Refusing to honor all of the terms of the existing negotiated agreement with Local 2624, American Federation of Government Employees, AFL-CIO, as it pertains to maintenance employees of Central Florida Area Exchange, including Floyd Owen, Bernard Titak and Cabel Jessup.

(c) Interfering with, restraining, or coercing maintenance employees of Central Florida Area Exchange, including Floyd Owen, Bernard Titak and Cabel Jessup by refusing to recognize their exclusive bargaining representative, Local 2624, American Federation of Government Employees, AFL-CIO; by refusing to honor the existing negotiated agreement with that labor organization; and by cancelling dues withholding authorizations executed on behalf of that labor organization.

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

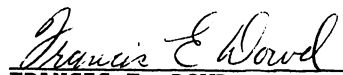
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Upon request, recognize Local 2624, American Federation of Government Employees, AFL-CIO, as representative of all maintenance employees of the Central Florida Area Exchange, including Floyd Owen, Bernard Titak and Cabel Jessup.

(b) Honor all terms of the existing negotiated agreement with Local Lodge 2624, American Federation of Government Employees, AFL-CIO, with respect to the certified bargaining unit of MacDill Air Force Base Exchange, including maintenance employees at Central Florida Area Exchange.

(c) Post at its facility at the MacDill Air Force Base, 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, Army Air Force Exchange Service, MacDill Air Force Base, Tampa, Florida, 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 an other materials.

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

  
FRANCIS E. DOWD  
Administrative Law Judge

Dated: January 15, 1975  
Washington, D.C.

## N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to recognize Local 2624, American Federation of Government Employees, AFL-CIO, as collective bargaining representative of all maintenance employees of Central Florida Area Exchange, including Floyd Owen, Bernard Titak and Cabel Jessup.

WE WILL NOT refuse to honor all of the terms of the existing negotiated agreement with Local Lodge 2624, American Federation of Government Employees, AFL-CIO, as it pertains to maintenance employees of Central Florida Area Exchange, including Floyd Owen, Bernard Titak and Cabel Jessup.

WE WILL NOT interfere with, restrain, or coerce maintenance employees of Central Florida Area Exchange by refusing to recognize their exclusive bargaining representative Local Lodge 2624, American Federation of Government Employees, AFL-CIO, by refusing to honor the existing negotiated agreement with that labor organization; and by cancelling dues withholding authorizations executed on behalf of that Labor organization.

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

\_\_\_\_\_  
 Commanding Officer  
 Army Air Force Exchange Service

Dated \_\_\_\_\_ By \_\_\_\_\_  
 (Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, U.S. Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

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

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

DEPARTMENT OF THE ARMY,  
UNITED STATES ARMY INFANTRY CENTER,  
CIVILIAN PERSONNEL OFFICE,  
FORT BENNING, GEORGIA  
A/SLMR No. 515

DEPARTMENT OF THE ARMY,  
UNITED STATES ARMY INFANTRY CENTER,  
CIVILIAN PERSONNEL OFFICE,  
FORT BENNING, GEORGIA

Respondent

and

Case No. 40-5218(CA)

BERNICE D. RUCKER

Complainant

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 54

Party-in-Interest

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by Bernice D. Rucker, (Complainant), an individual, alleging that the Respondent violated Section 19(a)(1) and (2) of Executive Order 11491, as amended, by virtue of its actions in refusing to promote or repromote the Complainant because of her membership in and activities on behalf of American Federation of Government Employees, AFL-CIO, Local 54. The Complainant had been a union steward since 1969 and, in such capacity, actively and vigorously processed grievances. Further, she was often forced to be away from her desk for extended periods of time in furtherance of activities associated with her duties as a union steward. Mrs. Rucker was subject to a reduction-in-force in the Finance and Accounting Section in August 1972 and was demoted from a GS-5 to a GS-2. Despite the fact that her name appeared on the registers of eligibles for the vacant higher positions in Finance and Accounting from August 1972 until the date of the hearing in this matter, she was not selected, even though, on occasion, her name was the only name listed on the register because of a lack of eligibles or declinations by previously selected eligibles. The evidence established that the Complainant's activities as a steward were met with displeasure by at least three Respondent representatives who played active roles in the selection of employees for promotion and repromotion.

On October 3, 1974, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary adopted the Administrative Law Judge's finding that the Respondent violated Section 19(a)(1) and (2) of the Order by permitting the Complainant's activity as a union steward to play a role in its determination of her fitness and/or selection for promotion, adding that but for the Complainant's activities as a union steward, she would have been selected for repromotion. The Assistant Secretary also adopted the Administrative Law Judge's recommendation that the Complainant's service computation date be set back to the date on which she would have been promoted but for the Respondent's improper conduct, and ordered back pay, if any, to make the Complainant whole for any loss of pay from the date of the denial of the promotion. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions to remedy such conduct.

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

The Administrative Law Judge found, and I agree, that the Respondent violated Section 19(a)(1) and (2) of the Order by permitting employee Rucker's activities as a union steward to play a role in its determination as to her fitness and/or selection for promotion. In this regard, it was noted that on August 9, 1973, Rucker was the only available eligible employee for a GS-4 position and that the evidence establishes that but for her activities as steward she would have received the August 9, 1973, repromotion.

However, in reaching my determination herein, I do not adopt the Administrative Law Judge's statement pertaining to an alleged obligation imposed on agency representatives to give eligible employees warning or notice with respect to the obligations imposed by specific jobs - where time away from the job is occasioned by protected union activity - and to allow the affected employees to make an election regarding the utilization of rights afforded by Section 1(a) of the Order. It has been previously held that the use of official time for the conduct of union representational duties is not an inherent matter of right under the Order although the Order does not preclude an agency or activity and an exclusive representative from entering into an agreement with respect to the use of official time by union representatives in certain situations. See Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485. In my view, where such a right has been granted by agreement, any warning or notice, as suggested by the Administrative Law Judge, with respect to obligations imposed by a specific job could, under certain circumstances, itself be violative of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders 1/ that the Department of the Army, United States Army Infantry Center, Civilian Personnel Office, Fort Benning, Georgia, shall:

1. Cease and desist from:

(a) Failing to promote or repromote Bernice Rucker, or any other employee, because she has utilized her rights under the Executive Order to assist a labor organization by serving as union steward.

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

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1/ In its exceptions the Respondent requested the deletion of certain remedial provisions regarding the change in employee Rucker's service computation date and the provision with regard to back pay. In my view, where an unfair labor practice is found to have been committed in a particular case, determinations with regard to specific remedial matters, such as the entitlement to back pay, should be handled at the compliance stage of the proceedings. Therefore, I adopt, as modified herein, the Administrative Law Judge's recommendations regarding both the change in service computation date to August 9, 1973, and the payment of back pay, if any, to which Rucker might be entitled. See Decision of the Comptroller General of the United States, B-180010, dated March 19, 1975.

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


(a) Change Bernice Rucker's service computation date as a GS-4 to August 9, 1973.

(b) Make Bernice Rucker whole for any loss of monies she may have suffered by reason of the failure of the Agency to promote her to a GS-4 on August 9, 1973.

(c) Post at its facility at Fort Benning, Georgia, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
May 23, 1975

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

NOTICE TO ALL EMPLOYEES



PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT fail to promote or repromote any employees because they have utilized their rights under the Executive Order to assist a labor organization by serving as union stewards.

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 change Bernice Rucker's service computation date as a GS-4 to August 9, 1973.

WE WILL make Bernice Rucker whole for any loss of monies she may have suffered by our failure to repromote her to a GS-4 on August 9, 1973.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

.....  
In the Matter of :  
 :  
 :  
 DEPARTMENT OF THE ARMY :  
 UNITED STATES ARMY INFANTRY CENTER :  
 CIVILIAN PERSONNEL OFFICE :  
 FORT BENNING, GEORGIA :  
 :  
 Respondent :  
 :  
 and :  
 :  
 BERNICE D. RUCKER :  
 :  
 Complainant :  
 :  
 and :  
 :  
 AMERICAN FEDERATION OF GOVERNMENT :  
 EMPLOYEES, AFL-CIO, LOCAL 54 :  
 :  
 Party in Interest :  
 .....

Case No. 40-5218 (CA)

Captain Thomas J. Schmidt, Jr.  
Judge Advocate General  
Office of the Staff Judge  
Advocate, USAIC  
Fort Benning, Georgia 31905

For the Respondent

Robert C. D. McDonald, Esquire  
Shade & McDonald  
919 First Federal Building  
Atlanta, Georgia 30303

For the Complainant

BEFORE: BURTON S. STERNBURG  
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a complaint filed on November 21, 1973, under Executive Order 11491, as amended, by Bernice D. Rucker, an individual, against the Civilian Personnel Office, United States Army Infantry Center, Fort Benning, Georgia, hereinafter called the Respondent or Army, a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the Atlanta, Georgia, Region on April 1, 1974.

The complaint alleges in substance, that the Army violated Sections 19(a)(1) and (2) of the Executive Order by virtue of its actions in refusing to promote or repromote Bernice D. Rucker because of her membership in, and activities on behalf of AFGE, Local No. 54, AFL-CIO.

A hearing was held in the captioned matter on May 14, 1974, in Ft. Benning, Georgia. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the joint exhibits and other relevant evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

1. In 1966, Rucker, the complainant herein, was first hired at Fort Benning as a GS-2 in Student Office Personnel.
2. Rucker, subsequently, transferred to the Finance and Accounting Office and eventually achieved the grade of GS-5 which she retained until a Reduction in Force in 1970.
3. Rucker was rehired back into the Quality Assurance section of Finance and Accounting as a GS-5 in June or July 1971, by Chief Warrant Officer Gandy who was then in charge of such section.

4. Subsequent to Rucker's rehire in 1971, Gandy was transferred and put in charge of the PFR section of Finance and Accounting.

5. In August of 1972, Finance and Accounting suffered another Reduction in Force which resulted in 47 employees receiving reductions in grade ratings. As of the date of the hearing, 31 of such employees had been repromoted to their original grades, 13 had been promoted but not to their original grades, and 3 employees had resigned.

6. Rucker, who had been demoted from a GS-5 to a GS-2 in August 1972, has remained as a GS-2 despite the fact that there have been approximately 25 advertised vacancies at higher grades in Finance and Accounting since August 1972. While Rucker's name has appeared on the registers of eligibles for the aforementioned vacancies, she has not been selected.

7. Subsequent to the hearing, according to a personnel action report forwarded for my information by the Respondent, Rucker has been repromoted to a GS-5.

8. In 1968, Rucker was appointed a union stewardess and remained in such position during the events underlying the instant complaint.

9. In her capacity as stewardess, Rucker actively and vigorously represented all the employees in Finance and Accounting with respect to numerous complainants and grievances involving working conditions and supervisory personnel, including particularly Chief Warrant Officer Gandy.

10. Upon Gandy's assumption of the responsibility for the PFR section of Finance and Accounting, the complaints of employees within such section and Rucker's contacts with Gandy grew in number due to the employees' dissatisfaction with Gandy's demanding attitude and intolerance to errors.

11. Despite the fact that Rucker's name consistently appeared on the registers of eligibles for the vacant higher positions in Finance and Accounting during the period August 1972 through the date of the hearing, she was never selected for such vacant positions. This was true even on



those occasions when her name was the only one listed on the register due to a lack of eligibles or declinations by other previously selected eligible employees listed thereon. In the latter cases, it was the policy of Colonel Wadsworth, who assumed complete control of Finance and Accounting in August or September 1973, or other selecting officials, to return the registers for a minimum of three names without first investigating the qualifications of Rucker for the vacant position or positions. Such action on one occasion resulted in a withdrawal of the vacancy to the detriment of the hiring office.

12. Colonel Wadsworth attributed the return of the registers carrying less than three names of eligibles to his policy of insisting, in accordance with applicable regulations, that selecting officials always have the benefit of selecting from a pool of at least three eligibles. Colonel Wadsworth's participation in all personnel actions with respect to Rucker was the result of a prior agreement with the Union.

13. Colonel Wadsworth, upon the basis of his observation of Rucker during a meeting concerning both a grievance and an EEOC complaint, had determined that her character left much to be desired.

14. Other than citing her absence from her desk due to her Union stewardess duties, Respondent has offered no testimony whatsoever to indicate that Rucker was not well qualified to fill the higher position vacancies.

15. With respect to finding of fact no. 14 above, Gandy in a telephone conversation with Rucker in August 1973, informed her that the reason she could not get back into Finance and Accounting was because of her activities on behalf of the Union which kept her away from her desk "quite a bit". Similarly, Supervisor Immel failed to select Rucker for vacant positions because of the fact that she was away from her desk "somewhere between 35% to 60% doing union work, representative of the union".

16. Rucker credibly testified that during the August 1973 telephone conversation with Gandy, Gandy informed her that her opportunities for employment would improve if she separated herself from the Union.

17. During a telephone conversation with employee Barbara Gordon relative to an EEOC complaint, Gandy informed Gordon that he disliked unions and had on numerous occasions informed Rucker that her union activities were interfering with her work and that the best thing she could do was get out of the Union.

18. August 9, 1973, was the first occasion upon which a Register containing Rucker's name as the only available eligible employee for a GS-4 position was returned for the development of additional candidates.

19. Respondent maintained an informal personnel file on Rucker which contained derogatory information, including a statement from a supervisor summing up various reprimands administered to Rucker prior to July 1970. Similar informal personnel files were also retained for other employees who had previously suffered a reduction in force and were still assigned to Finance and Accounting.

20. Respondent has in the past promoted and/or given commendations to other union stewards.

21. In a meeting in February 1972, Gandy opened a meeting with the employees by stating in substance, that certain action taken by him was pursuant to orders from higher command and that the Union could not do a thing about it.

DISCUSSION AND CONCLUSIONS

Section 1(a) of the Executive Order guarantees each employee the right to, freely and without fear of penalty or reprisal, join and assist a labor organization. The right to assist a labor organization "extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officers of the executive branch...or other appropriate authority". Abridgement of the aforementioned rights with respect to "hiring, tenure, promotion..." is violative of Sections 19(a)(1) and (2) of the Order.

In the instant case Rucker, the complainant herein, has been a union stewardess since 1969, and in such capacity has actively and vigorously processed grievances on behalf of her fellow employees. Due to the number of grievances and/or complaints filed, as well as the shortage of available stewards, Rucker was often forced to be away from her desk for extended periods of time in furtherance

of the activities generally associated with her duties as a union stewardess. No contention, whatsoever, is made that the absences occasioned by Rucker's stewardess duties were in any way violative of the applicable provisions of the collective bargaining agreement in effect between the Agency and the Union with respect to time off for processing grievances by employees or their representative.

Rucker's stewardess activities, admittedly, were met with displeasure by at least three Agency representatives who played active roles in the selection of employees for promotion and repromotion. Thus, Colonel Wadsworth determined at his first EEOC-grievance meeting with Rucker that her character left much to be desired, and supervisors Immel and Gandy were of the opinion that her absences from her desk due to grievance activity made her a less desirable employee. In fact Immel attributed such absences as being one of the reasons for his failure to consider Rucker for the announced vacancies within his section.

In view of the foregoing, it is apparent that Rucker's activities as a union stewardess played some part in the decision of management officials to non-select Rucker for some of the approximately 25 vacancies which occurred during the period February 1972 through May 14, 1974. Accordingly, I find that the Respondent violated Sections 19(a) (1) and (2) of the Order by allowing any part of Rucker's activity as a union steward to play a role in its determination of her fitness and/or selection for promotion. 1/

In reaching the above conclusion, I am not unmindful of the dilemma faced by Agency representatives when they are called upon to fill a position requiring constant if not total attention during an eight hour day, since it is obvious that one of the standards to be used must of necessity be the prospective employee's attendance record. However, when lack of attendance, i.e., time-away from job, is occasioned by protected union activity, such as the duties of a steward, it appears that an obligation is imposed upon Agency representatives to give advance warning or notice to eligible employees

1/ Although not controlling, it is noted that similar conclusions have been reached in the private sector. Cf. N.L.R.B. v. Great Eastern Corp., 309 F. 2d 352, 51 LRRM 2410, 2412 (2nd Cir. 1962); Batts Baking Co. v. NLRB, 380 F. 2d 199, 65 LRRM 2568, 2571, 2573 (10th Cir. 1967); General Tire v. NLRB, 332 F. 2d 58, 56 LRRM 2183, 2184 (5th Cir. 1964).

with respect to the obligations imposed by the specific jobs and thereby allow the affected employee to make an election with regard to the utilization of the rights afforded by Section 1(a) of the Order. To hold otherwise would make Section i(a) a nullity, since the affected employee would in fact be suffering a penalty because of his participation in protected union activity.

Similarly, to allow Agency representatives to base adverse or detrimental character appraisals upon employees' actions during grievance meetings, etc., as in the case of Colonel Wadsworth, would also be violative of the rights accorded employees under Section 1(a) of the Order. Short of insubordination, I find no restrictions in the Order with respect to the manner in which the rights accorded employees are to be utilized. In this latter connection it is noted that no insubordination has been charged to Mrs. Rucker.

RECOMMENDATIONS

Having found that Respondent has engaged in certain conduct which is violative of Sections 19(a) (1) and (2) of Executive Order 11491, as amended, by virtue of its actions in allowing Rucker's activities as a stewardess to play a role in her selection for repromotion, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Executive Order. 2/

2/ Inasmuch as Mrs. Rucker has now been repromoted to a GS-5, I will not include any instruction to this end in the recommended order. However, since it is apparent that the delay in such repromotion has had a decided effect on Mrs. Rucker's service computation date for purposes of future Reductions in Force, I deem it appropriate that such service computation date be changed to August 9, 1973, the first date on which supervisor Immel failed to select her for repromotion despite the fact that she was the only remaining available employee appearing on the Register of Eligibles. Being mindful of the fact that such vacancy was only at the GS-4 level, I shall also order Respondent to make her whole for any back-pay that she might have been entitled to at Grade 4 from August 9, 1973 until the date of her repromotion to a GS-5.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Army, United States Army Infantry Center, Fort Benning Georgia, shall:

1. Cease and desist from:

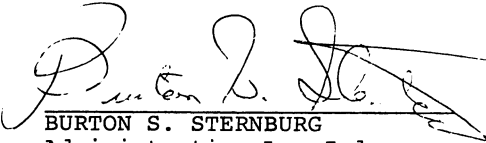
- (a) Failing to promote or repromote Bernice Rucker or any other employees who have utilized their rights under the Executive Order to serve as a union stewardess.
- (b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

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

- (a) Change Bernice Rucker's service computation date as a GS-5 to August 9, 1973.
- (b) Make Bernice Rucker whole for any loss of monies she may have suffered by reason of the failure of the Agency to promote her to a GS-4 on August 9, 1973.
- (c) Post at its facilities in the Finance and Accounting Office Building, Fort Benning, Georgia, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and

they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

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

  
 BURTON S. STERNBURG  
 Administrative Law Judge

Dated: October 3 , 1974  
Washington, D.C.

## N O T I C E   T O   A L L   E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT

RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT fail to promote or repromote any employees who utilize their rights under the Executive Order to serve as a union stewardess.

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 change Bernice Rucker's service computation date as a GS-5 to August 9, 1973.

WE WILL make Bernice Rucker whole for any loss of monies she may have suffered by our failure to repromote her to a GS-4 on August 9, 1973.

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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

INTERNAL REVENUE SERVICE,  
WILLMINGTON, DELAWARE DISTRICT  
A/SLMR No. 516

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and Chapter 56, NTEU, alleging violations of Section 19(a)(1) and (2) of the Order. Specifically, the Complainant alleged that the Respondent Activity had violated the Order by virtue of having placed in the performance evaluation worksheet of an employee who was the president of the local NTEU Chapter a remark concerning his union activities; interrogating the employee about his union activities during a promotional interview; suggesting to the employee that he consider not running for the presidency of the NTEU Chapter again; and failing to promote the employee to a GS-13 position.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) by placing the remark concerning the employee's union activities in his performance evaluation worksheet and interrogating him about his union activities. However, the Administrative Law Judge found that the Respondent had not violated Section 19(a)(1) by suggesting to the employee in the course of a "counseling" session that the employee consider not running for the Chapter presidency again. In this regard, he noted that the suggestion was not intended to discourage unionism nor reflective of an anti-union animus but, rather, was a suggested means of dealing with the employee's utilization of time and in response to criticism of the employee by others. The Administrative Law Judge also concluded that the failure to promote the employee to a GS-13 position was not based on discriminatory reasons and therefore was not violative of Section 19(a)(1) and (2).

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the remark in the performance evaluation worksheet and the interrogation of the employee were violative of Section 19(a)(1), and he ordered that any reference to the employee's union activities be expunged from his personnel file. He also agreed with the Administrative Law Judge that the failure to promote the employee to a GS-13 position was not grounded on discriminatory considerations and therefore, did not violate the Order. However, the Assistant Secretary concluded that the statement made to the employee that he consider not running for the presidency of the Chapter 56 again violated Section 19(a)(1) in that, in the context in which it was made, such statement implied to the employee that his opportunities for promotion would be affected in the future by his running for the presidency of Chapter 56 and his attaining such office. Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from such conduct and to take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,  
WILMINGTON, DELAWARE DISTRICT

Respondent

and

Case No. 20-4503(CA)

NATIONAL TREASURY EMPLOYEES UNION and  
CHAPTER 56, NATIONAL TREASURY  
EMPLOYEES UNION

Complainant

DECISION AND ORDER

On January 20, 1975, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendations, and the Respondent filed an answering brief to the Complainant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, including the exceptions filed by the Complainant and the answering brief filed by the Respondent, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge, 1/ except as modified herein.

1/ As noted in the Administrative Law Judge's Report and Recommendations, the supervisor of employee James Hartnett inserted a remark in Hartnett's performance evaluation worksheet regarding Hartnett's union activities. The Administrative Law Judge found, and I agree, that such insertion was violative of Section 19(a)(1) of the Executive Order. Accordingly, I will order that any reference to union activities made by the Respondent, if such reference exists, be expunged from the personnel file of James Hartnett, or any other of its employees. Cf. Western Division of Naval Facilities Engineering Command, San Bruno, California, A/SLMR No. 264.

The Administrative Law Judge found, among other things, that a statement made by supervisor Ralph Helm to James Hartnett on January 31, 1974, suggesting that Hartnett give some consideration to not running again for the presidency of the Complainant Chapter was not violative of Section 19(a)(1). In this regard, he noted that Helm's suggestion was not intended to discourage unionism nor reflective of anti-union animus on the part of management. Rather, in the Administrative Law Judge's view, it was a suggested means of dealing with Hartnett's utilization of time, and was a response to a criticism by others.

Contrary to the Administrative Law Judge, I find that Helm's statement to Hartnett was violative of Section 19(a)(1). Thus, the statement was made to Hartnett at a time when Hartnett had expressed dissatisfaction for not being selected for a promotion even though he was one of the best qualified candidates. In my view, such a statement, in this context, implied to Hartnett that his running for the presidency of the Complainant Chapter and his attaining such office would affect his opportunities for promotion in the future. Under these circumstances, I find that such conduct interfered with, restrained, or coerced Hartnett in the exercise of his rights assured by the Order to join and assist a labor organization and, therefore, was violative of Section 19(a)(1) of the Order. 2/

REMEDY

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

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Wilmington, Delaware District, shall:

- 1. Cease and desist from:

- (a) Interfering with, restraining, or coercing James Hartnett, or any other employee, by inserting any remark or comment in any performance evaluation worksheet form, or appraisal, regarding the employees' union activities or union affiliation.

2/ Cf. United States Army Tank Automotive Command, Warren, Michigan, A/SLMR No. 447; Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, A/SLMR No. 485; and Department of the Army, Picatinny Arsenal, Dover, New Jersey, A/SLMR No. 512.

(b) Interrogating James Hartnett, or any other employee, as to their activities on behalf of, or affiliation with, Chapter 56, National Treasury Employees Union, or any other labor organization.

(c) Interfering with, restraining, or coercing James Hartnett, or any other employee, in the exercise of their rights assured by Executive Order 11491, as amended, to join and assist a labor organization.

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


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

(a) Expunge any reference to union activities, if such reference exists, from the personnel file of James Hartnett or any other employee.

(b) Post at its facility at Wilmington, Delaware, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of the order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
May 23, 1975

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

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce James Hartnett, or any other employee, by inserting any remark or comment in any performance evaluation worksheet form, or appraisal, regarding the employees' union activities or union affiliation.

WE WILL NOT interrogate James Hartnett, or any other employee, as to their activities on behalf of, or affiliation with, Chapter 56, National Treasury Employees Union, or any other labor organization.

WE WILL NOT interfere with, restrain, or coerce James Hartnett, or any other employee, in the exercise of their rights assured by Executive Order 11491, as amended, to join and assist a labor organization.

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

WE WILL expunge any reference to union activities, if such reference exists, from the personnel file of James Hartnett or any other employee.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR  
 OFFICE OF ADMINISTRATIVE LAW JUDGES  
 WASHINGTON, D.C. 20210



..... :  
 In the Matter of :  
 :  
 INTERNAL REVENUE SERVICE :  
 Wilmington, Delaware District :  
 :  
 Respondent : CASE NO.  
 : 20-4503 (CA)  
 and :  
 :  
 NATIONAL TREASURY EMPLOYEES UNION and :  
 CHAPTER 56, NATIONAL TREASURY EMPLOYEES :  
 UNION :  
 :  
 Complainants :  
 .....

Appearances:

Donald David Sand, Esquire  
 General Legal Services Division  
 Internal Revenue Service  
 1111 Constitution Avenue, N. W.  
 Room 4427  
 Washington, D. C. 20224  
 For the Respondent

Tom Gosselin, Esquire  
 National Field Representative  
 National Treasury Employees Union  
 1730 K Street, N. W.  
 Washington, D. C. 20006

BEFORE: WILLIAM NAIMARK  
 Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This matter arose under Executive Order 11491, as amended (herein called the Order), pursuant to a Notice of Hearing on Complaint issued on September 10, 1974 by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, Philadelphia Region.

On June 13, 1974 National Treasury Employees Union and Chapter 56, National Treasury Employees Union (herein called the Complainants) filed a complaint against Internal Revenue Service, Wilmington, Delaware District (herein called the Respondent). The complaint alleged violations of 19(a)(1) and (6) of the Order by virtue of Respondent's having (1) placed a remark concerning Revenue Agent James Hartnett's union activity in his performance evaluation worksheet dated December 12, 1973; (2) interrogated Revenue Agent Hartnett as to his union activities and plans on January 28, 1974 at an interview conducted by the District's ranking panel concerning a promotion; (3) failed to consider and promote agent Hartnett to a GS-13 position. 1/ Respondent filed a response dated July 18, 1974 denying that it failed to select Hartnett for the GS-13 promotion because of his union affiliation. It also alleged that the remark placed in the agent's evaluation worksheet was deemed a favorable comment and inserted to aid Hartnett in obtaining a good rating; that questions were asked of Hartnett at the beginning of his interview to put him at ease.

A hearing was held before the undersigned on October 22, 1974 at Wilmington, Delaware. Both parties were represented by counsel and afforded full opportunity to be heard, adduce evidence, and to examine and cross-examine witnesses. Thereafter, both parties filed briefs 2/ which

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1/ On August 28, 1974 the Assistant Regional Director approved the withdrawal by Complainant of that portion of the complaint alleging a violation of 19(a)(6) of the Order.

2/ In a post hearing brief counsel for Complainants moved that the complaint be amended to allege a violation, (continued on next page)

have been duly considered.

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

Findings of Fact

1. Respondent's office at Wilmington, Delaware employs about 150 individuals, including revenue agents who audit income tax returns, and, at all times material herein, these employees have been represented by the Complainant Chapter 56, NTEU.

2. Under date of December 18, 1973 Respondent published a Merit Promotion Plan Vacancy Notice 3/ No. 73-27 which advertised that two vacancies existed for the position of Internal Revenue Agent, GS-512-13. Said Notice stated the area of consideration would be District Wide, and that the evaluation methods would consist of (a) review of official personnel folder, (b) review of latest performance evaluation, and (c) an interview.

3. The established procedure by Respondent in filling promotion vacancies for revenue agents is as follows:

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2/ - continued

based on the same facts originally alleged, of 19(a)(2). Notwithstanding an objection voiced by Respondent the motion is hereby granted. The amendment conforms the complaint to the evidence adduced in respect to the non-selection of Hartnett for promotion. Further, the alleged discrimination was fully litigated at the hearing, and under Section 203.15(g) of the Rules and Regulations I deem it appropriate to permit the amendment to allege a 19(a)(2) violation. Environmental Protection Agency A/SLMR No. 136; U.S. Department of Defense, Department of Navy, Naval Air Reserve Training Unit, A/SLMR No. 106. In view of my disposition of the merits herein, Respondent was not afforded an opportunity, as requested, to file a supplemental brief in opposition thereto.

3/ Complainants Exhibit 1



(a) A supervisor is obliged to prepare a performance evaluation 4/ for those agents recommended by him, rating the employee on various factors pertaining to his work habits, attitudes and abilities. This is required to be done only when the prior evaluation was made more than six months ago, although a supervisor may prepare another evaluation earlier if he feels there has been a change in the employee's performance.

(b) In addition to this performance evaluation there is a performance evaluation worksheet 5/ which is prepared by a revenue agent's supervisor. The latter rates the employee on standards and comments upon the agent's performance in respect to each standard.

(c) Performance evaluations, which are utilized in promoting agents to vacancies at Respondent's district office, are submitted to a Ranking Panel composed of three supervisors. The Panel reviews the evaluation and establishes a numerical rating and a cut off score in order to separate the eligibles from the 'highly qualified' employees. Those individuals whose score is above the cut off number are deemed highly qualified. Both the eligibles and those in the highly qualified category are placed on a Roster of Eligibles for Promotion and Promotion Certificate.

(d) Those employees who are above the cut off score and highly qualified are then interviewed by the members of the Ranking Panel. This body reviews their promotion file, together with the evaluations and worksheets prepared by the respective supervisors. It also discusses with each candidate work-related issues raised in the past, current matters being handled by each one, and future plans developed by the particular agent. The Panel seeks to determine the ability of the applicant to communicate and judges how the agent may relate to the public.

(e) After the interviews the Panel submits to the selecting official the names of those candidates deemed 'best qualified', and these persons are listed in alphabetical order on the promotion certificate. From those names the selecting official chooses the agent, or agents, to fill the vacant position. The Panel submits to the selecting official,

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4/ Form 3861

5/ Form 2883

together with the list of best qualified agents, the personnel files, numerical scores, and evaluations pertaining to each such agent.

4. Revenue Agent James J. Hartnett was employed by Respondent in 1967 as a GS-7, and after various promotions during the years, he became a GS-12 in 1969. For the past five years Hartnett has been president of Chapter 56, NTEU as well as its chief steward. Except for an occasional meeting with management on a personnel problem, he spent very little time on union business. Hartnett picked up the union mail - usually on his lunch hour - and distributed it to the proper persons. About 75-80% of his day was spent outside the District Office working on cases and auditing returns. He has been supervised for the past four to six months by Ralph N. Helm, and prior thereto his supervisor was Eugene Cassidy.

5. On October 31, 1973 Cassidy signed a performance evaluation worksheet 6/ in which he rated Hartnett on various standards and commented in respect thereto. Supervisor Helm prepared a Form 2883 worksheet 7/ rating Hartnett again on such standards, which was signed by the supervisor on December 12, 1973. In this rating Helm change the rating on standard "contacts and sense of responsibility" from 'good' to 'very good'. In commenting upon Hartnetts' utilization of time, a standard to be rated, Helm wrote on page 2 the following:

"Time in both cases currently being examined by Jim is under plan for the current stage of development. It is important to note that, while Jim is President of the Local NTEU Chapter, he spends a minimal amount of time on that job; and time spent is properly charged." (Emphasis supplied)

6. Group Manager Helm recommended Hartnett for promotion to a GS-13 in his performance evaluation 8/ dated January 7, 1974. Hartnett and 13 other revenue agents were recommended

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6/ Complainant's Exhibit 7

7/ Complainant's Exhibit 3

8/ Complainant's Exhibit 2

as eligible for two GS-13 vacancies listed on the 73-27 notice for a merit promotion.

7. The Ranking Panel members selected to choose the highly and best qualified agents for these vacancies were Helm (Panel Chairman), and Group Managers Robert Boyer and Donald M. Evans. About a week prior to its conducting interviews the Panel met to arrive at a cut off score to determine which agents were deemed highly qualified. A numerical score of 210 was chosen as the cut off, and those applicants who obtained scores above this figure were considered highly qualified. The revenue agents 9/ falling into this category, together with their scores, were as follows:

- Norman Hare - 301
- Allen Schwartz - 242
- Barry Brodie - 227
- Robert Goldman - 222
- James Hartnett - 212
- Rudolph Koeller - 212

8. On January 28, 1974 the Ranking Panel members interviewed the six revenue agents picked as highly qualified applicants for the two vacancies, GS-13 Revenue Agent. Each candidate was interviewed separately and were queried on (a) current cases and type of work being performed by the agent; (b) plans for the future; (c) self-development plans, as the taking of courses, and the like; (d) other items the agent desired to mention.

9. Hartnett testified, and I find, that in addition to discussing the foregoing, he was interrogated 10/ by

9/ Four applicants declined the position, and the remaining four agents did not obtain the required scores to be designated as highly qualified.

10/ There is a dispute as to whether this occurred at the outset of the interview, as stated by Boyer and Helm, (continued on next page)

Helm in respect to his union activities. Thus, this Group Manager asked Hartnett if he were going to run for the Chapter presidency again, if Hartnett intended to hold the job indefinitely, and did Hartnett feel his association with the union would affect his aspirations for management with the service. The employee replied by stating he didn't know whether he'd run again as he wanted to learn who else was interested and thus evaluate those who aspired to the job. Hartnett also stated that training as chief steward was an asset within the service since union trained officers were more knowledgeable about union contracts than other revenue agents. 11/

10. Upon concluding the interviews on January 28, 1974 the Ranking Panel selected as best qualified for the GS-13 vacancies revenue agents Barry Brody, Robert Goldman, Norman Hare, James Hartnett, and Allen Schwartz. On this date the promotion certificate containing these names, in alphabetical order, was submitted by the panel to the selecting official, James J. Kerrigan. All evaluations and worksheets, together with the personnel files and the raw scores of each such revenue agent, were forwarded to said official. No recommendations were made by the panel members.

10/- continued

or at its conclusion as testified to by Hartnett. Both versions agree that, any event, the questions were posed by Helm after Evans was called out of the meeting to attend to other business. I do not believe it necessary to resolve the issue as to when the interrogations occurred, particularly since Helm and Boyer admit to questions being asked of Hartnett re his position as union president.

11/ Both Boyer and Helm recalled that the latter asked Hartnett whether he intended to run for President again. Neither was certain whether other questions were posed, and Helm admitted he may have asked Hartnett whether the latter's association with the union would be a liability if selected for management. Accordingly, and on view of Hartnett's clear and precise recollection, I credit his testimony in this regard.

11. The selecting official, Kerrigan, has been chief of the Audit Division in this district since May 1, 1973. On the same date that he received the promotion certificate and material from the panel, January 28, 1974, Kerrigan selected Brody and Hare for the two GS-13 vacant positions. He testified that in making his selection he relied, in part, upon the performance evaluation (3861) of the supervisors. Further, Kerrigan maintained that while he reviewed the notes of the interviews, examined the worksheets, was aware of the remark placed in Hartnett's worksheet, and had the scores of the candidates before him, nothing contained in these sources of material affected his decision. The selecting official's testimony also shows that he reviewed the personnel file of Brody and Hartnett; that he knew the latter was president of the union but such knowledge did not play any part in his selection of the 2 men for the position.

Kerrigan's first choice for the GS-13 vacancies was Hare and was based upon the fact that the latter aided him in preparing documents. Although Hare was a conferee at the time of his selection, Kerrigan had a working relationship with this applicant when Hare worked under his supervision as chief of Conferences in review for several weeks. Kerrigan was aware of the abilities of Hare whom he considered a very good technician. The record reflects his second choice was Brody, based on the evaluation in Form 3861, the fact that this employee had received a special achievement award within the previous eight months, and that Brody had served as an instructor to teach trainees and journeymen, through certain phases, how to review tax laws. Kerrigan's third choice for the position was Hartnett based on the evaluations, although he was not familiar with the work of this candidate. The selecting official testified he had no discussion 12/ with the panel concerning which candidate should be selected, nor did he ever discuss Hartnett's union activities with them.

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12/ Hartnett testified he was told by Kerrigan on January 31 that after its submission to him, the latter had returned the list of best qualified to the Panel and asked for a recommendation of 2 names they could live with as case coordinators. Further, that Kerrigan said the panel (continued on next page)

12. On January 13, 1974, at the request of Kerrigan, Helm 'counselled' with Hartnett and Goldman to explain the procedures followed by the panel and how the selections were made. Helm spoke to Hartnett twice that day. The supervisor acknowledged that Hartnett had no particular weakness in his work performance, particularly since the employee had improved in two areas: being in the office so often, and spending considerable time discussing issues with other agents in lieu of conducting his own research. During the second conversation between them, Hartnett repeated to Helm that he was dissatisfied at not being selected since his work was without fault. Hartnett testified, and I find, 13/ that the supervisor said he wouldn't want it repeated but certain people in the office were inquiring why Hartnett was in the office so often even though, in Helm's opinion, this employee was allowed time under the contract to handle union activities. Further, according to Hartnett, his supervisor then asked whether the employee had given consideration to not running for chapter president. When Hartnett said he'd been thinking of it, Helm remarked that he might want to consider it seriously.

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12/ - continued

did so and thus Kerrigan selected Hare and Brody. This is denied by the Panel Chairman, and the other members testified they had no knowledge of this being done. I find it unnecessary to make a finding as to whether Kerrigan made this statement to Hartnett in view of my findings and conclusions as to the alleged discrimination herein.

13/ Helm had difficulty recalling the second conversation. He did recall telling Hartnett that if he were in his position, he'd consider his job first if he thought the union activities affected his work. However, Helm could not remember much else of this conversation. I credit Hartnett in regard to this conversation.

Conclusions

Respondent's Alleged Interference,  
Restraint or Coercion Under 19(a)(1)

Complainants maintain that Respondent engaged in acts of interference violative of Section 19(a)(1) of the Order by (1) inserting a remark in Hartnett's performance evaluation concerning his union activity, (2) questioning Hartnett on January 28, 1974 in regard to his union activities, (3) suggesting that Hartnett should consider seriously not running for President again.

(1) Respondent insists that the remark written by Helm in Hartnett's performance evaluation worksheet on December 12, 1973 was a complimentary one, which in no manner cast aspersion upon the employee or his union activities. It argues that the reference to Hartnett being president of Chapter 56 was made in conjunction with the further comment that he spends very little time in that position. Thus, in rating his utilization of time, the supervisor, Helm, was commending Hartnett in respect to this performance factor. The employer, in essence, considers the remark re Hartnett in the evaluation worksheet (Form 2883) to be parenthetical in nature, and it urges there was no intent to abridge the freedom accorded employees under the Order.

At first blush Respondent's argument seems plausible enough, but upon more deliberation, I am persuaded that it should be rejected. An employer infringes upon the right of an employee to engage in union activities when it comments upon, or refers to, such employee's activities in an appraisal or evaluation irrespective of whether the remarks are benign or not. If the remark is sanctioned because it is considered salutary in nature, then, in each instance, a subjective interpretation will be required as to the ultimate effect caused by such comment. Such a result would open the door to placing statements in employees' personnel files, or appraisals, couched in laudatory language but disclosing facts that form no necessary part of the appraisal and which may cause other officials to react in a different manner to the disclosures.

In my opinion the employee herein, Hartnett, is entitled to perform as union president without a narrative being inserted in his file as to how much time is spent undertaking these duties as well as a characterization thereof. The freedom to engage in union activities necessarily presumes

that no remarks concerning these activities be placed in Hartnett's file, or evaluation worksheet, by his supervisor. A rating in respect to Hartnett's utilization of time does not require a statement relating to his union presidency or the time devoted to fulfilling that office. The supervisor's comment was gratuitous in nature, forming no necessary part of the evaluation. Accordingly, and in view of the frequency, I find and conclude that the remark made by Helm in Hartnett's Form 2883 was an interference with the rights around employer under the Order and violative of 19(a)(1) thereof. See Western Division of Naval Engineering Command, A/SLMR No. 264.

(2) In respect to the interrogation of Hartnett by Helm at the interview on January 28, 1974, Respondent, while not denying its occurrence in part, contends the questions were casual and intended to put the employer at ease. Though there may well be situations when such queries are posed within the framework of informality - and thus not constitute any interference with employees' rights - I am persuaded that such was not true in the case at bar.

The questions asked of Hartnett re his intentions to run for union president, and whether he felt it would affect his aspirations to become part of management, were asked in a milieu far removed from a casual and informal discussion. The interview, at which the interrogation occurred, was indeed a formal discussion designed to elect information regarding Hartnett's future plans and intentions as an employee with the agency. Moreover, the interview was scheduled so the group managers could appaise Hartnett and the other candidates for promotion to a GS-13. In that setting questions asked of an employee in regard to his running for union president, as well as its possible effect upon becoming part of management, must necessarily have a restraining and coercive impact upon such employee. Such interrogation can scarcely be described as an isolated inquiry when conducted during the same session that an employee's career is being determined. Accordingly, I am constrained to conclude that Helm's interrogation of Hartnett on January 28, 1974 constituted interference, restraint or coercion and was a violation of 19(a)(1) of the Order. Vanderberg Air Force Base, A/SLMR No. 383.

(3) Complainants insist, further, that the statement by Helm to Hartnett on January 31, 1974, suggesting the latter give some consideration to not running for the presidency of the union again, was also an act of interference. A careful review of the record testimony convinces me that this remark, made in the context of a discussion concerning Hartnett's being in the office so often, was not an infringement of that employee's rights under the Order. The comments by Helm were clearly referable to the possible impingement which the union business may have had upon Hartnett's time as a revenue agent.

Helm had remarked that certain people inquired why Hartnett had been in the office so frequently, and this remark followed a discussion about the use of the employee's time and the fact that, while this was once a weak point, Hartnett had shown much improvement in this area. Thus, I construe Helm's suggestion that Hartnett consider giving up the presidency was not intended to discourage unionism, nor reflective of an anti-union animus on the part of management. Rather was it a suggested means of dealing with Hartnett's utilization of time, and a response to the criticism by others that the employee was in the office a good deal of the time. Moreover, the comments by Helm were made in reply to Hartnett's inquiry concerning his work performance and whether any weaknesses existed. In such a posture, I do not conclude that the statement by Helm was coercive or violative of 19(a)(1).

Respondent's Failure To  
Select Hartnett for Promotion  
As Alleged Discrimination

The issue with respect to the non-selection of Hartnett for the GS-13 revenue agent vacancy is essentially factual in nature. Complainants contend that the failure to select Hartnett was discriminatorily motivated. In support of this contention they advert to the interview conducted by the Ranking Panel on January 28, 1974, whereat Helm questioned Hartnett re his intentions to continue running for president of the local union. Moreover, they urge that the remarks placed by Helm in the evaluation worksheet, and his comments to Hartnett on January 31, 1974,

reflect a desire to frustrate the employee's efforts to gain further recognition with the agency.

While a resolution of this issue is not free from doubt, I am persuaded that the record does not contain sufficient evidence to warrant inferring that Hartnett was not promoted because of his functioning as union president. It does not appear that Respondent manifested anti-union animus in the past, or exhibited hostility to the bargaining representative and its officials. However, Hartnett had been chief steward and president for five years without being the object of any overt acts of discrimination, and the record does not reflect harassment toward him by Respondent as a result of his union activities.

The evidence herein indicates that Hare was the first selection by Kerrigan due to the latter's having worked with the employee and being impressed with his performance. Kerrigan was influenced by Brody's having received a special award, his tutoring other agents in the research of tax law, and the supervisor's evaluation of this agent. Both individuals scored higher than Hartnett whose raw score was the lowest of the best qualified candidates. While Kerrigan had knowledge of Hartnett's affiliation with the union, nothing supports the conclusion that his rejection of Hartnett in favor of the other two successful candidates was precipitated by anti-union sentiments. The selecting official had displayed no resentment toward Hartnett, nor had he evidenced any dissatisfaction with his union activities. He had not discussed Hartnett's role as president of the union with any of the supervisors or with the employee individually. Certainly no anti-union animus on the part of Kerrigan was shown to have existed.

Although I found that the interrogation by Helm of Hartnett was discriminatorily coercive, I do not believe Respondent's conduct in this respect demonstrates that the failure to promote this employee was illegally motivated. The questioning of Hartnett, though unprivileged, does not serve to show that Kerrigan rejected Hartnett for unionism. The Panel made no recommendations to the selecting official, nor did the members converse with Kerrigan re the candidate and their qualifications

or affiliations. Whatever ideas Helm entertained as to the wisdom of Hartnett in continuing his duties as president, they were not, so far as this record indicates, imparted to Kerrigan. Moreover, despite Hartnett's activities on behalf of the union, Helm rated the agent highly and, in fact, changed one evaluation factor from 'good' to 'very good'. Accordingly, I am convinced that Kerrigan selected the two agents for the GS-13 whom he deemed most suitable based on their experience and the evaluations of their supervisors. I also conclude that the failure to select Hartnett was not bottomed on any discriminatory reason, and that Respondent did not violate 19(a)(1) or (2) in respect thereto.

Recommendations

In view of my findings and conclusions heretofore stated, I make the following recommendations to the Assistant Secretary of Labor for Labor-Management Relations:

1. That those portions of the complaint alleging violations by Respondent of Sections 19(a)(1) and (2) based on its failure or refusal to select James Hartnett on January 28, 1974 to fill a GS-13 vacancy position, for revenue agent at Wilmington, Delaware District, be dismissed.

2. That Respondent be found to have engaged in conduct proscribed by Section 19(a)(1) of the Order (a) by virtue of its supervisor having inserted a remark in a performance evaluation worksheet form to the effect that 'while James Hartnett is president of the local union, he spends a minimal amount of time on union business'; (b) by interrogating an employee, who was president of the union, regarding his plans and intentions to run again for president of the local union in the future; and that, accordingly, the following order, which is designed to effectuate the policies of the Order, be adopted.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(a) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that the Internal Revenue Service, Wilmington, Delaware shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing James Hartnett, or any other employee, by inserting any remark or comment in any performance evaluation worksheet form, or appraisal, regarding an employee's union activities or union affiliation.


(b) Interrogating James Hartnett or any of its employees as to his activities on behalf of or affiliation with, Chapter 56, National Treasury Employees union, or any other labor organization.

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

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

(a) Post at its facility at Wilmington, Delaware, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

  
WILLIAM NAIMARK  
Administrative Law Judge

DATED: January 20, 1975  
Washington, D. C.

APPENDIX  
NOTICE TO ALL EMPLOYEES  
PURSUANT TO  
A DECISION AND ORDER OF THE  
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS  
and in order to effectuate the policies of  
EXECUTIVE ORDER 11491, AS AMENDED  
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees by inserting any remark or comment in any appraisal form regarding their union activities or their affiliation with Chapter 56, National Treasury Employees Union, or any other labor organization.

WE WILL NOT interrogate our employees as to their activities on behalf of, or affiliation with, Chapter 56, National Treasury Employees Union, or any other labor organization.

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

WE WILL expunge any reference to union activities, or affiliation with Chapter 56, National Treasury Employees Union, from the performance evaluation worksheet form of James Hartnett or any other employee.

\_\_\_\_\_  
(Agency or Activity)

Dated: \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania, 19104.

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

DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION  
A/SLMR No. 517

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This case involved an unfair labor practice complaint filed by National Association of Air Traffic Specialists (NAATS) (Complainant) against Department of Transportation, Federal Aviation Administration (Respondent) alleging violations of Section 19(a)(1) and (6) of the Order. The case was transferred to the Assistant Secretary pursuant to Section 206.5(b) of the Assistant Secretary's Regulations after the parties submitted a stipulation of facts and exhibits to the Assistant Regional Director. The complaint alleged that the Respondent violated the Order by failing and refusing to comply with an arbitration award directing it to provide NAATS members employed at the Respondent's Flight Service Station, Des Moines, Iowa, Municipal Airport with adequate parking accommodations. The Complainant contended that the arbitration award became final and binding and that the Respondent was obliged to implement the award after its petition for review was denied by the Federal Labor Relations Council. The Respondent argued that questions arising from an arbitrator's award are not appropriate matters for consideration under Section 19 of the Order and, therefore, are not matters for enforcement by the Assistant Secretary within the framework of the unfair labor practice procedures. Moreover, the Respondent contended that, even assuming Section 19 of the Order was applicable, its decision not to implement the arbitrator's award was not violative of the Order as such award was rendered moot by virtue of the renegotiation of the parties' agreement.

In finding that the Respondent violated Section 19(a)(1) and (6), the Assistant Secretary, citing Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412, FLRC 74A-46, noted that the Federal Labor Relations Council recently held that "the resolution of enforcement questions under the unfair labor practice procedures of the Assistant Secretary is required to assure the effectuation of the purposes of the Order" and that, therefore, "the Assistant Secretary has the authority under sections 6(a) (4) and 19 of the Order to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order." The Assistant Secretary further noted that while the Aberdeen case involved the issue whether the Assistant Secretary had the authority to enforce under Section 19 of the Order a binding arbitration award in which no exceptions were filed with the Council, the Council additionally found that there was no distinction to be drawn with respect to those cases in which exceptions had been filed.

Based on the foregoing rationale of the Council, the Assistant Secretary rejected the Respondent's contention that questions arising from



an arbitration award are not appropriate matters for enforcement by the Assistant Secretary within the framework of the unfair labor practice procedures.

With respect to the question of "mootness" raised by the Respondent, the Assistant Secretary found that the evidence was insufficient to establish that the Complainant waived a previously existing term and condition of employment as a result of the execution of the parties' most recent negotiated agreement.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and take certain affirmative actions.

A/SLMR No. 517

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION

Respondent

and

Case No. 22-5558(CA)

NATIONAL ASSOCIATION OF AIR TRAFFIC  
SPECIALISTS (NAATS)

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Assistant Regional Director for Labor-Management Services Kenneth L. Evans' Order Transferring Case to the Assistant Secretary pursuant to Section 206.5(b) of the Assistant Secretary's Regulations.

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

The complaint herein alleges that the Respondent violated Section 19(a)(1) and (6) of the Order by failing and refusing to comply with an arbitration award directing it to provide NAATS members employed at the Federal Aviation Administration (FAA) Flight Service Station, Des Moines, Iowa, Municipal Airport, with adequate parking accommodations. In this regard, the Complainant contends that the arbitration award involved herein became final and binding and that the Respondent was obliged to implement that award after the latter's petition for review was denied by the Federal Labor Relations Council on March 29, 1974.<sup>1/</sup> The Respondent, on the other hand, argues that questions arising from an arbitrator's award are not appropriate matters for consideration under Section 19 of the Executive Order and, therefore, are not matters for enforcement by the Assistant Secretary within the framework of the unfair labor practice procedures. Moreover, the Respondent contends that, even assuming Section 19 of the Order was applicable in this matter, its decision not to implement the arbitrator's award was not violative of Section 19(a)(1) and (6) of the Order as such award was rendered moot by virtue of the renegotiation of the parties' agreement.

1/ See Federal Aviation Administration, U.S. Department of Transportation, and National Association of Air Traffic Specialists, Des Moines, Iowa, Flight Service Station, FLRC No. 73A-50.

The undisputed facts, as stipulated by the parties, are as follows:

On September 14, 1971, the Respondent issued Order 4665.3A which announced the FAA's policy "on providing accommodations for official and employee parking in FAA occupied buildings and facilities." The Order required the Respondent to provide "adequate parking accommodations" for its employees engaged in maintenance and operation of agency technical facilities.<sup>2/</sup>

Shortly thereafter, effective June 1, 1972, the Complainant and the Respondent entered into a national agreement which was to be in effect for one year, which agreement subsequently was extended to October 1, 1973. Article VIII, Section 1, of the agreement, dealing with "Parking Facilities", provided, in part, that "To the extent that FAA has control over parking, adequate parking accommodations shall be provided for the privately owned vehicles of on-duty Flight Service Employees . . . . Regional officials and Facility Chiefs shall assure that the FAA policy on parking accommodations at FAA facilities is complied with." <sup>3/</sup>

The negotiated agreement contained a grievance procedure which provided for the submission of unresolved grievances to arbitration. During the period of the agreement, unit employees engaged in maintenance and operation of the Respondent's technical facilities operation at the FAA Des Moines, Iowa, Municipal Airport filed a grievance requesting that the Respondent furnish "adequate" parking as required by Article VIII of the agreement and Order 4665.3A. This grievance subsequently was submitted to arbitration pursuant to the terms of the agreement.

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<sup>2/</sup> Section 4a(2) of FAA Order 4665.3A provided, in relevant part:

"(a) On Airports. Adequate parking accommodations for FAA employees in close proximity to FAA technical facilities is considered to be an integral part of each facility . . .

No new leases, permits or other instruments are to be executed or existing ones modified without the inclusion of specific statements assuring adequate employee parking accommodations at all technical facilities located on the airport . . . ."

<sup>3/</sup> Article V of the agreement, entitled, "Management Rights", specified that:

"In the administration of all matters covered by this agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, . . . by published Department of Transportation and Federal Aviation Administration policies and regulations in existence at the time the agreement was approved, and by subsequently published agency policies and regulations . . . ."

On August 20, 1973, Arbitrator C. Wayne Hatcher issued his award and concluded as follows:

"The grievance herein is resolved in favor of the Association and its members. The Employer has failed to provide adequate parking accommodations, for the privately owned vehicles of the Association's members at the FAA facility in question at the Administration Building of the Des Moines, Iowa, Municipal Airport, in compliance with Article VIII of the Association-Employer Agreement and the provisions of FAA Order 4665.3A.

The Employer, by use of FAA funds, shall immediately provide temporary parking accommodations that are located apart from the parking area as presently assigned to the Association's members, and such temporary parking accommodations so to be provided shall as closely as possible comply with Article VIII of the parties' Agreement and FAA Order 4665.3A. Such temporary parking accommodations shall be afforded to the Association's members rent free, unless the Regional Director determines a reasonable cost is appropriate, until such time as the Employer can provide said Association members with other parking accommodations at an area which fully complies with respect to the adequacy requirements concerning weather conditions, personnel safety, rental cost and the reasonable distance that the area may be situated away from the FAA facility as set forth in said Article VIII of their Agreement and FAA Order 4665.3A."

On September 11, 1973, the parties concluded a new agreement which replaced the agreement due to expire on October 1, 1973. This new agreement did not include the previous article concerning "Parking Facilities." Thereafter, on September 12, 1973, the Respondent filed a petition for review of the arbitrator's award with the Federal Labor Relations Council. On March 29, 1974, the Council rejected the Respondent's contention that the arbitrator exceeded his authority stating, in part:

"It is uncontroverted that the arbitrator was authorized by the parties to determine whether the FAA 'has provided adequate parking accommodations at FAA facilities . . . at Des Moines, Iowa . . . in compliance with Article VIII of the Association-Employer Agreement and Federal Aviation Administration's Order 4665.3A.' Moreover, as noted previously, Article VIII specifically incorporates the 'FAA policy on parking accommodations at FAA facilities.' In the opinion of the Council, the agency has misinterpreted

the arbitrator's award in which the arbitrator merely made an application of the provisions of FAA Order 4665.3A to the particular facts of the grievance and, in so doing, made essentially the same determination as had the agency's regional director, namely, that the parking afforded the agency's employees was not 'adequate,' as required by FAA Order 4665.3A."

Subsequently, the Respondent took the position "that, since the current NAATS agreement eliminated parking provisions from the bargaining agreement, the Des Moines grievance was rendered moot and all contractual obligations to effect this award were likewise nullified." To date, the Respondent has continued in its refusal to comply with the award on the foregoing basis.

All of the facts and positions set forth above are derived from the parties' stipulation, accompanying exhibits and briefs.

With respect to the Respondent's contention that questions arising from arbitration awards are not appropriate matters for consideration under Section 19 of the Executive Order and, therefore, are not matters for enforcement by the Assistant Secretary, it was noted that in Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412, FLRC 74A-46, the Federal Labor Relations Council (Council) recently held that, "the resolution of enforcement questions under the unfair labor practice procedures of the Assistant Secretary is required to assure the effectuation of the purposes of the Order" and that, therefore, "the Assistant Secretary has the authority under sections 6(a)(4) and 19 of the Order to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order." <sup>4/</sup> While the Aberdeen case involved the issue whether the Assistant Secretary had the authority to enforce under Section 19 of the Order a binding arbitration award in which no exceptions were filed with the Council, it was additionally found by the Council that there was no distinction to be drawn with respect to those cases in which exceptions had been filed. Thus, the Council stated that, "Such authority obtains: (1) if the party has failed to file with the Council a petition for review of the award under the Council's rules of procedure, or (2) if such appeal was filed but the Council rejected acceptance of the appeal or issued a decision upholding the award."

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<sup>4/</sup> Section 6(a)(4) provides, in relevant part: "(a) The Assistant Secretary shall -- (4) decide unfair labor practice complaints . . . and alleged violations of the standard of conduct for labor organizations."

Based on the foregoing rationale of the Council, I reject the Respondent's contention that questions arising from an arbitration award are not appropriate matters for enforcement by the Assistant Secretary within the framework of the unfair labor practice procedures.

As noted above, the Respondent further contended that because the parties' September 11, 1973, agreement was silent on the subject of parking, the instant "grievance was rendered moot and all contractual obligations to effect this award were likewise nullified." While it is clear that the parties' new negotiated agreement did not contain the previous parking provisions, it is far from clear, as the Respondent now argues, that there was a waiver intended by the parties of the previous terms and conditions regarding parking and that a new agreement would not have been executed had the previous terms and conditions relating to parking not been waived. <sup>5/</sup> What is clear, however, is that at the time the instant grievance was submitted for arbitration, the application of FAA Order 4665.3A was subject to the grievance procedure established under the then existing negotiated agreement. In my view, when the question of the application of FAA Order 4665.3A was submitted to an arbitrator for decision pursuant to the terms of the parties' agreement, both parties, in effect, agreed to be bound by the arbitrator's award, absent such award being overturned by the Council on exceptions or the parties' mutual agreement not to be bound by such award. In the instant case, as noted above, the Council denied the Respondent's petition for review and there is no affirmative evidence that the parties mutually agreed not to be bound by the arbitration award. Under these circumstances, the arbitrator's award, in effect, established a term and condition of employment for unit employees at the Respondent's Des Moines facility. Such a term and condition of employment, although not treated expressly in the parties' most recent negotiated bargaining agreement, became and remained a matter upon which both the Complainant and the Respondent were obligated to meet and confer if either desired a modification. Since the most recent negotiated agreement contains no specific reference to the above-noted previously established term and condition of employment and no affirmative evidence was submitted to indicate that the parties mutually

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<sup>5/</sup> Interestingly, on September 12, 1973, one day after the new negotiated agreement was executed, the Respondent filed its petition for review of the arbitrator's award with the Council. Furthermore, there is no evidence that the Respondent at any time advised the Council that the entire matter allegedly had been rendered moot by virtue of the parties' new negotiated agreement. Thus, the matter of mootness was raised by the Respondent only after the Council's decision issued denying the Respondent's petition for review.

agreed to a rescission of same, 6/ I find that the evidence is insufficient to establish that the Complainant waived the previously existing term and condition of employment as a result of the execution of the parties' most recent negotiated agreement. Nor, under the circumstances herein, do I believe that the Respondent can now achieve, by merely declaring that the issue is moot as a result of a new negotiated bargaining agreement, which is silent on the subject of parking, what it failed to achieve through the grievance-arbitration machinery and review by the Council.

Accordingly, I find that the Respondent's refusal to comply with the arbitration award herein violated Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Transportation, Federal Aviation Administration shall:

1. Cease and desist from:

(a) Refusing to comply with an arbitration award directing the FAA Flight Service Station, Des Moines, Iowa, Municipal Airport to afford adequate parking accommodations for the Agency's employees as was required by FAA Order 4665.3A.

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

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

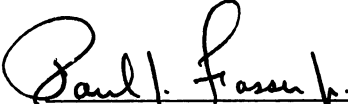
(a) Upon request, comply with the arbitration award directing the FAA Flight Service Station, Des Moines, Iowa, Municipal Airport to afford adequate parking accommodations for the Agency's employees as was required by FAA Order 4665.3A.

(b) Post at its facility at the FAA Flight Service Station, Des Moines, Iowa, Municipal Airport, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor

for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Administrator of the Federal Aviation Administration and shall be posted and maintained by the Regional Director, FAA Flight Service Center, Des Moines, Iowa, Municipal Airport for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees at the FAA Flight Service Center, Des Moines, Iowa, are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
May 30, 1975

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

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6/ In this regard, while the Respondent's letter to the Complainant's General Counsel, dated June 26, 1974, indicated that there was agreement "to forego any provisions on parking in our current agreement," there is no contention that the parties agreed that the established term and condition of employment affected by the arbitration award was, therefore, nullified.

## 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 comply with an arbitration award directing the FAA Flight Service Station, Des Moines, Iowa, Municipal Airport to afford adequate parking accommodations for the Agency's employees as was required by FAA Order 4665.3A.

WE WILL, upon request, comply with the arbitration award directing the FAA Flight Service Station, Des Moines, Iowa, Municipal Airport to afford adequate parking accommodations for the Agency's employees as was required by FAA Order 4665.3A.

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

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

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

DEPARTMENT OF THE ARMY,  
ABERDEEN PROVING GROUND  
A/SLMR No. 518

On July 11, 1974, the Assistant Secretary issued an Order Referring Major Policy Issues To The Federal Labor Relations Council in A/SLMR No. 412 in which he determined that a refusal to comply with an award issued by an arbitrator under conditions agreed to by the parties would constitute a unilateral action with respect to negotiated terms and conditions of employment, would thwart the arbitration process, would be inconsistent with the purposes and policies of the Order and, therefore, would be violative of Section 19(a)(1) and (6). However, it was noted that the Respondent's defense in the matter - i.e., that it was unable to make payment of the amount involved because no appropriation existed for payment and a special authorization from the Comptroller General of the United States was needed in order to implement the award raised major policy issues which required referral to the Federal Labor Relations Council.

Subsequently, the Respondent sought an advance decision from the Comptroller General as to the appropriate fund citation, if any, from which to make payment to the Complainant. On October 1, 1974, the Comptroller General issued a decision holding that there was no authority to implement the arbitration award involved which ordered the Respondent to pay the sum of \$80.33. Thereafter, the Comptroller General reaffirmed his decision on April 30, 1975, by denying the Complainant's request for reconsideration.

On March 20, 1975, the Council issued its Decision finding that:

. . . The Assistant Secretary does have the authority under sections 6(a)(4) and 19 of the Order . . . to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order. As to whether a party may rely upon a defense that it cannot comply with an arbitration award until it may be assured of the legality of the award (e.g., until it receives appropriate authorization from the Comptroller General), such a defense may not lie to the unfair labor practice proceeding . . . .

The Council further stated that:

A party's refusal to comply with an arbitration award issued under a negotiated grievance procedure where

the party has failed to file exceptions with the Council is a failure to comply with its obligations under the Order and may be deemed an unfair labor practice. And such party may not relieve himself of such obligations under the Order by requesting an opinion from another agency such as the United States General Accounting Office. Hence, such action is not a defense to an unfair labor practice charged for failure to implement an arbitration award issued under the negotiated grievance procedure in an agreement, such as that in this case.

Based on the rationale contained in the Council's Decision, as well as in A/SLMR No. 412, the Assistant Secretary found that the Respondent's failure to abide by an arbitration award, issued under a negotiated grievance procedure, to which no exceptions were filed with the Council, violated Section 19(a)(1) and (6) of the Order. Under these circumstances, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions consistent with his decision. In view of the decision of the Comptroller General, the Assistant Secretary did not require the Respondent to implement the arbitration award involved by making the payment to the Complainant ordered by the arbitrator.

A/SLMR No. 518

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
ABERDEEN PROVING GROUND

Respondent

and

INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS, LOCAL LODGE 2424

Case No. 22-5129(CA)  
A/SLMR No. 412  
FLRC No. 74A-46

Complainant

SUPPLEMENTAL DECISION AND ORDER

On July 11, 1974, I issued an Order Referring Major Policy Issues To The Federal Labor Relations Council. <sup>1/</sup> In connection with that determination, I concluded that a refusal to comply with an award issued by an arbitrator under conditions agreed to by the parties would constitute a unilateral action with respect to negotiated terms and conditions of employment, would thwart the arbitration process, would be inconsistent with the purposes and policies of the Order, and, therefore, would be violative of Section 19(a)(1) and (6). However, it was noted that the Respondent's defense in this matter - i.e., that it was unable to make payment of the amount involved because no appropriation existed for payment and a special authorization from the Comptroller General of the United States was needed in order to implement the award - raised the following major policy issues which required referral to the Federal Labor Relations Council: (1) whether the Assistant Secretary has jurisdiction to enforce under Section 19 of the Order a binding arbitration award in which no exceptions were filed with the Federal Labor Relations Council, and (2) if the Assistant Secretary has jurisdiction to enforce a binding arbitration award, is a defense that a party cannot comply with an arbitration award until it receives authorization from the Comptroller General to make payment dispositive of the matter?

On August 17, 1973, the Respondent sought an advance decision from the Comptroller General as to the appropriate fund citation, if any, from which to make payment to the Complainant. The subsequent Decision of the Comptroller General, issued on October 1, 1974, held that there was no authority to implement the arbitration award involved which ordered

<sup>1/</sup> See A/SLMR No. 412

the Respondent to pay the sum of \$80.33 to the Complainant.<sup>2/</sup> Thereafter, the Complainant requested reconsideration of the Decision of the Comptroller General. On April 30, 1975, the Comptroller General reaffirmed his prior decision.

On March 20, 1975, the Federal Labor Relations Council issued its Decision On Referral Of Major Policy Issues From Assistant Secretary wherein it found, in pertinent part, that:

. . . the Assistant Secretary does have the authority under sections 6(a)(4) and 19 of the Order . . . to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order. As to whether a party may rely upon a defense that it cannot comply with an arbitration award until it may be assured of the legality of the award (e.g., until it receives appropriate authorization from the Comptroller General), such a defense may not lie to the unfair labor practice proceeding . . . .

The Council further stated that:

A party's refusal to comply with an arbitration award issued under a negotiated grievance procedure where the party has failed to file exceptions with the Council is a failure to comply with its obligations under the Order and may be deemed an unfair labor practice. And such party may not relieve himself of such obligations under the Order by requesting an opinion from another agency such as the United States General Accounting Office. Hence, such action is not a defense to an unfair labor practice charged for failure to implement an arbitration award issued under the negotiated grievance procedure in an agreement, such as that in this case.<sup>3/</sup>

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<sup>2/</sup> Decision of the Comptroller of the United States, File No. B-180095.

<sup>3/</sup> The Council noted, however, that where the Assistant Secretary finds that an agency has committed an unfair labor practice by its failure to abide by an arbitration award to which no exceptions were filed with the Council, the Assistant Secretary may not, as part of his remedial order, direct an agency to comply with an award which the Comptroller General has determined to be contrary to law.

Based on the rationale contained in the Council's Decision, as well as in A/SLMR No. 412, I find that the Respondent's failure to abide by the arbitration award involved herein, issued under a negotiated grievance procedure, to which no exceptions were filed with the Council, violated Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Army, Aberdeen Proving Ground, Aberdeen, Maryland, shall:

1. Cease and desist from:

(a) Failing to abide by arbitration awards issued under a negotiated grievance procedure contained in an agreement with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, or in an agreement with any other exclusive representative, when it has failed to file exceptions with the Federal Labor Relations Council.

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


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

(a) In the future, either file exceptions with the Federal Labor Relations Council or abide by arbitration awards issued under a negotiated grievance procedure contained in an agreement with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, or in an agreement with any other exclusive representative.

(b) Post at its facility at the Department of the Army, Aberdeen Proving Ground, Aberdeen, Maryland, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Aberdeen Proving Ground and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of the order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
May 30, 1975

  
\_\_\_\_\_  
Paul J. Passer, Jr., Assistant Secretary of  
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

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

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL either file exceptions with the Federal Labor Relations Council or abide by arbitration awards issued under a negotiated grievance procedure contained in an agreement with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, or in an agreement with any other exclusive representative.

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

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.



Department of the Army,  
Aberdeen Proving Ground

and

A/SLMR No. 412  
FLRC No. 74A-46

International Association of Machinists  
and Aerospace Workers, Local Lodge 2424

DECISION ON REFERRAL OF MAJOR POLICY  
ISSUES FROM ASSISTANT SECRETARY

Background of Case

In his consideration of this case the Assistant Secretary found that the International Association of Machinists and Aerospace Workers, Local Lodge 2424 (the union) filed an unfair labor practice complaint charging the Department of the Army, Aberdeen Proving Ground (the agency) with a violation of section 19(a)(1) and (6) of the Order by refusing to seek review by the Federal Labor Relations Council or to comply with a binding arbitration award issued pursuant to the terms of the parties' negotiated agreement. The Assistant Secretary found, based upon the undisputed facts as stipulated by the parties, that the collective bargaining agreement between the union and the agency provided for the deduction by the agency of union dues from the pay of eligible employees within the unit who voluntarily authorized such deductions, and the transmittal to the union of an amount equal to the total of all such deductions (less 2 cents for each individual deduction) not later than 3 workdays after each payday. When a unit employee who had filed such a dues withholding authorization was promoted to a job outside the unit, the agency, contrary to the terms of the agreement, failed to terminate the authorization. Instead the agency continued to deduct and remit such dues to the union until over a year later when the agency discovered its mistake and ceased such deductions. The agency reimbursed the employee for \$80.33 (the amount of dues erroneously deducted from his pay). When the agency next transmitted to the union dues which had been deducted from employee pay, the agency deducted the amount of \$80.33. The union filed a grievance under the negotiated grievance procedure requesting payment of the withheld amount of \$80.33. The grievance proceeded to arbitration and the arbitrator found that the agency had violated the agreement by withholding from a payment of deducted union dues an amount previously paid to the union by mistake. Finding that "the particular method used in the instant case violated the provisions of the Collective Bargaining Agreement," the arbitrator ordered the agency to reimburse the union in the amount of \$80.33 which had been improperly withheld.

The agency has not compiled with the arbitrator's award nor has the agency filed a petition for review of the award with the Council. Instead the agency sought an advance decision from the Comptroller General of the United States requesting answers to the following questions:

- (1) Was the action to deduct the \$80.33 for the erroneous payments to the union correct?
- (2) If the deduction for the erroneous payments was correct, what action then should be taken in reply to the Award of Arbitration?
- (3) If it is held that the arbitrator was correct, what is the appropriate fund citation from which to make payments?

In defense of the unfair labor practice charge, the agency stated that it is unable to make payment of the amount involved because no appropriation exists for payment and a special authorization from the Comptroller General of the United States is needed in order to implement the award.

Under these circumstances the Assistant Secretary concluded that certain major policy issues had been raised which, pursuant to section 2411.4 of the Council's rules of procedure<sup>1/</sup> and section 203.25(d) of the Assistant Secretary's regulations, he referred to the Council for decision:

- (1) Whether the Assistant Secretary has the authority to enforce under section 19 of the Order a binding arbitration award in which no exceptions were filed with the Council; and
- (2) If the Assistant Secretary has the authority to enforce a binding arbitration award, is a defense that a party cannot comply with an arbitration award until it receives authorization from the Comptroller General to make payment dispositive of the matter?

1/ Section 2411.4 of the Council's rules of procedure provides:

Notwithstanding the procedures set forth in this part, the Assistant Secretary or the panel may refer for review and decision or general ruling by the Council any case involving a major policy issue that arises in a proceeding before either of them. Any such referral shall be in writing and a copy of such referral shall be served on all parties to the proceeding. Before decision or general ruling, the Council shall obtain the views of the parties and other interested persons, orally or in writing, as it deems necessary and appropriate.

Opinion

The issues referred to the Council raise questions about the enforcement of arbitration awards which are of substantial importance to the labor-management relations program under the Order.

1. Authority of the Assistant Secretary to Enforce Arbitration Awards.

As the Assistant Secretary pointed out in his referral, while "the Order provides specifically that parties may file exceptions to arbitration awards with the Federal Labor Relations Council under regulations prescribed by the Council, the Order and the Rules and Regulations of the Federal Labor Relations Council are silent with respect to the procedure to follow in order to obtain enforcement of arbitration awards."

Executive Order 11491, as amended, provides in section 4(c) that:

- (c) The Council may consider, subject to its regulations--
  - (1) appeals from decisions of the Assistant Secretary issued pursuant to section 6 of this Order;
  - (2) appeals on negotiability issues as provided in section 11(c) of this Order;
  - (3) exceptions to arbitration awards; and
  - (4) other matters it deems appropriate to assure the effectuation of the purposes of this Order.<sup>2/</sup>

Section 13(b) of the Order provides, in relevant part, that "Either party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council."<sup>3/</sup> In discussing exceptions to arbitration awards, the Study Committee Report and Recommendations which led to the issuance of E.O. 11491 stated that "[c]hallenges to such awards should be sustained only on grounds similar to those applied by the courts in private sector labor-management relations, and procedures for the consideration of exceptions on such grounds should be developed by the Council."<sup>4/</sup> There was no mention of enforcement of arbitration awards in the Study Committee Report.

<sup>2/</sup> It should be noted that the Council's authority under section 4(c) is cast in discretionary terms--the "Council may consider, subject to its regulations." (Emphasis added.)

<sup>3/</sup> This sentence originally constituted section 14(b) of the Order; when the Order was amended by E.O. 11615 in 1971, section 14(b) was revoked and the sentence was incorporated in section 13(b).

<sup>4/</sup> Labor-Management Relations in the Federal Service (1969), p. 42.

When the Council first issued Part 2411 of its Rules and Regulations on September 29, 1970, Subpart B of Part 2411 established a single set of procedures under which the Council would review: (1) awards of arbitrators under the Order; (2) decisions of the Assistant Secretary under section 6 of the Order; and (3) decisions of agency heads on negotiability issues provided under section 11(c)(4) of the Order. The alternative actions available to the Council in issuing its decisions on the merits in all three types of cases were described in one section (§ 2411.20(a)) which provided, in relevant part:

§ 2411.20 Council decision; compliance actions.

- (a) The Council shall issue its decision sustaining, enforcing, modifying, and enforcing as so modified, setting aside in whole or in part, or remanding the decision or award. . . .

These rules were in effect from September 29, 1970, until October 3, 1972.

In 1972, the Council assessed its experience under its initial rules of procedure and concluded that some changes in Part 2411 would better assure the effectuation of the purposes of the Order. The Council published a proposed revision of Part 2411 in the Federal Register (37 F.R. 9138), and invited comments and suggestions from interested persons. One of the changes proposed and eventually adopted was a rearrangement of the format of Part 2411 to establish three separate subparts, each of which was limited to rules of procedure governing one particular type of review case. Another proposed change was the deletion from the rules of the alternative of a Council decision "enforcing" an arbitration award. In explanation of the latter proposed change, the Council stated that:<sup>5/</sup>

The existing provision [§ 2411.20(a)] describes the alternatives open to the Council in all three types of review cases. The modifications are necessary to accurately describe the Council's function in deciding arbitration award cases since this subpart is limited to those cases. The alternative of "enforcing" would not appear to be involved in this function.

In response, only one objection to the change was received. The AFL-CIO, speaking for the international unions affiliated with that organization, objected to the deletion of "enforcing" from the list of possible actions which the Council might take in arbitration cases.

The Council considered the comments that were received (37 F.R. 20668) and concluded that section 2411.37(b) should be adopted and issued as proposed, namely:

<sup>5/</sup> FLRC Information Announcement of May 3, 1972, "Request for Comments on Proposed Revision of Council Rules," Comparative Analysis, Subpart D, § 2411.32.

§ 2411.37 Council decision.

(b) The Council shall issue its decision sustaining, modifying, setting aside in whole or in part, or remanding the award.

Thus, it is clear that the Council then concluded, and we agree, that the enforcement of arbitration awards was not a role contemplated for the Council in carrying out its function of considering "exceptions to arbitration awards" under section 4(c)(3) of the Order and as amplified in the Study Committee Report which led to the issuance of the Order (quoted above). Instead, the resolution of enforcement questions under the unfair labor practice procedures of the Assistant Secretary is required to assure the effectuation of the purposes of the Order.

Significantly in this regard, where disputes arise concerning the alleged failure of a party to abide by an arbitration award, such disputes may involve factual questions which must be resolved in order to determine whether or not an award has been implemented. Such disputed issues of fact, frequently entailing credibility determinations, are best resolved through a hearing as provided under the unfair labor practice procedures of the Assistant Secretary. For this reason complaints concerning the alleged failure of a party to abide by an arbitration award, where that party has not filed with the Council a petition for review of the award under the Council's rules of procedure, can and should be resolved by the Assistant Secretary under his authority in section 6(a)(4)<sup>6/</sup> to decide the unfair labor practice complaints specified in section 19 of the Order. The Council is of the opinion that these procedures, as reflected in the rules, are consistent with and implementive of the language and purposes of the Order.

Therefore, the Council holds that the Assistant Secretary of Labor has the authority under sections 6(a)(4) and 19 of the Order to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order. Such authority obtains: (1) if the party has failed to file with the Council a petition for review of the award under the Council's rules of procedure, or (2) if such appeal was filed but the Council rejected acceptance of the appeal or issued a decision upholding the award. The Council recognizes that this method for seeking enforcement of arbitration awards may require the initiation of separate

<sup>6/</sup> Section 6(a)(4) of the Order provides, in relevant part:

- (a) The Assistant Secretary shall—
- . . . . .
- (4) decide unfair labor practice complaints . . . . .

proceedings under the Order. Therefore, the Council believes it would be appropriate for the Assistant Secretary to expedite the processing of unfair labor practice cases which pertain to the enforcement of arbitration awards. Furthermore, the Council itself will expedite the processing of any appeals which it might receive from decisions of the Assistant Secretary in such cases.

2. Defenses to Unfair Labor Practice Complaints Alleging Refusal to Comply with Arbitration Awards.

We turn next to the question of whether, if the Assistant Secretary has the authority to enforce a binding arbitration award, is a defense that a party cannot comply with an arbitration award until it receives authorization from the Comptroller General to make payment dispositive of the matter? As we have already determined, the Assistant Secretary does have the authority under sections 6(a)(4) and 19 of the Order, and under the circumstances described above, to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order. As to whether a party may rely upon a defense that it cannot comply with an arbitration award until it may be assured of the legality of the award (e.g., until it receives appropriate authorization from the Comptroller General), such a defense may not lie to the unfair labor practice proceeding. In this connection, the party has ample opportunity to raise such questions concerning the legality of the award in exceptions filed with the Council. A party's refusal to comply with an arbitration award issued under a negotiated grievance procedure where the party has failed to file exceptions with the Council is a failure to comply with its obligations under the Order and may be deemed an unfair labor practice. And such a party may not relieve himself of such obligations under the Order by requesting an opinion from another agency such as the United States General Accounting Office. Hence, such action is not a defense to an unfair labor practice charged for failure to implement an arbitration award issued under the negotiated grievance procedure in an agreement, such as that in this case.<sup>7/</sup>

<sup>7/</sup> We recognize that disbursing officers and agency heads have a statutory right under 31 U.S.C. § 74 to seek rulings from the Comptroller General on questions involving payments to be made by or under them. We believe the view taken herein regarding the respective jurisdictions of the General Accounting Office and the Council to be consistent with the position taken by the Comptroller General in his recent decision in B-180010, October 31, 1974, 54 Comp. Gen. \_\_\_\_, wherein he stated in pertinent part:

[S]ection 13(b) of Executive Order No. 11491 provides that either an agency or an exclusive representative may file an exception to an arbitrator's award with the Federal Labor Relations Council. . . .

(Continued)

However, the Assistant Secretary, in fashioning a remedial order in unfair labor practice cases, may not require a party to engage in an illegal action. In this connection, the Assistant Secretary's remedial order must "effectuate the purposes of the Order."<sup>8/</sup> Obviously, it would be inconsistent with such purposes to require a party to violate applicable law, appropriate regulation or the Order.<sup>9/</sup> Thus, where the Assistant Secretary finds that an agency has committed an unfair labor practice under Executive Order 11491, as amended, by its failure to abide by an arbitration award to which no exceptions were filed with the Council, the Assistant Secretary may not, as part of his remedial order, direct the agency to comply with an award which the Comptroller General has determined, under 31 U.S.C. § 74, to call for an improper payment and, hence, to be contrary to law.

(Continued)

When an agency does choose to first file an exception with the Council, if the Council is unsure as to whether the arbitration award may properly be implemented in accordance with the decisions of this Office, it should either submit the matter directly to this Office for decision or, after ruling on any other issues involved in the exception which involved matters not within the jurisdiction of this Office, it should instruct the agency involved to request a ruling from this Office as to the legality of implementation of the award.

While the decision herein recognizes the obligation of agencies under the Order to file exceptions to arbitration awards with the Council where agencies have questions as to the legality of such awards, at the same time it does not prevent agencies from exercising their statutory rights to seek rulings directly from the Comptroller General. However, the fact that an agency has sought a ruling directly from the Comptroller General does not relieve the agency of its obligations under the Order and, hence, is not a defense to an unfair labor practice complaint.

8/ Section 6(b) of the Order states:

In any matters arising under paragraph (a) of this section, the Assistant Secretary may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order.

9/ In this regard, it should be noted that section 2411.37(a) of the Council's rules provides, in pertinent part, that "[a]n award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order . . . ." Thus, for example, if the Council finds that an award violates the provisions of title 5, United States Code, or that an award violates the regulations of the Civil Service Commission, or that an award violates section 12(b) of the Order, the Council will modify or set aside that award.

In the present case, subsequent to the referral of the case to the Council by the Assistant Secretary, the Comptroller General has issued an advance decision in response to the agency's questions regarding the arbitration award. The Comptroller General concluded that the action to deduct the \$80.33 for the erroneous payments to the union was correct, stating that "no authority exists to pay an additional amount, notwithstanding the arbitration award."<sup>10/</sup> Therefore, in this particular case, should the Assistant Secretary find that the agency did commit an unfair labor practice in failing to abide by an award to which no exceptions were filed with the Council, he may not, as a part of his remedial order, direct the agency to comply with the arbitration award.

In summary, in an unfair labor practice complaint case, where it is alleged that the respondent has failed to comply with an arbitration award issued under a negotiated grievance procedure and the respondent has failed to file with the Council a petition for review of the award under the Council's rules of procedure, neither a defense that the award violates applicable law, appropriate regulation or the Order, nor a defense that the respondent has referred the question of the legality of the award or its implementation to another agency, including the General Accounting Office, is dispositive of the unfair labor practice complaint. While the Assistant Secretary, after appropriate consideration, which may include referral to proper authorities for legal interpretations, may ultimately conclude that the arbitrator's award is contrary to applicable law, appropriate regulation or the Order, the Assistant Secretary may nevertheless find that the respondent has committed an unfair labor practice by failure to meet its obligations under the Order. Should the Assistant Secretary so find that an unfair labor practice has been committed, he may not include in his remedy a requirement that the complainant comply with an award that is contrary to applicable law, appropriate regulation or the Order.

Conclusion

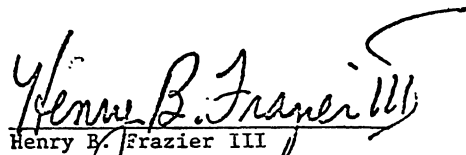
Therefore, in response to the Assistant Secretary's questions:

- (1) The Assistant Secretary has the authority under section 6(a)(4) and (b) of the Order to find that a party has committed an unfair labor practice by its failure to comply with an arbitration award under a negotiated grievance procedure to which no exceptions were filed with the Council (just as he may in a case in which a party fails to comply with an award after exceptions were filed with the Council and the Council has either rejected the appeal or issued a decision upholding the award.)
- (2) In an unfair labor practice complaint case alleging refusal to comply with an arbitration award, a defense that a party cannot comply with the award until it receives authorization from the Comptroller General to make payment is not dispositive of the unfair labor practice complaint. However,

<sup>10/</sup> Decision of the Comptroller General of the United States, B-180095, October 1, 1974.

In fashioning a remedy in such cases, the Assistant Secretary may not require a party to comply with an award that violates applicable law, appropriate regulation or the Order. While the Assistant Secretary, after appropriate consideration, which may include referral to proper authorities for legal interpretations, may ultimately conclude that the arbitrator's award is contrary to applicable law, appropriate regulation or the Order, the Assistant Secretary may nevertheless find that the respondent has committed an unfair labor practice by failure to meet its obligations under the Order.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued; March 20, 1975

UNITED 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 AGRICULTURE  
and AGRICULTURAL RESEARCH SERVICE  
A/SLMR No. 519

This proceeding arose upon the filing of an unfair labor practice complaint by the National Federation of Federal Employees, Local 1552 (Complainant) against the United States Department of Agriculture (Department) and the Agricultural Research Service (ARS). The amended complaint alleged essentially that the Department and the ARS violated Section 19(a)(6) of the Order by delay and subsequent "erosion" of a basic agreement negotiated at a local level, which constituted bad faith bargaining.

The Administrative Law Judge concluded that the ARS violated Section 19(a)(6) of the Order by virtue of the conduct of the Director of Personnel of the ARS in rejecting the parties' agreement of October 13, 1972. In the Administrative Law Judge's view, such conduct, in the circumstances of this case, improperly negated the authority of the Activity's Chief Negotiator. Moreover, he found that the ARS' failure to submit the locally negotiated agreement to the Department within 30 days after its execution, as required by Department regulations, violated Section 19(a)(6) of the Order.

The ARS argued that Section 15 of the Order permits the "head of the agency" to delegate approval authority to more than one "designated official" and that the Department, under its regulations (DPM Section 4-5h), had delegated approval authority to the Department's Director of Personnel and to "Agency Heads." Therefore, it contended that the ARS Director of Personnel properly exercised that part of Section 15 authority granted him under the Department's regulations and, thus, his finding that certain provisions of the agreement were contrary to published policy and regulations did not negate the delegated authority of the Activity's Chief Negotiator.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the ARS violated Section 19(a)(6) of the Order. In reaching this conclusion, the Assistant Secretary rejected the ARS' contention that the Director of Personnel of the ARS was an appropriate approval authority under Section 15 of the Order when he returned the locally signed agreement to the parties and found that the interpretation of DPM Section 4-5h by the ARS to establish a dual level of approval for executed negotiated agreements and its subsequent application of such

approval authority was inconsistent with the intent of Section 15 and with the ARS' obligation under Section 11(a) of the Order to meet at reasonable times and confer in good faith.

However, the Assistant Secretary found, contrary to the Administrative Law Judge, that the ARS did not violate Section 19(a)(6) by its refusal to submit the signed agreement to the Director of Personnel of the Department within 30 days from the execution by the parties as required by Agency regulations. In this regard, he noted that the failure of an agency to follow its own regulations or procedures is not necessarily an unfair labor practice under the Order. Thus, absent evidence of anti-union motivation, which was not present in the instant case, he found that any violation of Agency regulations which occurred herein was not violative of Section 19(a) of the Order.

Further, in agreement with the Administrative Law Judge, the Assistant Secretary found that the Department properly exercised its Section 15 approval authority and, therefore, its conduct was not viewed as being violative of the Order.

Based on his decision, the Assistant Secretary ordered the ARS to cease and desist from its conduct found violative of the Order and to take certain affirmative actions.

A/SLMR No. 519

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT  
OF AGRICULTURE  
and  
AGRICULTURAL RESEARCH SERVICE

Respondents

and

Case No. 22-5144(CA)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1552

Complainant

DECISION AND ORDER

On November 21, 1974, Administrative Law Judge William B. Devaney issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent Agricultural Research Service, hereinafter referred to as ARS, engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendation. The Administrative Law Judge also found that further proceedings against the Respondent United States Department of Agriculture, hereinafter referred to as the Department, were unwarranted. Thereafter, the ARS filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the ARS' exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, except as modified below.

The Administrative Law Judge found that the rejection of the October 13, 1972, negotiated agreement by the Director of Personnel of the ARS, to whom no Section 15 approval authority was delegated, negated the authority of the Activity's Chief Negotiator, contrary to the requirement of Section 11(a) of the Order and the Department Personnel Manual (DPM) Chapter 711, Subsection 4-3, and, thus, violated Section

19(a)(6) of the Order. He also found that the failure of the ARS to submit the locally negotiated agreement of October 13, 1972, to the Department's Director of Personnel within 30 days after its execution as required by DPM Subchapter 711, Section 4-5h, 1/ to be an unreasonable delay in bargaining in violation of Section 19(a)(6) of the Order. As to the Department's rejection through its Director of Personnel of four provisions of the negotiated agreement which were found to be contrary to applicable laws and regulations, the Administrative Law Judge found no violation of the Order as such conduct, in his view, was consistent with the purposes of Section 15 of the Order.

The gravamen of the ARS' exceptions in this matter is that Section 15 of the Order permits the "head of the agency" to delegate approval authority to more than one designated official and that the Department, under DPM Section 4-5h, had delegated approval authority to the Director of Personnel and to "Agency Heads." 2/ Therefore, it contends that the ARS Director of Personnel properly exercised that part of Section 15 authority granted to him under the Department's regulations and, thus, his finding that certain provisions of the agreement were contrary to published policy and regulations did not negate the delegated authority of the Activity's Chief Negotiator. I cannot agree with Respondent ARS' interpretation of Section 15 of Executive Order 11491, as amended.

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1/ DPM Subchapter 711, Section 4-5h provides that:

All basic agreements, any supplements and amendments thereto or any extensions or renewals of agreements shall be submitted, for review and approval by the Director of Personnel or his designee no later than thirty (30) calendar days after the date of execution by the parties. Such agreements must have been approved by the agency and ratified by the labor organization, if necessary. Review by the Director of Personnel shall be for the purpose of screening for conflicts with applicable laws, regulations and published Department policies and regulations. Agency Heads shall assure that the negotiated agreement is in compliance with published policies and regulations of the Agency and appropriate subordinate levels before forwarding the agreement to the Director of Personnel.

2/ It was noted that the ARS' use of the term "agency" in its exceptions is inconsistent with the definition contained in Section 2(a) of the Order which provides:

"Agency" means an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office;"

Clearly, the Department herein is an "Agency" within the meaning of the Order and the ARS is a component activity of that Agency.

The Study Committee Report and Recommendations (August 1969) pointed out some of the difficulties that had been encountered with regard to the approval of agreements in the Federal sector. In this regard, it was noted that where the approval process resulted in unwarranted delay, or in unnecessary or arbitrary revision of locally negotiated agreements on the basis of disagreement with the language or substance of what had been negotiated, union complaints concerning the fact that a negotiated agreement must be approved by the agency head or his designated representative seemed justified. Although the 1969 Report and Recommendations concluded that the requirement for agency approval was necessary and should be continued, it recognized that some limitation should be incorporated into the approval process and recommended that "approval or disapproval" be based solely upon the agreement's conformity with laws, existing published agency policies and regulations and with the regulations of other appropriate authorities. In addition, the Report and Recommendations of the Federal Labor Relations Council (1975) recognized that elimination of the problem of unwarranted delays in the review of negotiated agreements by agency authorities had not been "totally realized." In its attempt to assure that the approval process was accelerated to the maximum extent possible it encouraged agencies to expedite their approval process by such means as eliminating intermediate levels of review, delegating approval authority as close as possible to the level of negotiations, exercising review on a post-audit basis, and streamlining internal procedures. In the Council's view, "The goal of the negotiating parties and reviewing officials should be to see that negotiated agreements are put into effect as soon as reasonably possible after execution. That is the policy goal of the Council." Further, in connection with achieving the foregoing goals of accelerating the approval process, the Council recommended that Section 15 of the Order be modified to include a requirement that action must be taken by an agency head or his designated representative to approve or disapprove a negotiated agreement within 45 days from the date of its execution by the parties. 3/

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3/ As a result, Section 15 now requires that:

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

Based on the clear intent expressed by the Study Committee's Report and Recommendations of 1969, the Council's Report and Recommendations of 1975 concerning the desire for acceleration of the approval process and noting the requirement of Section 11(a) imposed on agencies and exclusive representatives "to meet at reasonable times and confer in good faith", I find that the granting of approval authority to more than one level for review is inconsistent with the purposes and policies of the Order. Thus, to subject locally negotiated agreements to intermediate levels of approval would, in my judgment, result in an unsettling effect on labor relations in the Federal sector by impairing and substantially delaying the collective bargaining process. While clearly an agency may choose to delegate its Section 15 approval authority to an intermediate level or, in the alternative, provide that an intermediate official review the executed agreement and forward that agreement, with any comments, to the "approval" authority, I do not believe that the establishment of intermediate, independent approval authorities is consistent with the intent and purposes of Section 15. As demonstrated by the circumstances herein, where an agency seeks to delegate a portion of its approval authority to an intermediate level and still retains a portion of that authority in the agency head, an additional level of review and approval is created which is time consuming, lacks finality, and, in effect, creates unreasonable delays in the consummating of negotiated agreements. Clearly, the purposes of the Order are not best served where, as here, an agency head or his representative who has been designated to have Section 15 approval authority, does not receive a locally executed agreement for approval until nearly nine months after its original signing because of the intermediate approval level's prior incomplete review and subsequent return of that agreement to the local level for modification. 4/

Under these circumstances, I reject the ARS' contention that the Director of Personnel of the ARS was an appropriate approval authority under Section 15 of the Order when he returned the locally signed agreement of October 13, 1972, to the parties. Thus, based on the foregoing considerations, I find that the interpretation and application of DPM Section 4-5h by the ARS to establish a dual level of approval for executed negotiated agreements and its returning of the agreement to the parties was inconsistent with the intent of Section 15 and with the ARS'

4/ The subject case arose and was litigated prior to the recent amendments to Executive Order 11491. However, it appears that the new 45 day requirement would not necessarily remedy the type of improper conduct which I find was involved herein. Thus, even under the current Order, an intermediate level of review and approval could disapprove an agreement within the prescribed 45 day period and the parties at the local level could not be assured, as demonstrated by the facts in the instant case, that conforming the agreement in accordance with the recommendation of the intermediate level would subsequently result in an approved agreement since the agency head or his designated representative had not yet received such agreement to ascertain whether it conforms to applicable laws, the Order, existing agency policies and regulations, and regulations of other appropriate authorities.

- 4 -

obligation under Section 11(a) of the Order to meet at reasonable times and confer in good faith. Accordingly, I conclude that the ARS' conduct in interpreting DPM Section 4-5h to establish a dual level of approval and its subsequent application of such approval authority was violative of Section 19(a)(6) of the Order.

However, contrary to the Administrative Law Judge, I find that the ARS did not violate Section 19(a)(6) by its refusal to submit the signed agreement to the Director of Personnel of the Department within 30 days from the execution by the parties as required by Department regulations. As noted in the exceptions herein, the failure of an agency to follow its own regulations or procedures is not necessarily an unfair labor practice under the Order. 5/ Thus, absent evidence of anti-union motivation, which was not present in the instant case, I find that any violation of Department regulations which occurred herein was not violative of Section 19(a) of the Order. Accordingly, I conclude that this aspect of the complaint should be dismissed.

Finally, while the ARS' conduct as an intermediate approving authority was viewed as being violative of Section 19(a)(6), I find, in agreement with the Administrative Law Judge, that the Department properly exercised its Section 15 approval authority on May 25, 1973, and, therefore, its conduct was not viewed as being violative of the Order.

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of Agriculture, Agricultural Research Service, Beltsville, Maryland, shall:

1. Cease and desist from:

Applying DPM Subchapter 711, Section 4-5h to require two levels of approval of negotiated agreements with each level having the authority to return such agreements for conformance with applicable laws, the Order, existing published agency policies and regulations and regulations of other appropriate authorities.

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

5/ Cf. Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334.

- 5 -

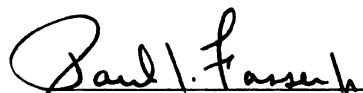


a. Post at its Northern Regional Research Center facility, Peoria, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Agricultural Research Service and shall be posted and maintained by the Director of the Northern Regional Research Center for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director of the Northern Regional Research Center shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

b. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

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

Dated, Washington, D.C.  
May 30, 1975

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

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



.....  
In the Matter of: :  
: :  
DEPARTMENT OF AGRICULTURE :  
AGRICULTURAL RESEARCH SERVICE, :  
: :  
Respondent, :  
: :  
and : Case No. 22-5144 (CA)  
: :  
NATIONAL FEDERATION OF FEDERAL :  
EMPLOYEES LOCAL 1552, :  
: :  
Complainant :  
.....

Janet Cooper, Esquire  
Staff Attorney  
National Federation of Federal  
Employees, Local 1552  
1737 "H" Street, N.W.  
Washington, D.C. 20006  
For Complainant

Charles H. Cook  
Labor Relations Officer

Richard Finnegan  
Chief,  
Labor Relations Branch  
Personnel Division  
Agricultural Research Service  
United States Department of Agriculture  
Hyattsville, Maryland 20782  
For Respondent

Before: WILLIAM B. DEVANEY  
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491, as amended. It was initiated by a complaint dated November 26, 1973, and filed November 28, 1973 (Ass't. Sec. Exh. 1a), and an amended complaint dated December 6, 1973 (Ass't. Sec. Exh. 1c). Both the original complaint and amended complaint alleged a violation of Section 19(a)(6) of the Executive Order, as the result, inter alia, of the Director, Personnel Division, ARS (hereinafter, Agricultural Research Service is also referred to as "ARS" and the Department of Agriculture as "Department"), to whom no Section 15 authority had been delegated, disapproving an agreement entered into by the agency's Chief Negotiator; failing and refusing to submit the signed agreement to the Department's Director of Personnel within the time required by the Department's Regulations; and the Department declaring provisions of an agreement inoperative, as contrary to law, after the agreement had been permitted to become effective.

A hearing was duly held in Washington, D.C., before the undersigned 1/ and briefs were timely filed and have been carefully considered. Upon the entire record in this case, I make the following findings, conclusions and order.

Findings of Fact

The facts are not in dispute and either have been stipulated (Joint Exh. 1) or clarified and expanded upon by further joint exhibits and testimony and may be briefly stated as follows:

1. Local 1552 has been recognized as the exclusive representative for all non-supervisory wage grade employees

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1/ The parties have filed with their briefs, Motions for correction of transcript. Said motions are hereby granted and the requested corrections are set forth in Appendix A hereto. In addition, the spelling of the name of the undersigned is also hereby corrected as set forth in Appendix A.

at ARS' Northern Regional Research Center, Peoria, Illinois, since 1968. 2/ The first agreement was negotiated in 1968 for a term of two years; and was automatically renewed for a further term of two years with a termination date of December 18, 1972.

2. On March 9, 1972, Local 1552 requested renegotiation; and on May 24, 1972, a document entitled "Memorandum of Understanding, Rules and Procedures for Negotiation Sessions" was signed by the parties (Joint Exh. 5), which provided, in part, as follows:

"II. NEGOTIATORS

A. Both Employer [previously defined as the NMN Division USDA, ARS'] and Union representatives will be prepared and authorized to negotiate on any negotiable item contained within original proposal(s).

...

"V. AUTHORITY IN NEGOTIATIONS

The Chief Negotiator for the Employer is authorized by the Director of NMN to negotiate on all matters within his delegated authority and discretion and which are within the purview of Executive Order 11491, as amended. It is likewise understood that the Chief Negotiator for the Union shall have identical authority and responsibility for the Union." (Joint Exh. 5).

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2/ The ARS activity has had a variety of names, i.e. Northern Utilization Research and Development Division; Northern Marketing Nutrition Research Division; Northern Regional Research Laboratory; Northern Research Laboratory and Northern Regional Research Center. It was agreed that, notwithstanding the change in name, the organization as material herein has remained the same. (Tr. 52).

3. Negotiations began July 5, 1972, and an agreement was signed by the local parties October 13, 1972 (Joint Exh. 6), and transmitted to ARS headquarters in Washington.

4. By letter dated November 10, 1972 (Joint Exh. 8), the Director, Personnel Division, ARS, Mr. Glavis B. Edwards, advised the Personnel Officer in Peoria, Mr. Meyners, that the agreement was returned with some nineteen required changes. Mr. Edwards, stated, in part as follows:

"...Approval cannot be granted until the agreement is brought into conformance with appropriate rules and regulations..." (Joint Exh. 8).

After receipt of the letter, the local parties submitted the matter to their respective national headquarters for settlement. By letter dated April 10, 1973, Mr. Edwards advised the Personnel Officer in Peoria, Mr. Meyners, of the changes worked out by his office and NFFE National Headquarters and by letter dated April 13, 1973, the President of NFFE, Mr. N. T. Wolkomir, wrote Mr. Donald D. Hendrick, President of Local 1552, urging adoption of the changes agreed upon and set forth in Mr. Edwards' letter of April 10, 1973 (Joint Exh. 10). On May 25, 1973, a revised agreement incorporating the changes was signed by the local parties (Joint Exh. 11) and was transmitted to ARS headquarters in Washington. By letter dated June 11, 1973, the Director, Personnel Division, ARS, Mr. Edwards, transmitted the agreement to the Department (Joint Exh. 12).

5. The Department's Personnel Manual provides, in part, as follows:

"4-5. NEGOTIATION OF AGREEMENTS

"h. All basic agreements, any supplements and amendments thereto or any extensions or renewals of agreements shall be submitted, for review and approval by the Director of Personnel or his designee no later than thirty (30) calendar days after the date of execution by the parties. Such agreements must have been approved by the agency and ratified by the labor organization, if necessary. Review by the Director of Personnel shall be for the purpose of screening for conflicts with applicable laws, regulations and published Department policies and regulations. Agency Heads shall

assure that the negotiated agreement is in compliance with published policies and regulations of the Agency and appropriate subordinate levels before forwarding the agreement to the Director of Personnel.

"i. The effective date of an agreement ...will be the date of its approval by the Director of Personnel. However, any agreement not approved or referred to the parties for further negotiation by the 45th day after execution by the parties shall become effective on the 46th day subject to post audit by the Director of Personnel." (Joint Exh. 7, DPM-711, Subchapter 4).

6. The agreement having been approved by ARS and the Department having failed to act by the 45th day after the May 25, 1973, execution by the parties, the agreement became effective July 10, 1973. By letter dated July 23, 1973, the Assistant Director of Personnel of the Department, Mr. August M. Seeger, advised the Director, Personnel Division, ARS, Mr. Edwards, that the agreement had been found to comply with applicable laws and Department regulations except in four provisions: Section 4.2-Scope; Section 4.5-Meeting Place; Section 6.2-Procedure for All Contract Grievances, Step 1; and Section 6.2-Procedure for All Contract Grievances, Step 2 (Joint Exh. 13). By letter dated August 3, 1973 (Joint Exh. 14), the Director, Personnel Division, ARS, transmitted Mr. Seeger's letter of July 23, 1973, to the Personnel Officer, Mr. Meyners, in Peoria, with a copy to NFFE.

7. By letter dated August 13, 1973 (Joint Exh. 15), the President of NFFE, Mr. Wolkomir, advised Mr. Seeger that NFFE could not accept his comments with regard to Section 4.2 and 6.2, Step 2 and that he was advising Local 1552 to refuse to alter those provisions.

8. By letter dated August 22, 1973 (Joint Exh. 16) Mr. Seeger responded to Mr. Wolkomir's letter of August 13, 1973, and stated, in part, that,

"Since you raise objections only to our comments in respect to Sections 4.2 and 6.2, Step 2, of the agreement, we assume that the other actions we suggest are acceptable and will be incorporated into the agreement." (Joint Exh. 16)

9. By letter dated August 30, 1973 (Joint Exh. 17), Mr. Wolkomir responded to Mr. Seeger's letter of August 22, 1973, and stated, in part, as follows:

"We are prepared to argue our case before the Federal Labor Relations Council. We therefore request an agency head determination on negotiability so that we may proceed with our appeal." (Joint Exh. 17)

10. By letter dated September 14, 1973 (Joint Exh. 18) addressed to Mr. Wolkomir the Director of Personnel, of the Department, Mr. S. B. Pranger, set forth the Department's determination on negotiability.

11. By letter dated October 15, 1973, Mr. Wolkmoir advised Mr. Seeger that he was thereby charged with violating Section 19(a)(6) of the Executive Order (Joint Exh. 19) and Mr. Seeger responded by letter dated October 19, 1973 (Joint Exh. 20) in which he referred to the agency head determination on negotiability which had been requested and furnished, "...so you could appeal to the Federal Labor Relations Council."

12. At the hearing NFFE stated that the comments of the Department of July 23, 1973 (Joint Exh. 14) with regard to Sections 4.5 and 6.2, Step 1 had been "agreed to by the parties, as proper changes" (Tr. 19); that these sections had been "settled" - "We changed it" (Tr. 20).

13. The current President of Local 1552, Mr. John W. Smith, Jr., testified that the Joint Hearing Committee, which is one of the provisions in dispute (Section 6.2, Step 2), has been used (Tr. 29, 36); but the Regional Personnel Officer of ARS, Mr. Herman H. Meyners, testified that, to his knowledge, there had been no grievance and, accordingly, no occasion to use the negotiated grievance procedures and that the Joint Hearing Committee had not been used. Mr. Meyners stated that there had been consultations between

local managers and Local 1551. Since there clearly appears to have been a misunderstanding as to terms, I find that, in view of the fact that there have been no grievances designated as such, as Mr. Smith stated (Tr. 28), the consultations had were not pursuant to Section 6.2, Step 2, but were consultations pursuant to other provisions of the Agreement.

14. The designated officer for Section 15 review of agreements is the Director of Personnel of the Department (Tr. 87). ARS has not been delegated any authority to approve agreements under Section 15 of the Executive Order. When the Administrator of ARS forwards an agreement to the Department his obligation is to assure that the agreement, as it is submitted for approval, conforms with ARS policy, although if obvious omissions or violations of FPM or DPM requirements are noted by ARS they would seek correction before submission to the Department for approval.

#### CONCLUSIONS

The clash of protected rights makes this a most troublesome case. On the one hand, Section 15 of the Executive Order mandates that agreements be subject to the approval of the agency head (or his designee) and this authority is not affected by the fact that an agreement has been negotiated and signed. Local 174, American Federation of Technical Engineers, AFL-CIO and Supship, USN, 11th Naval District, FLRC No. 71A-49 (1973). It is also clear that conformity to the Executive Order is included within the term "applicable laws" of Section 15. Local 174, AFTE, supra.

On the other hand, Section 11 of the Executive Order requires good faith negotiation and Section 19(a)(6) of the Executive Order makes it an unfair labor practice for agency management to refuse to consult, confer, or negotiate in good faith with a labor organization as required by the Order, Army and Air Force Exchange Service, Keesler Consolidated Exchange, A/SLMR No. 144 (1972); and dilatory tactics which delay negotiations may violate Section 19(a)(6).

#### 1. Procedures Caused Unreasonable Delay.

In recognition of the mutual obligation of agency management and the Union to delegate meaningful authority to their respective negotiators, a Memorandum of Understanding was signed May 24, 1972. Thereafter, on October 13, 1972, the local parties signed a new agreement. Contrary to the requirement of the Department's Personnel Manual, the agreement was not submitted to the Director of Personnel of

the Department within 30 calendar days after the date of execution by the parties. Instead, the Director, Personnel Division, ARS, by letter dated November 10, 1972, returned the agreement with some nineteen changes and informed the parties that "Approval cannot be granted until the agreement is brought into conformance with appropriate rules and regulations". A revised agreement was signed May 25, 1973, and the Director, Personnel Division, ARS, transmitted the agreement to the Department for approval on June 11, 1973, with the notation that the submitted agreement complied with Department requirements under 711-4-5d. On July 23, 1973, the Department advised the Director, Personnel Division ARS, that four provisions of the agreement were contrary to applicable laws, and the Director, Personnel Division, ARS, transmitted the advise to complainant on August 3, 1973.

The Department's Personnel Manual governs consultations and negotiation of agreements. ARS has no separate Personnel Manual, although it implements the DPM by administrative memorandums (AM). Respondent stated that review by ARS is governed by DPM Chapter 11 (See, Joint Exh. 7). In accordance with Section 23 of the Executive Order and fully consistent with the obligations of Section 11(a) of the Executive Order, United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (1972), the Department issued appropriate regulations which empowered its representatives to negotiate and enter into agreement on all matters within the scope of negotiations in the bargaining unit. Thus, DPM, Chapter 711, Section 4-3, provides, in part, that, "Officials designated to represent management in negotiations ... shall be delegated authority to reach agreement on all matters appropriate for negotiation at that level." In turn, the Memorandum of Understanding confirmed the delegation of this authority to the activity's Chief Negotiator (Joint Exh. 5).

Rejection of the October 13, 1972, agreement by the Director, Personnel Division of ARS, to whom no Section 15 approval authority was delegated, negated the authority of the Chief Negotiator, contrary to the requirement of Section 11(a) of the Executive Order and DPM Section 4-3, and violated Section 19(a)(6) of the Executive Order. Joint Tactical Communications Office (Tri-Tac), Department of Defense, Fort Monmouth, New Jersey, A/SLMR No. 396 (1974), which adopted the findings, conclusions and recommendations of the Administrative Law Judge in Case No. 32-3462(CA) (1974).

Respondent's assertion that the Director, Personnel Division, ARS, properly disapproved the Agreement of October 13, 1972, pursuant to the portions of DPM 4-5h which provide that,

"Such agreements must have been approved by the agency..."

and that,

"Agency Heads shall assure that the negotiated agreement is in compliance with published policies and regulations of the Agency and appropriate subordinate levels before forwarding the agreement to the Director of Personnel."

must be rejected. The Memorandum of Understanding required that Local 1551's proposals be submitted prior to the commencement of negotiations; negotiations began July 5, 1972, and the agreement was not signed until October 13, 1972. Not only was the Chief Negotiator's authority to reach agreement, required by Section 11(a) of the Order and implemented DPM 4-3, confirmed by the Memorandum of Understanding, but delegation of such authority imposed on the Agency's Chief Negotiator the obligation to assure, on behalf of the Agency Head, that the negotiated agreement was in compliance with published ARS policies and regulations. In agreement with the decision in Tri-Tac, supra, approval by the Director of ARS must be, in effect, a ministerial act, since Section 15 approval has, specifically, been delegated to the Department's Director of Personnel. Such result is required by Section 11(a) of the Executive Order and by DPM Section 4-3. As the Council stated in the Merchant Marine Academy case, supra,

"Clearly, the Order requires the parties to provide representatives who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit."

To permit the Director, Personnel Division, ARS, to disapprove an agreement entered into by the duly authorized Chief Negotiator of the activity would make a mockery of the obligation. Indeed, the frustration of the bargaining process was further clearly demonstrated by the facts that:

a) resolution of the matters raised by the Director, Personnel Division, ARS, in his letter of November 10, 1972, moved from the local level to the national headquarter levels of ARS and NFFE and, eventually, back to the local parties for adoption in April, 1973; b) not until August 3, 1973, was NFFE advised by the Department that four provisions, each of which was part of the initial agreement of October 13, 1972, and the revised agreement of May 25, 1973, were contrary to applicable provisions of law.

Not only did the disapproval of the agreement by the Director, Personnel Division, ARS, directly frustrate the bargaining process, but the failure of ARS to submit the agreement of October 13, 1972, to the Director of Personnel within thirty days after the date of execution by the parties, as required by DPM 4-5h, unreasonably delayed bargaining and, itself, constituted a violation of Section 19(a)(6) of the Executive Order.

2. Section 15 Approval

Pursuant to Section 2 of the Executive Order, the Department is the agency for the purposes of Section 15 approval; and DPM Section 4-5h expressly provides that the Director of Personnel, or his designee, shall review and approve agreements in accordance with Section 15 of the Executive Order. An agreement with a labor organization is subject to the approval of the head of the agency, or by his designee, notwithstanding the delay in submission, which has been found to have been in violation of 19(a)(6) of the Executive Order; and notwithstanding execution of the agreement. Local 1741, American Federation of Technical Engineers, AFL-CIO and Supships, USN, 11th Naval District, San Diego, California, FLRC No. 71A-49 (1973).

The Department approved the revised agreement on May 25, 1973, except for the four provisions it found contrary to "applicable laws". As to two of the provisions NFFE has accepted the Department's determination and has changed, or agreed to change, the provisions as indicated by the Department. As to the remaining two provisions (Sections 4.2 and 6.2, Step 2) the Department has determined that said provisions are contrary to law and therefore, not negotiable. Section 15 specifically authorizes disapproval of agreements contrary to "applicable laws", including the Executive Order, Local 174, AFTE, supra, and Section 11(c) provides that,

"(c) If, in connection with negotiation, an issue develops as to whether a proposal is contrary to law...or this Order and therefore not negotiable, it shall be resolved as follow;

...

"(4) A labor organization may appeal to the Council for a decision when -

"(i) it disagrees with an agency head's determination..."

(Executive Order 11491, as amended)  
(Emphasis supplied).

The President of NFFE requested the Department's determination on negotiability and the determination was issued by the Department September 14, 1973. Whether or not NFFE appealed the Department's determination to the Council, Section 11(c) of the Executive Order lodges exclusive jurisdiction in the Council to determine disputes concerning negotiability, at least in the absence of a baseless claim interposed solely for delay which I expressly find not to be true here, or when other suitable adjudicatory procedures are provided under the Order for resolution of the matter, FLRC No. 71P-4 (1971), which is also not true in this case. Accordingly, as the Council has exclusive jurisdiction to determine disputes involving an agency head's determination as to negotiability, the issue may not properly be determined under the complaint procedures of the Order.

It may be argued that "negotiability" pertains only to the point that an agreement becomes effective; that when the agreement of May 25, 1973, became effective on July 10, 1973 (pursuant to DPM 4-5h, and the failure of the Director of Personnel to act within 45 days after execution of the agreement by the parties), the only basis on which any portion of the fully effective contract could be rendered inoperative would be that such provision is contrary to law; and that jurisdiction exists under the complaint procedures to determine whether the provisions in question are contrary to law. Such argument ignores, however, the reservation of jurisdiction to the Council to determine appeals on negotiability issues in Sections 4(c) and 11(c) of the Order; the retention in the amended Order of agency approval as a necessary requirement; and the limitation incorporated into Section 15 that disapproval be based solely on conformity with laws, existing published agency policies and regulations and with regulations of other appropriate authorities. The

provision of DPM 4-5h is intended to insure that any executed agreement be fully effective on the 46th day following execution by the parties subject only to post audit in the event any portion should be found contrary to law, etc. To conclude that DPM 4-5h withdraws the right of agency review under Section 15 when an agreement has become effective would not only be contrary to the intent and purpose of amended Section 15 and create jurisdiction to determine negotiability disputes under the complaint procedures which the Executive Order carefully and expressly reserved to the Council, but would compel the abandonment of provisions as contained in DPM 4-5h. Required deferral of an operative agreement pending agency head approval would be inimical to the intent and purpose of the Order and contrary to the interests of employees and labor organizations and is rejected under the circumstances of this case, including the following:

a) The Department acted with reasonable promptitude; b) There is no indication that the provisions, found to be contrary to law, during the short period from July 10, 1973 to July 23, 1973, when, as part of the agreement they were technically in effect, had been employed or relied upon in any manner to the possible prejudice of any employee; and c) The determination of negotiability, whether correct or incorrect, was not wholly without merit and was not interposed for delay or to thwart the collective bargaining process.

Accordingly, the Department properly exercised Section 15 review of the agreement of May 25, 1973, and its determination on negotiability is not subject to review under the complaint procedures of the Order.

3. Timeliness

Section 203.2(2) of the Regulations provides that the charge must be filed within six months of the alleged unfair labor practice. The initial unfair labor practice, i.e., the action of Director, Personnel Division, ARS, in violation of 19(a)(6), occurred in November, 1972, and the charge was not filed until October 15, 1973; however, the violation was a continuing violation; the Director, Personnel Division, ARS, continued to assert the authority to review signed agreements at all times, including July, 1973; and no executed agreement was submitted to the Director of Personnel until June 11, 1973. Accordingly, the charge was timely filed.

RECOMMENDATIONS

Having found that Respondent Activity, Agricultural Research Service, engaged in conduct which was in violation of Section 19(a)(6) of the Executive Order by disapproving an agreement entered into by its duly authorized Chief Negotiator and by failing and refusing to submit signed agreements to the Director of Personnel of the Department of Agriculture for Section 15 approval within 30 days from the date of execution by the parties as required by Department regulation, I recommend that the Assistant Secretary adopt the following order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Agricultural Research Service, United States Department of Agriculture, shall:

(1) Cease and desist from:

(a) Withholding approval of agreements entered into by its duly authorized negotiators;

(b) Failing and refusing to submit agreements to the Director of Personnel, or his designee, within 30 days after the date of execution by the parties as required by Department Regulations; and

(c) In any like or related manner refusing to consult, confer, or negotiate with Local 1551, NFFE, or other duly certified or recognized labor organization as required by Executive Order 11491, as amended.

(2) Take the following affirmative action in order to effectuate the purpose and provisions of Executive Order 11491, as amended:

(a) Post at its Northern Research Center, facility, Peoria, Illinois, copies of the attached notice marked "Appendix B"

on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Northern Research Center and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

*William B. Devaney*  
 WILLIAM B. DEVANEY  
 Administrative Law Judge

Dated: November 21, 1974  
 Washington, D.C.

The transcript of hearing in Case No. 22-5144 (CA) is hereby corrected as follows:

1. The name of the Administrative Law Judge, which appears throughout the transcript as: "William B. Devayney" is hereby corrected to read "William B. Devaney".

2. The following corrections, as noted by the parties in their respective Motions, are hereby made on the pages and lines shown below:

<u>Page</u>	<u>Line</u>	<u>Corrected wording, spelling, etc.</u>
5	7	a Department Regulation Number 711-4, 5(i) is worded in such
12	22	and it does refer to the Joint Exhibits which I will introduce
14	9	Joint Exhibit No. 2, this letter of exclusive recognition
25	5	Q Did you have, as first vice-president, knowledge of all
36	15	MR. COOK: First, the grivence is taken up
	20	MR. COOK: I am trying to say they can't
44	17	if I wait until the noon recess it might, if there is any
46	10	MR. FINNEGAN: Chief, Labor Relations and Safety
85	9	agency, in this particular case referring to the subordinate
	17	is responsible for assuring that the agreement conforms to
86	9	In other words, the Executive Order requires
92	5	Q Isn't it, in fact, the case that there are 19 separate
93	10	Federal sector. The FPM, in this particular case, In the
	18	tions, So, for example, if there were no review at the



APPENDIX A (continued)

<u>Page</u>	<u>Line</u>	<u>Corrected wording, spelling, etc.</u>
95	24	and amendments of agreements shall be effective on the date of approval
106	22	Q Okay, to be more specific, if a conflict occurred
121	4	Mr. Edminster, the Administrator.
	10	had approved; is that correct?
128	21	the Executive Order, Department Regulations, FPM, Comptroller General
133	1	in an unfair labor practice hearing.
134	22	Based on that language alone, it doesn't fit in with the
135	14	third sentence. "[Quote] However, any employee or group of employees
	20	the adjustment." [unquote] Interpret the word "Joint" because it is
137	11	was in all 26 agency's regulations, above and beyoon the

APPENDIX B

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effecuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT

RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

AGRICULTURAL RESEARCH SERVICE WILL NOT withhold approval of agreements executed by its duly authorized negotiators.

AGRICULTURAL RESEARCH SERVICE WILL submit agreements to the Director of Personnel, or his designee, within 30 days after the date of execution by the parties, as required by Department Regulations.

AGRICULTURAL RESEARCH SERVICE WILL NOT refuse to consult, confer, or negotiate with Local 1551, NFEE, or other duly certified or recognized labor organization as required by Executive Order 11491, as amended.

Agricultural Research Service  
Northern Research Center  
United States Department of  
Agriculture

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
Director

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

May 30, 1975

A/SLMR No. 520

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

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

U.S. NAVAL AIR STATION  
NEW ORLEANS,  
BELLE CHASSE, LOUISIANA  
A/SLMR No. 520

U.S. NAVAL AIR STATION  
NEW ORLEANS,  
BELLE CHASSE, LOUISIANA

The subject case arose as the result of a decertification petition filed by an individual seeking to decertify Local R5-126, National Association of Government Employees (NAGE) as the exclusive representative of a unit of General Schedule firefighters at the Activity. The Activity takes the position that a three year agreement negotiated between it and the NAGE barred the instant decertification petition. The Petitioner and the Intervenor, International Association of Fire Fighters, AFL-CIO, Local F-189 (IAFF), claim that the petition should be considered as timely filed because the NAGE local is defunct and, therefore, under Section 202.3(c)(3) of the Regulations of the Assistant Secretary, unusual circumstances exist which substantially affect the unit or the majority representation.

Under all of the circumstances, the Assistant Secretary found the NAGE local to be defunct as the evidence established that it was unwilling or unable to represent the employees in the unit involved. In this regard, the Assistant Secretary noted particularly that NAGE Local R5-126 had no dues paying members; that it had no officers; that the local funds had been disbursed among the membership; and that neither the NAGE local nor the NAGE National Office, even though notified, sought to intervene in the proceeding or took any affirmative action to represent the employees in the unit.

Accordingly, the Assistant Secretary ordered that the decertification petition be dismissed. He noted, in this regard, that in view of his finding of defunctness, a decertification election was rendered unnecessary as there is not now any exclusively recognized labor organization representing the unit employees.

Activity

and

Case No. 64-2561(DR)

ROBERT E. HIRSTIUS

Petitioner

and

INTERNATIONAL ASSOCIATION OF  
FIRE FIGHTERS, AFL-CIO, LOCAL F-189

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer 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:

The Petitioner, Robert E. Hirstius, seeks decertification of Local R5-126, National Association of Government Employees, herein called NAGE, the exclusive representative of a unit of General Schedule fire fighters employed by the Activity. The Activity takes the position that a three year agreement negotiated between it and the NAGE, which was effective April 17, 1973, bars the instant decertification petition. On the other hand, the Intervenor, the International Association of Fire Fighters, AFL-CIO, Local F-189, herein called IAFF, contends that the instant petition should be considered as having been timely filed in that the NAGE local involved is defunct and, therefore, under Section 202.3(c) (3) of the Assistant Secretary's Regulations, unusual circumstances exist which substantially affect the unit or the majority representation. Neither the NAGE local involved nor its National Office sought to intervene in this proceeding. Further, neither sought to appear at the hearing although they were served with a copy of the Notice of Hearing by the Assistant Regional Director.

The record reveals that NAGE Local R5-126 was certified as the exclusive representative of the employees in the unit on November 10, 1970. 1/ Thereafter, the parties negotiated a two year agreement, dated February 24, 1971, and, upon its expiration, negotiated a three year agreement dated April 17, 1973.

The evidence establishes that the Petitioner was the president of NAGE Local R5-126 from its inception until his formal resignation effective September 10, 1974. In this connection, the record indicates that there were ten dues paying members of the NAGE in the unit through the end of August 1974; 2/ that these members had expressed dissatisfaction with the NAGE National Office; that all of the remaining dues paying members revoked their dues authorizations in August 1974; 3/ and that in August 1974 the remaining union funds were disbursed among the resigning members.

The record reflects that, while historically the Petitioner himself conducted most of the union business with respect to the unit involved herein, the NAGE National Office assisted him in negotiating the first agreement and gave some assistance regarding two grievances. However, there was no evidence that the NAGE National Office has taken any affirmative action to administer the current negotiated agreement or to represent any of the unit employees since receiving notification of the instant decertification petition and the Petitioner's resignation.

Under all of the above circumstances, I find that NAGE Local R5-126 is defunct in that the evidence establishes that it is unwilling or unable to represent the employees in the unit involved. 4/ In this regard, it was noted particularly that NAGE Local R5-126 has no dues paying members; that it has no officers; that the local funds have been disbursed among the membership; and that the NAGE did not seek to intervene in this proceeding. Moreover, the National Office of the NAGE, although notified of the decertification petition and the Petitioner's resignation, has taken no affirmative action toward representing the employees in the unit involved. Accordingly, I find that NAGE Local R5-126 is defunct and that the Activity has no remaining obligation to honor the current agreement negotiated between it and the NAGE or to recognize the NAGE as the exclusive representative of the firefighters in question.

1/ The parties present at the hearing stipulated as to the unit's appropriateness.

2/ The evidence establishes that there were 34 employees in the unit involved.

3/ It was stipulated that as of September 1, 1974, there were no dues paying members of NAGE Local R5-126.

4/ See Federal Aviation Administration, Department of Transportation, A/SLMR No. 173, in which the Assistant Secretary found a labor organization to be defunct "when it is unwilling or unable to represent the employees in its exclusively recognized or certified unit." The Assistant Secretary further noted that the "temporary inability to function does not constitute defunctness." There is no evidence in the instant case that there was merely a temporary inability to function.

-2-

Because I have found the exclusively recognized representative, NAGE Local R5-126, to be defunct, a decertification election is rendered unnecessary as there is not now any exclusively recognized labor organization representing the unit employees. Therefore, I shall order that the subject decertification petition be dismissed. 5/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 64-2561(DR) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
May 30, 1975

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

5/ Inasmuch as the IAFF did not intervene in this case on the basis of a cross-petition, its position is dependent on the status of the subject decertification petition. As the decertification petition herein has been dismissed, the intervention also must necessarily fall. It should be noted, however, that the dismissal of the instant decertification petition does not, in any way, preclude the filing of an appropriate representation petition for the employees in the unit involved by the IAFF or by any other labor organization.

-3-

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

U.S. ARMY CLUB MANAGEMENT DIRECTORATE, TAGCEN,  
 FORT MEADE, MARYLAND  
 A/SLMR No. 521

This case arose when the American Federation of Government Employees, AFL-CIO, Local 1622 (AFGE), filed a petition seeking an election in a unit of nonappropriated fund employees of the Activity. The parties were in essential agreement as to the scope and composition of the appropriate unit; however, the issue was raised whether or not a number of employees sought to be excluded were management officials within the meaning of the Order.

The Assistant Secretary found that the unit sought by the AFGE was appropriate for the purpose of exclusive recognition and directed an election in that unit. He also made a number of eligibility findings. Thus, based on the parties' stipulations and record evidence, the Assistant Secretary concluded that a Club Management Specialist should be excluded from the unit as a supervisor and that a Procurement Analyst was not a management official and, therefore, should be included in the unit. Noting the definition of management official 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, he found also that two Business Management Analysts, two Loan Specialists and eight Club Management Specialists, alleged to be management officials, were not management officials within the meaning of the Order. Based on a lack of record evidence, he made no eligibility finding with respect to one Club Management Specialist. The Assistant Secretary further found that two Club Management Specialists were neither management officials nor supervisors and that one of the Activity's Club Management Specialists was neither a management official nor an employee engaged in Federal personnel work within the contemplation of Section 10(b)(2) of the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY CLUB MANAGEMENT DIRECTORATE, TAGCEN,  
 FORT MEADE, MARYLAND 1/

Activity

and

Case No. 22-5782(RO)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, AFL-CIO, LOCAL 1622

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 Earl T. 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 2/, 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 1622, herein called AFGE, seeks an election in a unit of all full-time and part-time nonappropriated fund employees of the U.S. Army Club Management Directorate, TAGCEN, located at Fort Meade, Maryland, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors and guards. The parties generally were in agreement as to the scope and composition of the claimed unit. However, the Acting Assistant Regional Director for Labor-Management Services issued a Notice of Hearing for the purpose of eliciting evidence on the status of certain employees who the parties had agreed to exclude from the claimed unit on the basis that they are management officials. 3/

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

2/ The Activity filed an untimely brief which was not considered.

3/ As indicated above, the unit sought by the AFGE would exclude professional employees. In view of the fact that no evidence was adduced at the hearing with respect to the professional status of any employees sought to be excluded, I shall make no findings in this regard.

The record reveals that the mission of the Activity is to exercise central direction and technical supervision for Army officers clubs, non-commissioned officers clubs and enlisted mens' clubs worldwide. The claimed unit is limited to those employees of the Activity located at Fort Meade. While the Activity also has under its jurisdiction two regional offices in Hawaii and Germany and two field offices in Texas and California, the record reveals that the employees of the regional offices and field offices are serviced by different personnel offices than the employees in the claimed unit. 4/ Under the circumstances, I conclude that the evidence is insufficient to establish that the claimed employees at Fort Meade and those of the regional and field offices share a community of interest which could warrant the latter's inclusion in the petitioned for unit. Accordingly, I find that the petitioned for unit of employees located at Fort Meade is appropriate for the purpose of exclusive recognition, as such employees share a clear and identifiable community of interest and such a unit will promote effective dealings and efficiency of agency operations.

#### Eligibility issues 5/

The record discloses that eligibility issues were raised with respect to the following employee classifications:

#### Business Management Analysts

It is contended that two Business Management Analysts, John J. Ontko and Louis M. Friedman, are management officials. The record reveals that Ontko serves as a member of a team of specialists which visits the various Army club installations and analyzes their operations in order to suggest changes which could lead to improved operating efficiency. In the performance of his duties, Ontko serves as an expert or professional rendering resource information to his supervisors rather than as an individual who actively participates in the ultimate determination as to what a particular Activity policy will be. 6/ Accordingly, I find that Ontko is not a management official within the meaning of the Order and should be included in the unit found appropriate.

4/ Although the parties were in agreement as to the appropriateness of the claimed unit of employees located at Fort Meade as well as to the categories of employees to be included in, and excluded from, such unit, evidence adduced at the hearing in this matter indicated that the Activity had the above noted regional and field offices. Under these circumstances, the Hearing Officer properly sought to elicit evidence concerning these offices.

5/ At the hearing, the parties stipulated that one Club Management Specialist position occupied by Frederick S. Newman, Jr. was supervisory in nature, and that another position, that of Procurement Analyst, occupied by Helen C. Thomas, was not a managerial position. As there was no contrary evidence in the record in this regard, I find that the Club Management Specialist position occupied by Newman should be excluded from the unit found appropriate and the Procurement Analyst position occupied by Thomas should be included in the unit.

6/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

Business Management Analyst Louis M. Friedman works in staff capacity under the supervision of a Branch Chief and is involved in preparing regulations and directives concerning management of the Activity. The evidence is insufficient to establish that Friedman's participation in policy determination extends beyond that of an expert or professional providing resource information and recommendations. Therefore, I find that Friedman is not a management official within the meaning of the Order and should be included in the unit found appropriate.

#### Loan Specialists

It is asserted that two Loan Specialists, Mary E. Russo and Wilson R. Russell, are management officials. The record reveals that both Loan Specialists perform similar duties, which involve evaluating applications from Army Clubs for loans and monitoring loan repayments. The evidence indicates that the job functions of these employees are performed within established guidelines and do not involve the formulation of policy. Accordingly, I find that Russo and Russell are not management officials within the meaning of the Order and should be included in the unit found appropriate.

#### Club Management Specialists

It is contended that twelve employees classified as Club Management Specialists, who work in various capacities in several branches of the Activity, are management officials and should be excluded from the unit.

Richard D. Belgrano, Claude L. Hatecke, Frederick J. Pazzano and Benedict A. Yankolonis are Club Management Specialists assigned to the Activity's Franchise Operations Branch. 7/ The record indicates that Belgrano is involved in performing marketing surveys and providing marketing information; Hatecke coordinates the design of club facilities; and Yankolonis performs a liaison function between the Activity and the clubs and disseminates policies and instructions regarding the management of the clubs. The evidence does not establish that the job functions performed by these three employees are other than those of experts preparing or imparting resource information to Activity management. Accordingly, I find that Belgrano, Hatecke, and Yankolonis are not management officials within the meaning of the Order and should be included in the unit found appropriate.

Stanley P. Day, John O. Lamphier, Jr., and Amy M. Wu are Club Management Specialists employed in the Activity's Franchise Analysis Branch. Day and Lamphier review and analyze the financial statements and audit reports of Army club operations and Wu compiles statistical financial data. The evidence establishes that their duties involve the compilation of resource information rather than the participation in policy formulation. Accordingly,

7/ The record does not indicate Pazzano's duties and responsibilities. Accordingly, I shall make no finding with respect to whether he is a management official within the meaning of the Order.

I find that Day, Lamphier and Wu are not management officials within the meaning of the Order and should be included in the unit found appropriate. <sup>8/</sup>

Peter D. Lucey and Robert M. Monetta are Club Management Specialists specializing in the area of food and beverage operations. In the performance of their duties, Lucey and Monetta visit the Army clubs and make recommendations with respect to improving the efficiency of food and beverage operations. Edward C. Burgnon and William R. Gregg are Club Management Specialists performing duties involving the establishment and operation of training programs for Army club management and personnel. The evidence establishes that Lucey, Monetta, Burgnon and Gregg do not participate in the determination of what operating policies will be but, rather, act in the capacity of experts conveying interpretations of policies and operating procedures to the management and personnel of the various Army clubs. Under these circumstances, I find that Lucey, Monetta, Burgnon and Gregg are not management officials within the meaning of the Order and should be included in the unit found appropriate.

It also is maintained that Kenneth P. Fisher, a Club Management Specialist involved in personnel work, is a management official. The record discloses that Fisher reviews the applications of military personnel for entry into the club management field and makes recommendations to a selection panel as to which applicants should be selected. The record discloses further that Fisher does not, at present, perform his above noted job functions with respect to civilian employees or nonmilitary job applicants. Under the circumstances, I find that Fisher is not a management official within the meaning of the Order, inasmuch as he does not participate in the determination of policy but, rather, renders recommendations based on existing policies and criteria. Moreover, I find that Fisher is not an employee engaged in Federal personnel work within the contemplation of Section 10(b)(2) of the Order in view of the fact that such personnel work as he performs is in connection with individuals who are in a military capacity and could not be included within the claimed unit. <sup>9/</sup> Accordingly, I find that Fisher is eligible for inclusion in the unit found appropriate.

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

All nonappropriated fund employees of the  
U.S. Army Club Management Directorate,  
TAGCEN, located at Fort Meade, Maryland,

<sup>8/</sup> Evidence adduced at the hearing indicated that Day and Lamphier each direct the activities of two clerks. However, I find that Day and Lamphier are not supervisors within the meaning of Section 2(c) of the Order inasmuch as the record reveals that any direction by Day and Lamphier with respect to the clerks is of a routine nature, is dictated by the nature of the work involved, and does not require the use of independent judgement.

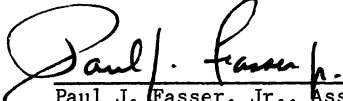
<sup>9/</sup> Cf. St. Louis Region, United States Civil Service Commission, St. Louis, Missouri, A/SLMR No. 162.

excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in the Order.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted, as early as possible, but not later than 60 days from the date below. The appropriate Area Director 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 or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 1622.

Dated, Washington, D.C.  
June 23, 1975

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

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

DEPARTMENT OF THE NAVY,  
 NAVY COMMISSARY COMPLEX OFFICE,  
 LONG BEACH, CALIFORNIA  
 A/SLMR No. 522

This case involved a petition for clarification of unit filed by the American Federation of Government Employees, Local 2631, AFL-CIO (AFGE) seeking a determination that the employees of the Navy Commissary Complex Office, Long Beach, California (Complex Office) be included in its exclusively recognized unit of nonsupervisory employees of the Long Beach Navy Commissary Store, Long Beach, California.

The AFGE was granted exclusive recognition in 1966 for a unit of all nonsupervisory employees of the Long Beach Navy Commissary Store. In 1970 the Complex Office was established at Long Beach to perform at one location certain administrative functions previously performed by the Long Beach Navy Commissary Store and three other Navy Commissary Stores. The record revealed that the Complex Office, which is located in a different building some distance from the Long Beach Navy Commissary Store, was initially staffed with employees transferred from the Long Beach Navy Commissary Store. However, employees hired subsequently were recruited from a number of other sources.

The Assistant Secretary concluded that the employees of the Complex Office were not a part of the exclusively recognized unit of employees of the Long Beach Navy Commissary Store. In this regard, he noted that the Complex Office and the Long Beach Navy Commissary Store perform different functions; the employees of the Complex Office perform the same services for all four stores of the Complex on an equal basis; the employees of the Complex Office and the Long Beach Navy Commissary are located in different buildings and have different duties and responsibilities; most of the former employees of the Long Beach Navy Commissary Store who became employees of the Complex Office perform different job functions from those which they performed previously; and there was no evidence that the exclusive representative of the Long Beach Navy Commissary Store had represented, or had sought to represent, any employee of the Complex Office in a grievance or appeal action. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
 NAVY COMMISSARY COMPLEX OFFICE,  
 LONG BEACH, CALIFORNIA

Activity

and

Case No. 72-4880

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, LOCAL 2631, AFL-CIO

Petitioner

DECISION AND ORDER

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

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

The Petitioner, American Federation of Government Employees, Local 2631, AFL-CIO, herein called AFGE, filed a petition for clarification of unit (CU) seeking to clarify its current exclusively recognized unit, consisting of all nonsupervisory employees of the Long Beach Navy Commissary Store, to include the employees of the Navy Commissary Complex Office, Long Beach, California (Complex Office). The Activity took the position that the unit currently represented by the AFGE is limited to the employees of the Long Beach Navy Commissary Store and does not encompass the employees of the Complex Office.

The record reveals that prior to 1970 there were three Navy Commissary Stores and one branch Commissary Store operating on an independent, autonomous basis in the northern half of the Eleventh Naval District. Thus, in addition to the Long Beach Navy Commissary Store, there were Commissary Stores located at China Lake and Port Hueneme and a store at Point Mugu which was operated as a branch of the Port Hueneme Navy Commissary Store. These stores performed the function of retailing foodstuffs to active duty and retired military personnel and their dependents.

The AFGE was granted exclusive recognition in 1966 for a unit consisting of all nonsupervisory employees of the Navy Commissary Store at Long Beach. Further, the record reveals that the employees of the Navy Commissary

Store at Port Hueneme are represented by the National Association of Government Employees, Local R12-29, and that the employees of the Point Mugu and China Lake stores are not represented exclusively by any labor organization.

On April 1, 1970, the Complex Office was established at Long Beach to consolidate at one location certain administrative, inventory, data processing, stock control, pricing, procurement and accounting functions which had theretofore been performed by the individual stores. The record reveals that the Complex Office provides these services on an equal basis to each of the four stores under its jurisdiction. In this regard, the evidence establishes that the primary functions performed by Complex Office employees are dissimilar to those performed currently by any employees of the Long Beach Navy Commissary Store as well as those performed by employees of the other three stores.

The Complex Office, which is located in an office building some distance from the Long Beach Navy Commissary Store, initially was staffed with six persons transferred from the Long Beach Navy Commissary Store. However, employees hired subsequent to the establishment of the Complex Office were recruited from a number of other sources. 1/ Moreover, the record reveals that not only do the employees at the Complex Office provide services which are not now performed at the four stores, but that, in almost all instances, the former employees of the Long Beach Navy Commissary Store, who became employees of the Complex Office, perform different duties from those which they performed prior to their transfer.

Although the AFGE contends that it historically and traditionally has represented the employees of the Complex Office, as well as those of the Long Beach Navy Commissary Store, the record fails to establish any instance where the AFGE has represented, or has sought to represent, any Complex Office employee in a grievance or appeal action. Moreover, the unit description contained in the negotiated agreements between the parties which were entered into after the establishment of the Complex Office makes no reference to employees of the Complex Office. Nor do such negotiated agreements contain any special reference or provision with respect to Complex Office employees.

Under these circumstances, I find that the employees of the Complex Office are not part of the exclusively recognized unit of employees of the Long Beach Navy Commissary Store. Thus, as noted above, the Long Beach Navy Commissary Store and the Complex Office perform different functions; the employees of the Complex Office perform the same services for all four stores of the Complex on an equal basis; the employees of the Complex Office and Long Beach Navy Commissary Store are located in different buildings and have different duties and responsibilities; most of the former employees of the Long Beach Navy Commissary Store who became employees of the Complex

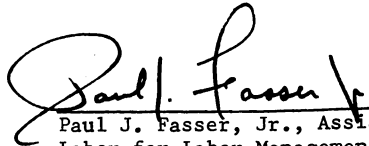
1/ Although certain of the employees at the Complex Office continued to have union dues deducted after their transfer from the Long Beach Navy Commissary Store, the record indicates that this occurred without the knowledge or acquiescence of the Commanding Officer of the Complex Office and resulted from the failure to cancel the dues deductions by the Regional Finance Center, which handles the payroll for the stores involved.

Office perform different job functions from those which they performed previously; and there is no evidence that the exclusive representative of the Long Beach Navy Commissary Store has represented, or has sought to represent, any employee of the Complex Office in a grievance or appeal action. Accordingly, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 72-4880 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 23, 1975

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



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

VETERANS ADMINISTRATION,  
 VETERANS ADMINISTRATION DATA PROCESSING CENTER,  
 AUSTIN, TEXAS

AND

VETERANS ADMINISTRATION,  
 DEPARTMENT OF DATA MANAGEMENT,  
 WASHINGTON, D.C.

A/SLMR No. 523

This matter arose upon the filing of eight unfair labor practice complaints by the National Federation of Federal Employees, Ind., Local 1745 (NFFE).

One complaint involved three separate allegations that the Respondent Veterans Administration Data Processing Center (DPC) violated Section 19(a)(1) and (2) of the Order. In its first allegation, the NFFE alleged that a supervisor had placed a discriminatory requirement on a NFFE steward, that she contact him whenever she left the project, even when the reason for her absence was work-related. The DPC argued that as the matter was resolved within a few days there should be no violation found, or, if a violation were found, there should be no remedy required. The Administrative Law Judge concluded that the DPC's conduct constituted adverse disparate treatment toward the steward in violation of Section 19(a)(1) of the Order. He also found that the requirement constituted discrimination regarding a working condition and, thus, violated Section 19(a)(2). Moreover, he concluded that the DPC's conduct was not isolated, de minimus or fully remedied and, thus, a remedial order was required. The Assistant Secretary adopted the Administrative Law Judge's recommendation that the DPC's conduct was violative of Section 19(a)(1) of the Order. However, contrary to the Administrative Law Judge, the Assistant Secretary found that the requirement did not constitute a violation of Section 19(a)(2) of the Order as there was no evidence adduced that the steward was, in fact, required to comply with the reporting requirement. In its second allegation, the NFFE contended that when the supervisor read a memorandum to employees regarding an Equal Employment Opportunity (EEO) complaint filed by the NFFE, he was attempting to discredit the NFFE by breaking the confidentiality of the memorandum. In this regard, the supervisor admitted reading the memorandum to employees because his secretary, who was mentioned in the memorandum, had told him that the NFFE had not asked her permission before using her name in the EEO complaint. The Assistant Secretary adopted the Administrative Law Judge's finding of violation of Section 19(a)(1) on the basis that the reading of the memorandum to the employees conveyed to them that confidential matters brought to the attention of the exclusive representative would not be kept confidential. In its third allegation, the NFFE contended that a low promotional appraisal given the NFFE steward by her supervisor and the supervisor's requirement that she take a job-related examination against her wishes were both related to her union activities. In this regard, the Assistant Secretary agreed with the Administrative Law Judge's

recommendation that this allegation should be dismissed based on the NFFE's failure to meet its burden of proof.

A second complaint charged the DPC with a Section 19(a)(1) and (2) violation based on management's alleged promotion of a decertification petition by allowing the use of its mail routing system for distribution of the petition. Specifically, the NFFE charged that an alleged supervisor sponsored the decertification petition and that other DPC supervisors failed to prevent use of the mail system and failed to prevent their employees from engaging in decertification activities on duty time. The Administrative Law Judge found first that the alleged supervisor involved was, in fact, a supervisor within the meaning of Section 2(c) of the Order. Therefore, he found that the supervisor's admitted participation as a sponsor in the decertification effort constituted a violation of Section 19(a)(1) of the Order. With regard to the allegations that other supervisors failed both to prevent use of the internal mail system for the distribution of decertification literature and duty time decertification activity by employees, the Administrative Law Judge recommended dismissal of these allegations of the complaint as, in his view, the Complainant did not meet its burden of proof. However, noting the fact that at least some petitions were returned through the internal mail system and the fact that the NFFE was not at that time permitted the use of such internal mail system, the Administrative Law Judge found that the DPC violated Section 19(a)(1) by not taking adequate measures to disassociate itself from the implication that it was lending support to the decertification effort through the use of its mail service to return the signed decertification petitions. With respect to the alleged Section 19(a)(2) violation, the Administrative Law Judge concluded that discrimination with regard to a condition of employment had not been shown, and he, therefore, recommended that the allegation be dismissed. The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge with regard to these unfair labor practice complaints.

The Administrative Law Judge considered two additional complaints together as they involved the same issue. In both cases, the NFFE contended that employees it alleged to be supervisors were engaged in decertification activities in violation of Section 19(a)(1) of the Order. The Administrative Law Judge found that neither of the employees met the Section 2(c) definition of a supervisor and, therefore, he recommended dismissal of these unfair labor practice complaints. The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge with respect to these two unfair labor practice complaints.

In another unfair labor practice complaint, the NFFE alleged that the DPC violated Section 19(a)(1) and (6) of the Order when its supervisor caused to be circulated among the employees a memorandum entitled "Status of Agreement with NFFE Local 1745." Citing Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, the Administrative Law Judge concluded that the Activity's direct communication with unit employees relating to the parties' positions on the status of negotiations was violative of Section 19(a)(1) and (6) of the Order. He noted, in this regard, that there was no mutual agreement between the parties concerning the DPC's right to communicate directly with unit employees over this matter, and no evidence was presented that there was in existence a past

practice of such direct communication with unit employees. The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation in this regard.

The Administrative Law Judge considered the final two unfair labor practice complaints together as they both were related to the status of an auditor employed by the Respondent, Veterans Administration, Department of Data Management, Washington, D.C. (DMD), but who worked in his capacity as an auditor at the Austin Data Processing Center. In the first case, the NFFE contended that the DMD violated Section 19(a) (1) of the Order by certain alleged decertification activity by the auditor who the NFFE contended had a special status by virtue of his auditor duties. In the second case, the NFFE asserted that the DMD violated Section 19(a)(1) and (2) based on alleged statements by the auditor which were calculated to discredit the NFFE's President. The Assistant Secretary adopted the Administrative Law Judge's finding that, based on the evidence adduced at the hearing, the auditor did not possess any indicia of supervisory or managerial authority within the meaning of the Order, and that it was not established that, by virtue of his duties and responsibilities, he possessed any special status which would preclude him from partaking in any of the alleged conduct set forth in the unfair labor practice complaints. Accordingly, the Assistant Secretary agreed with the Administrative Law Judge's recommended dismissal of these complaints.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,  
VETERANS ADMINISTRATION DATA PROCESSING CENTER,  
AUSTIN, TEXAS

Respondent

and

Case Nos. 63-4716(CA),  
63-4717(CA),  
63-4718(CA),  
63-4719(CA),  
63-4720(CA) and  
63-4815(CA)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, IND., LOCAL 1745

Complainant

VETERANS ADMINISTRATION,  
DEPARTMENT OF DATA MANAGEMENT,  
WASHINGTON, D.C.

Respondent

and

Case Nos. 63-4722(CA) and  
63-4760(CA)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, IND., LOCAL 1745

Complainant

DECISION AND ORDER

On February 7, 1975, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent, Veterans Administration Data Processing Center, Austin, Texas, had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge found other alleged conduct of the Respondent Data Processing Center not to be violative of the Order and that the Respondent, Veterans Administration, Department of Data Management, Washington, D.C., had not engaged in any of the alleged unfair labor practices. Thereafter, the parties filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, including the parties' exceptions and supporting briefs, I hereby adopt the findings 1/, conclusions 2/ and recommendations of the Administrative Law Judge, only to the extent consistent herewith.

The Administrative Law Judge found, among other things, that the Respondent Data Processing Center violated Section 19(a)(1) and (2) of the Order when its supervisor Charles Wilson told union steward Martha Boehm that she would be required to inform him whenever she was to leave the PAID project. While I agree that, under the particular circumstances herein, such conduct was violative of Section 19(a)(1), I find that further proceedings under Section 19(a)(2) are unwarranted. Thus, no evidence was adduced that union steward Boehm was, in fact, required to comply with this reporting requirement. 3/ Accordingly, I shall dismiss the Section 19(a)(2) aspect of the complaint in Case No. 63-4716(CA).

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing union steward Martha Boehm, or any other union steward, in the exercise of their right to assist a labor organization.

(b) Revealing to unit employees confidential or personal information received in the course of labor-management dealings with the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, where the effect is to dissuade employees from consulting with the Union or seeking the Union's assistance.

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

2/ On page 27 of his Recommended Decision and Order at footnote 44, the Administrative Law Judge inadvertently omitted the citation A/SLMR No. 100 in citing the decision of the Assistant Secretary in General Services Administration, Memphis, Tennessee. This inadvertence is hereby corrected.

3/ Cf. Army and Air Force Exchange Service, Vandenberg Air Force Base, California, A/SLMR No. 437, at footnote 3.

(c) Reading to employees, or circulating among employees for their reading, communications pertaining to the collective bargaining relationship between the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, and the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, unless there exists a mutual agreement to permit such action.

(d) Partaking in, or lending support to, an effort to decertify the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative.

(e) Failing to take timely and adequate measures to disassociate the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, from the implication that it supports the decertification of the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, by allowing the use of its internal mail distribution service in furtherance of a decertification effort.

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

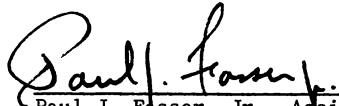
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at its facility at Veterans Administration Data Processing Center, Austin, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaints in Case Nos. 63-4718(CA), 63-4719(CA), 63-4720(CA), 63-4722(CA) and 63-4760(CA) be, and they hereby are, dismissed in their entirety, and that the complaint in Case No. 63-4716(CA), insofar as it alleges a violation of Section 19(a)(2) of the Order, be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 24, 1975

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

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce union steward Martha Boehm, or any other union steward, in the exercise of their right to assist a labor organization.

WE WILL NOT reveal to unit employees confidential or personal information received in the course of labor-management dealings with the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, where the effect is to dissuade employees from consulting with the Union or seeking the Union's assistance.

WE WILL NOT read to employees, or circulate among employees for their reading, communications pertaining to the collective bargaining relationship between the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, and the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, unless there exists a mutual agreement to permit such action.

WE WILL NOT partake in, or lend support to, an effort to decertify the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative.

WE WILL NOT fail to take timely and adequate measures to disassociate the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, from the implication that it supports the decertification of the National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, by allowing the use of its internal mail distribution service in furtherance of a decertification effort.

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

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

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

U.S. DEPARTMENT OF LABOR  
 OFFICE OF ADMINISTRATIVE LAW JUDGES  
 WASHINGTON, D.C. 20210



In the Matter of

VETERANS ADMINISTRATION  
 VETERANS ADMINISTRATION DATA PROCESSING CENTER  
 AUSTIN, TEXAS

Respondent

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, Ind.  
 LOCAL 1745

Complainant

AND

VETERANS ADMINISTRATION  
 DEPARTMENT OF DATA MANAGEMENT  
 WASHINGTON, D.C.

Respondent

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, Ind.  
 LOCAL 1745

Complainant

CASE NOS.  
 : 63-4716 (CA)  
 : 63-4717 (CA)  
 : 63-4720 (CA)  
 : 63-4718 (CA)  
 : 63-4719 (CA)  
 : 63-4815 (CA)

CASE NOS.  
 : 63-4722 (CA)  
 : 63-4760 (CA)

Ted Myatt, Esquire  
 Chief Attorney  
 Waco Veterans Administration  
 Regional Office  
 1400 North Valley Mills  
 Waco, Texas 76710  
 For Respondents

Janet Cooper, Esquire  
 Staff Attorney  
 National Federation of Federal Employees, Ind.  
 1737 H Street, N. W.  
 Washington, D. C. 20006  
 For Complainant

BEFORE: SALVATORE J. ARRIGO  
 Administrative Law Judge

DECISION

Preliminary Statement

These proceedings, heard in Austin, Texas on May 13, 14, 15, and 16, 1974, arise under Executive Order 11491, as amended (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary for Labor-Management Relations (hereafter called the Assistant Secretary), an amended Notice of Hearing on Complaint and an amended Order consolidating cases issued on April 26, 1974, with reference to alleged violations of Section 19(a)(1), (2) and (6) of the Order as set forth in the above-captioned complaints filed by National Federation of Federal Employees, Ind., Local 1745 (hereafter called the Union or Complainant) against the above-captioned Respondents.

At the hearing all parties were represented by counsel and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses, and argue orally. Oral argument was waived and briefs were filed by the parties.

Stephan L. Schochet, Esquire  
 Office of the General Counsel  
 Veterans Administration  
 810 Vermont Avenue, N. W.  
 Washington, D. C. 20420

Norman E. Jacobs, Esquire  
 Labor Relations Specialist  
 Office of Personnel  
 Veterans Administration  
 810 Vermont Avenue, N. W.  
 Washington, D. C. 20420

Upon the entire record in this matter, 1/ from my reading of the briefs 2/ and my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions of law:

Background

Since October 2, 1970, and at all times material hereto, the Union has been the exclusive certified collective bargaining representative for all non-supervisory and non-professional employees of the Veterans Administration Data Processing Center, Austin, Texas. The parties are signators to a collective bargaining agreement effective for two years commencing November 22, 1971. At the time of the hearing the collective bargaining unit numbered 550 to 590 employees.

The Alleged Unfair Labor Practice Conduct

I. Case No. 63-4716(CA)

The complaint herein filed by the Union on October 1, 1973, alleges that Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas (hereafter called the Activity or Respondent DPC), violated Section 19(a)(1) and (2) of the Order by: (1) statements made to

1/ Subsequent to the close of hearing Complainant's counsel filed a Motion For the Correction of the Transcript. There being no objection to said proposed corrections, the motion is hereby granted.

2/ By letter dated July 8, 1974, Complainant's counsel moved to strike a portion of Respondent counsel's brief. The matter in question concerns identifying what document a witness was referring to during his testimony.

My findings must be based upon what evidence the record discloses and not how a brief might characterize that evidence. What is stated in a brief cannot add nor take away what the transcript itself discloses and all are bound by the clarity or lack of clarity of the transcript. However, striking a portion of counsel's brief in this matter is not necessary. The motion to strike is denied.

Union steward Mrs. Martha Boehm and attempting to tape record a meeting with Union representatives; (2) attempting to discredit the Union by making public a confidential memo relative to the Union filing an EEO complaint; and (3) giving Mrs. Boehm a low promotional appraisal and enrolling her for a job related examination without her consent.

- 1. The alleged illegal statements and tape recording attempt.

On March 27, 1973, Mrs. Martha Boehm was transferred to the Activity's PAID project as a computer programmer under the supervision of Charles A. Wilson. 3/ Shortly after beginning in the PAID project, Mrs. Boehm, a unit employee, was designated steward of that group, a fact that known to Mr. Wilson. 4/ Within the first two weeks of her assignment to the PAID project Boehm had occasion to leave the project area for approximately one hour. Upon her return Wilson called Boehm into his office. Wilson informed Boehm that he had received some complaints about her being out of the project that morning. He then told Boehm that he had an anti-union climate in the PAID project and because of this he was going to require her in the future to inform him where she was going, who she was going to see and the nature of her business if she was going to be absent from the project for more than 10 minutes at a time. 5/ Boehm

3/ The parties stipulated that Mr. Wilson is a supervisor within the meaning of the Order.

4/ The PAID project had no Union steward prior to Mrs. Boehm's appointment. Mrs. Boehm had no previous experience as a steward but, at the time, was serving as an administrative assistant to the Union's President. In September 1973, Mrs. Boehm became the Union's First Vice-President.

5/ Under the terms of the collective bargaining agreement a steward is required to inform the supervisor when leaving the work area on Union business. Article V Section 4 of the agreement provides:

(continued on next page)

returned to her desk and then came back to Wilson's office and showed him, from a log she kept, that her absences from the shop had been on project business. She explained to Wilson that she had been stopped by other people with whom she exchanged pleasantries but during her absences from the project that day she had not been engaged in Union business. She further explained that her personnel folder would reveal a letter of recommendation from almost everyone she had ever worked for and she had never been challenged with regard to the quality or quantity of her work or her integrity. That same day Boehm related her conversation with Wilson to Mrs. Delma Thames, the Union's acting President.

Later that afternoon, or perhaps the following day, Mrs. Boehm and Mrs. Thames met with Wilson in his office to discuss the matter. Wilson asked if there would be any objection to his tape recording the meeting. Mrs. Thames objected, contending that the meeting was an informal one and it was not the Union's practice in the informal stage of any proceeding to use a tape recorder. Wilson agreed not to tape the meeting. During the discussion Wilson acknowledged that he did not require other PAID project employees to inform him of their absences from the project. He also admitted that he told Boehm he had an anti-union atmosphere in his shop and since Boehm was a Union steward, she would not receive the same treatment other employees received and would be required to inform him of her absences from the project. Thames maintained that a Union steward was to be considered as part of the work unit and was to be treated

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5/ - continued

"Section 4. Reasonable time off during working hours will be granted to union officials for attendance at meetings with management officials concerning matters of mutual concern. If it becomes necessary for the union official to leave his work area, he shall obtain permission from his immediate supervisor. Permission will be granted in the absence of compelling circumstances. The official will inform his supervisor of the general nature of the

(continued on next page)

in the exact same manner as other people in that unit. Heretofore, no other project employee had been required to inform Wilson when leaving the work area and such absences for business reasons were frequent. On some occasions employees also left the project area for personal reasons without informing Wilson.

During the meeting the participants discussed their desire to settle the matter at an informal level and ultimately Wilson agreed that Boehm would not be required to report her absences from the project if she was going to leave on business related matters.

Shortly thereafter, Mrs. Thames met with Frank Burkett, Chief of the Systems Division and Wilson's immediate superior. Thames discussed Wilson's comments to Boehm with regard to being more strict with Boehm because of her being a Union steward. Burkett informed Thames that he would take care of the matter. On the following day Burkett told Thames that the matter was "resolved" without further explanation. Within a few days after his initial meeting with Boehm described above, Wilson met with the employees in the PAID project and explained to them that "Delma" (Thames) had some misunderstanding with regard to absences from the project area. Wilson informed the employees that absences which were not connected with project work had to be "cleared through channels" before the person left the work area. Accordingly, Boehm was satisfied with the outcome of the situation, decided not to file a formal grievance and no reoccurrence of any special reporting requirement for a Union steward was imposed thereafter.

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5/ - continued

business to be conducted, and the approximate amount of time he expects to be absent from his work area. If the union official is to meet with another employee, he will first ascertain that the employee is present and that the employee has obtained permission from his supervisor to meet with the official. Upon return, he will advise his supervisor of his return. Both the Employer and the Union will strive to accomplish all such duties with as much speed as possible."

Under the circumstances herein, I find that Wilson's requirement that Boehm contact him whenever she was to leave the PAID project was violative of Section 19(a) (1) and (2) of the Order. Wilson adopted the new approach vis a vis Boehm because of the anti-union sentiment of employees in the PAID project. The requirement constituted adverse disparate treatment to Boehm, the project steward, since other unit employees could at that time move freely in and out of the project for work related or personal reasons without reporting their activities. Such conduct on the part of Wilson interfered with, restrained and coerced employees in violation of Section 19(a) (1) of the Order. The discrimination visited upon Boehm because of her status as Union steward relative to her free movement in and out of the project for work related or personal reasons, a condition of employment, also violated Section 19(a) (2) of the Order.

Respondent contends that this allegation of the complaint should be dismissed since the "misunderstanding" was "cleared up within the next few days and never repeated." While the Assistant Secretary has not required a remedial order in all cases, 6/ I find that Respondent's overall conduct in the matters litigated before me were not isolated, deminimus or fully remedied and accordingly the violation found herein requires a remedial order.

2. The Union's EEO letter to the Activity.

By letter dated June 27, 1973, the Union, as a third party complainant, notified the Activity's Director that it was charging the Activity with violating the Equal Employment Opportunity (EEO) Act. The letter charged certain of the

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6/ See U.S. Army, Natick Laboratories, Natick Massachusetts, A/SLMR No. 381 and cf. Directorate of Maintenance, Production Branch, Warner Robins Air Material Area, Robins Air Force Base, A/SLMR No. 374, Report and Recommendation, fn. 18, where the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judges without comment. But see Vandenberg, AFB, 439 2d Aerospace Support Group, Vandenberg AFB, California, A/SLMR No. 435.

Activity's representatives with sex discrimination relative to carrying out the Activity's policy on the use of sick and annual leave as applied to women employees. Specifically the letter, inter alia, alleges discrimination with regard to the Activity's withholding a promotion of one named employee and counseling five named employees on alleged abuse of sick and annual leave.

On June 27, 1973, Mr. Wilson received a copy of the Union's letter from the Activity's Director. One of the women named in the letter, Mrs. Joyce Crowson was a clerk-typist in the PAID project. She also acted as Wilson's secretary. 7/ Wilson recalled having previously discussed leave usage with Crowson and assumed the matter was settled. Therefore, according to Wilson, he showed the Union's letter to Crowson to find out if Crowson had filed a discrimination charge. Crowson denied filing such a charge and according to Wilson, upon reading the Union's letter Crowson became "upset because she was not aware that they were going to use her name." Wilson testified that Crowson wanted the employees in the project 8/ to "be aware that she had nothing to do with the letter or this type of thing." According to Wilson 9/, he read the entire letter to all project employees at a group meeting which was scheduled for that same day in order to let the project employees know that Crowson "had no hand in complaining about the counseling on her leave." However, Wilson could not recall whether he made any comments at the meeting concerning the reason he was reading the letter to the employees.

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7/ The Activity contends Mrs. Crowson was, at the time, a confidential employee and the Union contends she was a unit employee. However, whether or not Mrs. Crowson was a member of the collective bargaining unit is immaterial to a resolution of the complaint herein.

8/ Approximately 19 unit employees worked in the PAID project.

9/ No other witness testified with regard to this meeting.



In the circumstances herein, I find that Wilson's reading the Union's letter of June 27 conveyed to PAID project unit employees that going to the Union with problems relative to their employment relationship with the Activity could lead to publication of matters that they perhaps would prefer did not become known to other employees or representatives of the Activity. Thus, the letter revealed by implication that the five named employees had conferred with the Union on having been counseled by the Activity for alleged abuse of leave and one employee complained of a withheld promotion. Wilson himself considered counseling an employee on abuse of such leave to be confidential information. Some employees might well consider that the Union's use in any manner without express permission of information given to the Union to be a breach of trust thereby adversely reflecting upon the Union. In my view Wilson's reading the entire letter rather than serving the avowed purpose of informing the project employees that Crowson wanted them to know "she had nothing to do with the letter or this type of thing" 10/ in these circumstances inherently tended to engender apprehension and indeed hostility to the Union 11/ as well as dissuade employees from seeking Union assistance or consulting with the Union with regard to employment related matters in fear that the matter would become public or fall into the Activity's hands without their consent. Such conduct impedes employees' free and full access to Union representation and assistance 12/ and thus runs counter to the very practice and philosophy of exclusive recognition. 13/

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10/ Wilson acknowledged he could have achieved the intended result without reading the entire letter.

11/ I also note that as found above, Wilson was sensitive and responsive to the anti-union sentiment in his project.

12/ See Veterans Administration Center, Bath, New York, A/SLMR No. 433.

13/ Cf. United States Army School/Training Center Fort McClellan, Alabama, A/SLMR No. 42.

Further, in Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, a case involving inter alia, the posting of contents of an activity's letter to a union reflecting events which occurred at a meeting held to resolve a negotiating problem and an unfair labor practice charge, the Assistant Secretary found that "it is improper for agencies or activities to communicate directly with unit employees with respect to matters relating to the collective bargaining relationship." The Assistant Secretary went on to state that "the need for such a policy is clearly demonstrated in this instance where Respondent's communications to unit employees created an unfavorable impression with respect to the actions of the Complainant's President and, in my view, necessarily tended to undermine the Complainant's exclusive bargaining status." (See additional discussion of this case, infra, Case No. 63-4815).

Accordingly, I conclude that Respondent DPC through Wilson's reading of the Union's letter of June 27, 1973, has interfered with, restrained and coerced employees in the exercise of rights assured by the Order in violation of Section 19(a) (1) of the Order.

3. Mrs. Boehm's promotional appraisal and the job related examination.

(a) The promotional appraisal

On July 12, 1973, Mrs. Boehm, a GS-11 computer programmer, received an employee appraisal given by Mr. Wilson and reviewed by Mr. Burkett (Complainant Exhibit No. 8). 14/ The appraisal, the first promotion appraisal Boehm received, was given as part of an evaluation of candidates who wished to be considered for promotion to a GS-12 programmer in another project. The ultimate selection for the promotion was made from those employees who were rated "highly qualified." In evaluating candidates for the "highly qualified" category, 40 percent of the rating was based upon the individual's appraisal and 60 percent of the rating was

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14/ Wilson informed Boehm that he asked Burkett to assist him with the appraisal because of the short period Boehm had been under Wilson's supervision. However, Wilson testified that the rating was his own product.

based upon a rating panel's evaluation of the individual's experience and prior awards. 15/ Wilson's appraisal of Boehm reveals that out of 15 rating factors, Boehm received the highest rating in 4 categories, the second highest rating in 10 categories and the middle rating in one category. 16/ Subsequently, Boehm was not ranked "highly qualified" and accordingly was not ultimately considered for the promotion. 17/

It is alleged that Boehm's membership and active Union participation adversely influenced Wilson's performance appraisal of her. However, there was no probative evidence offered which would established that the appraisal did not accurately reflect Boehm's performance. Boehm testified in summary fashion that at some undisclosed time in the past when she worked in another project she received a sustained superior performance award and also was shown by a "Miss McBride" an appraisal for the "management personnel inventory (MPI)" which was, according to Boehm, "completely out in the letter blocks of that inventory appraisal form which is similar to (the) appraisal form" being considered herein. However, there is no evidence that the prior award or MPI appraisal was based upon the same factors which were considered in the promotional appraisal nor is there any way of discerning the meaning of the MPI appraisal being "completely out in the letter blocks" of that appraisal form. Nor is there any evidence as to when and at what grade level Boehm received the award or MPI appraisal. Accordingly, I find that such conclusionary and vague testimony, absent other relevant evidence on

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15/ There is no evidence that Wilson was a member of the rating panel or participated in that portion of the evaluation.

16/ Except for one rating factor, the appraiser evaluates the employee's performance from 5 levels of proficiency.

17/ Boehm testified that she thought she missed being ranked "highly qualified" by two point.

this matter, does not support a conclusion that Wilson's appraisal of Boehm was not accurate and justified. I shall therefore recommend that this allegation be dismissed. 18/

(b) The job related examination

In this portion of the complaint, the Union alleges that after Mrs. Boehm had declined taking a voluntary examination in ANS Cobol, 19/ Wilson informed Boehm that it was uncertain as to what training would be offered in ANS Cobol and that he had signed Mrs. Boehm's name to the list of employees scheduled to take the examination scheduled for August 15, 1973.

According to the testimony of Boehm, the only witness called to testify on this matter, Boehm was informed by the Activity's Systems Division Office that ANS Cobol examination would be given to those who voluntarily wished to participate. Boehm notified the Systems Division Office that she did not wished to take the examination. Subsequently, Wilson had a conversation with Boehm at which time he mentioned that he noticed Boehm was not scheduled to take the examination and informed Boehm that he was not sure if a course in ANS Cobol would be given at the Activity. Wilson told Boehm that he would get some additional information on the subject. Sometime thereafter Boehm was informed that since it was uncertain whether a course in ANS Cobol would given, Wilson entered her name to take the examination. 20/ Boehm then went with Mrs. Thames to Mr. Burkett, Chief of the Systems Division to discuss

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18/ Cf. U.S. Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No. 445 and U.S. Department of the Interior, National Park Service, Jefferson National Expansion Memorial, St. Louis, Missouri, A/SLMR No. 402.

19/ ANS Cobol is an abbreviation for American National Standard Common Business Oriented Language. It is a type of technical "language" used in computer operations.

20/ Mrs. Boehm knew of no other PAID project employee treated similarly.

the matter and was told that taking the examination was voluntary. Boehm did not take the examination and the record does not disclose that there was any further mention of the matter.

At the time the ANS Cobol examination was given Boehm had been programming using ANS Cobol language. The examination was of the pass-fail variety and Boehm did not take the examination because, in her opinion, taking an ANS Cobol course would have been "more helpful" to her since at the conclusion of the course she would have received a numerical grade. However, Boehm did not know whether she would still be eligible to take the ANS Cobol course if she had already taken and passed the examination. There is no evidence as to what adverse effect, if any, failing the examination would have had on Boehm's yearly work evaluation, her future promotion opportunities, or otherwise.

In the circumstances herein, I find that Complainant has not met its burden of establishing a violation of the Order by Wilson's act of scheduling Mrs. Boehm to take the examination. Accordingly, I shall recommend that this allegation of the complaint be dismissed. 21/

II. Case Nos. 63-4717(CA) and 63-4720(CA)

The complaint in Case No. 63-4717, originally filed by the Union on September 28, 1973, 22/ and subsequently amended, alleges that Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, (hereafter called the Activity or Respondent DPC) violated Section

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21/ Cf. Department of the Navy, Portsmouth Naval Shipyard, supra, and U.S. Department of the Interior (National Park Service) supra.

22/ The written charge was filed with the Activity on July 26, 1973.

19(a)(1) of the Order by "management's active and open promotion of a petition for decertification of the Union holding exclusive representation at VADPC" on July 25, 1973, and by allowing "the use of the agency mail routing system and its symbols to distribute the petition." More specifically, the Union alleges: (1) Lamar Gordon, an alleged supervisor participated in the decertification drive and allowed his name to be used as a sponsor of the decertification petition; (2) the Activity's supervisors Charles Wilson and Carl Yocum failed to prevent the use of the Activity's internal mail system for collection of the decertification petitions and; (3) Charles Wilson and Carl Yocum failed to prevent their employees from engaging in decertification activities on duty time.

The complaint in Case No. 63-4720, filed on October 1, 1973, alleges that similar conduct on the part of Wilson and Yocum occurred on July 26, 1973, and violated Section 19(a)(2) of the Order. 23/

Respondent denies the allegations of both complaints.

1. The decertification effort

Sometime in July 1973, rumors began to flourish at the Activity that some employees were seeking to have the Union decertified as collective bargaining representative at the Activity. On July 25, 1973, prior to the 8:00 a.m. change in shift 24/ various employees began distributing a leaflet which solicited signatures to support a petition to the U.S. Department of Labor requesting a decertification election. The leaflet stated as follows:

" --- WE NEED YOUR HELP ---"

"An effort is being made to present a petition to the U.S. Dept. of Labor requesting that an election be held to determine if the National Federation of Federal

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23/ For convenience, I shall consider the allegations of both complaints under one heading.

24/ At least 75 percent of the unit employees work on the 8:00 a.m. to 4:30 p.m. shift.

Employees, local #1745, should cease to be the exclusive representative for eligible employees of the DPC.

We do not believe the NFFE represents a majority, neither in thinking nor in numbers, of the eligible employees at this DPC.

In you would like to help, please sign the attached form and forward it to one of the representatives listed below. Please do not detach the form.

Please be assured that by signing this you are in no way jeopardizing your present position or advancement.

Joyce Crowson	(327)	Bob McDowell	(345)
Lamar Gordon	(341)	James Moya	(327)
Jim Howell	(326)	Henry Rodgers	(327)
Joyce LaFleur	(326)	Barbara Wood	(327)

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I no longer desire to be represented for the purposes of exclusive recognition by the currently recognized labor organization; the National Federation of Federal Employees, local #1745. I request that an election be held to determine if the NFFE shall cease to be the exclusive representative of employees of the Veterans Administration Data Processing Center, Austin, Texas."

The numbers opposite the employee's names in the leaflet indicate specific projects within the Activity and are used for intra-Activity mail routing purposes. Messengers transmit mail from the various Activity locations to those designated by the numerical symbol. The mail stop symbols were placed on the leaflet so that employees would return the signed leaflets through the internal mail distribution system.

Leafleting at the Activity occurred when employees were arriving for work at the two employee entrances and the parking lot and continued from July 25 through July 27.

Hundreds of these leaflets were passed out to employees. At least 25 to 30 of the signed leaflets were returned on July 25 through the internal mail system to employees Wood and LaFleur. Others were hand-carried and personally delivered or placed on a designated representative's desk. Still others were collected at the Activity's entrances at the close of the work day.

A second leafleting to gather signatures to support the decertification effort occurred sometime during early August 1973. Subsequently, a petition for decertification was filed with the U.S. Department of Labor. The petition 25/ was signed by James Howell and dated September 14, 1973. 26/

2. Lamar Gordon's involvement

The Union alleges and the Activity denies that Lamar Gordon is a supervisor within the meaning of the Order. Gordon's name appears as a "representative" in the decertification leaflet reproduced above.

At all times relevant hereto, P. Lamar Gordon has been a GS-11, Digital Computer Systems Administration Specialist in the Supply/Log 1 section of the Activity's Analysis and Control Division. Gordon has held this position since February 1970. In addition to Gordon, the Supply/Log 1 section is staffed by a GS-12 Chief, Mr. Willis Havens, whom the parties acknowledge to be a supervisor within the meaning of the Order, and eight GS-7 Computer Aids.

The Supply/Log 1 section performs computerized accounting services for V.A. facilities located throughout the United States. The section is essentially a mail-order operation wherein information is supplied from the Agency's approximately 228 field stations in the form of IBM cards and accounting reports are produced therefrom. The reports are then analyzed by members of the section for accuracy in relation to the input and thereafter released to the field stations.

25/ Form LMSA 60(10/72), Case No. 63-4708 (DR).

26/ James Howell was a unit employee when the decertification effort was in progress but was not employed by Respondent DPC at the time of the hearing herein.

The section's Chief, Willis Havens, spends a substantial portion of his workday in telephone communication with the Agency's various field stations. 27/ Telephone calls from field stations average between seventy-five and one hundred a day. Havens also spends many hours performing research and engaging in administrative duties such as attending meetings at the facility. When Havens is absent from the facility on official business or for personal reasons for two days or more, Havens issues a memo entitled "Delegation of Authority" which states that during his absence Gordon will be Acting Chief of the section. The memo is circulated among the section employees for initialling. During the twelve-month period prior to July 1973, eight to ten such delegations issued appointing Gordon Acting Chief for periods of two days to two weeks duration. 28/ The majority of these delegations lasted two to three days and approximately two lasted more than a week. While serving as Acting Chief, Gordon assumes the duties of that position and is "in charge." During this period Gordon admittedly can independently grant sick or annual leave.

Gordon's normal duties, in part, consist of preparing work schedules for the section's daily, weekly, biweekly, monthly, quarterly and semi-annual work requirements. Gordon makes work assignments to employees on a daily basis. The relative skills of employees in the section are considered in making assignments and Gordon rotates employees on the various work projects in an effort to see that all employees are familiar with and can accomplish all work performed by the section. If an employee objects to a particular assignment Gordon informs the employee of the necessity of learning all jobs which the section is called upon to perform. When a new employee is being hired for the section Gordon is usually called upon to explain to him the function and operation of the section and thereafter has the responsibility for the proper training of

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27/ Havens was not called to testify at the hearing. His duties were ascertained primarily through the testimony of Gordon.

28/ From July 73 to May 74, ten to twelve such delegations were issued ranging from two days to three weeks in duration.

the individual. 29/ If "horseplay" on the job occurred, Gordon would remind the parties that a schedule had to be met and the employees would have to "knuckle down and get with it." Occasionally, Gordon personally works on a particular accounting project.

Gordon testified that when section Chief Havens is absent from the section for several hours during the course of a workday a request for annual leave or sick leave made to Gordon would be related to Havens upon his return to the section. If the employee was sick and needed to leave immediately in an emergency, Gordon would release the employee and later explain the incident to Havens who would generally "approve." However, employees Sybora and Chambers, whose testimony I credit, testified that Gordon, when Havens was present in the section approved annual or sick leave for them. Employee Guadalupe Gomez, whose testimony I found to be particularly impressive, clearly and directly testified that his requests for annual or sick leave were to Gordon and Gordon responded to his requests without ever consulting Havens. Indeed Gomez testified that during his two and one-half years employment with the Supply/Log 1 section he never asked Havens for annual leave.

I find that Gordon, in the course of fulfilling his normal duties, 30/ responsibly directs employees using independent judgment both as to the regular assignment of work in the Supply/Log 1 section and granting leave time to

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29/ Gordon's Position Description reads, in part:

"Plans, develops, and prepares internal procedures, for input and output processing. Modifies such procedures, as required, caused by equipment changes, program emphasis, or other changes. Plans operation to meet changes in workload resulting from new or revised procedures and keeps employees informed of pending change. Recommends schedule changes to assure accurate and timely work flow in order to meet required deadlines and emergency conditions. (continued on next page)

30/ I have taken particular note of the substantial amount of time Havens is away from the section and accordingly could not be personally involved in the day to day assignment and work station supervision of section employees.

section employees. Accordingly, I find P. Lamar Gordon to be a supervisor within the meaning of Section 2(c) of the Order.

With his knowledge and consent, Gordon's name appeared as a "representative" on the decertification leaflet, (re-produced supra), distributed in large numbers at the facility on July 25 through July 27. According to Gordon, the signed leaflets which he received were returned to his desk, some of which were returned personally and some he simply found on his desk. On July 26, Gordon learned that he was going to be delegated Acting Chief of his section during Haven's absence from July 27 through August 17, 1973. Gordon thereupon told Havens that he would withdraw from participation in the decertification movement until Havens' return. After the evening of July 26, Gordon no longer collected the signed decertification leaflets. On July 27, Gordon informed employees Howell and Maxon 31/ that he was no longer "connected" with the decertification effort. However, no other employees were informed of Gordon's termination from decertification activities or involvement.

Having found that Gordon is a supervisor within the meaning of the Order, I further find that his activities for and on behalf of the decertification effort, including allowing his name to be used as a "representative" for decertification, constituted interference, restraint and coercion violative of Section 19(a)(1) of the Order. When a supervisory employee partakes in a decertification drive, such conduct conveys to employees that the agency supports

29/ - continued

Orients new employees assigned to the section and conducts required training, prepares schedules and distributes work to maintain proper balance on quality and quantity as needed."

31/ Both Howell and Maxon were active in the decertification movement.

and encourages those who seek decertification and thereby breaches the neutrality and appearance of neutrality expected of an agency. 32/ Those who seek to curry favor with the agency or avoid supervisory enmity are thus subtly persuaded to support the agency's viewpoint. The Order dictates that the employees should be free of such interference, restraint and coercion in the exercise of their rights to decide if they want or wish to retain union representation.

3. The use of the Activity's internal mail service

As stated above, the decertification leaflets containing mail routing symbols for return were distributed in substantial numbers at Activity entrances from July 25 through July 27. The testimony establish that some signed leaflets were sent through the Activity's mail distribution system. Although supervisor Yocum testified he did not see a copy of this literature, on July 25 or July 26 Yocum was told by the Systems Division Chief that the Activity's messengers had been ordered not to pick up or deliver anything that looked like a decertification form. On July 25 or 26 it came to Yocum's attention that two of the employees in his project, Mr. Howell and Joyce LaFleur, (named in the leaflet), were involved in the decertification activity. On July 27, Yocum, "counseled" Howell and LaFleur about the matter. A memorandum of the conversation, prepared by Yocum, states that "(t)hey were instructed not to use the VA messenger service for (decertification) activity and that distribution or collection of forms or any other activity in this matter during duty hours would not be tolerated."

Supervisor Wilson testified that he first saw a copy of the decertification leaflet on July 25 or 26. In the morning of July 27 Wilson received word from his supervisor that mail stop numbers were incorporated in the decertification handbill and the Activity's mail service was being used to transmit the signed copies. Although he personally did not see any leaflets in the mail, Wilson "counseled" employees Wood, Crowson, Rogers and Moya about the matter. 33/

32/ See Antilles Consolidated Schools, Roosevelt Roads, Ceiba, Puerto Rico, A/SLMR No. 349, and Charleston Naval Shipyard, A/SLMR No. 1, fn. 17.

33/ Wood, Crowson, Rogers and Moya were named in the leaflet and were assigned to Wilsons' project.

A memorandum of the meeting, prepared by Wilson, states inter alia:

"This meeting was for the purpose of reiterating the fact that the VA mail system could not be used for non-government business. It was pointed out that the decertification papers that were distributed to employees on Wednesday and Thursday could not be returned to the recipients listed on the papers via VA messenger service. It was also discussed that the distribution and collection of the form could not be on duty hours."

In the circumstances herein, I find that the Activity was aware, on July 25, that the decertification leaflet containing mail routing symbols was distributed to employees and it was reasonably anticipated that the Activity's mail distribution service would be used to return the leaflets to the decertification representatives. Starting on the morning of July 25 and continuing through July 27, the leaflet was widely distributed at both of the facility's employee entrances. I find that supervisors Gordon and Wilson possessed direct knowledge of the leaflet's language on July 25, which knowledge is imputed to the Activity. Moreover, I infer that management, having a legitimate interest in the substantial distribution of literature at all the facility's employee entrances, pursued that interest at least to the point of promptly reading the literature being distributed at its doors. This is especially true where a widespread rumor of a decertification effort had existed immediately prior thereto.

I do not find that the Activity's failure to immediately and totally prevent the use of its mail service on the first day of the leafleting was deliberate or avoidable. It is reasonable to assume that in these circumstances some time was necessary for the Activity to evaluate the matter, decide on an appropriate course of action, and have that decision fully executed. Moreover, while some of the signed leaflets were returned through the mail delivery service on July 25, there was no showing that the service was used thereafter for such purpose. It is not clear whether management action or the employees personal preference was the reason for avoiding use of the mail system to return the signed leaflets after July 25. In any event, since the

Activity could not reasonably prevent the July 25 use of its mail delivery system by proponents of decertification and there is no evidence of actual use of the internal mail distribution service in furtherance of decertification after July 25, I do not find that Complainant has met its burden of proof that the Order was violated with regard to the use of the Activity's mail service in returning the signed decertification leaflets.

Nevertheless, I do find that Respondent DPC violated Section 19(a)(1) of the Order by not taking adequate measures to disassociate itself from the implication that it was lending support to the decertification effort through the use of its mail service to return the signed documents. 34/ The Activity's only actions to convey to its employees its disapproval of such implication was to "council" six of the eight employees named in the leaflet on the third day of the leafleting. 35/ Those who used the mail service to return the leaflet received no similar admonishment. While the Activity could do nothing to prevent the distribution of the leaflet, it could have timely informed its employees, in a manner reasonably calculated to fully notify them, that it did not authorize the decertification proponents to use the internal mail service and thereby dispel the implication of Activity support for the decertification effort. Accordingly, I find that the Activity's failure to adequately promulgate such a disavowal to erase the impression of more favorable treatment given to the decertification supporters over that accorded the Union violated Section 19(a)(1) of the Order. 36/

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34/ Use of the internal mail service was not available to the Union.

35/ Although there was testimony that the Activity's messengers were, at some undisclosed time on July 25 or July 26, told not to pick up or deliver the decertification leaflets, the evidence does not establish that this information or the reasons therefore was widely conveyed to unit employees.

36/ See Antilles Consolidated Schools (supra) and Charleston Naval Shipyard (supra).

However, I do not find that such conduct violated Section 19(a)(2) of the Order. Section 19(a)(2) provides that agency management shall not "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion or other conditions of employment." Discrimination with regard to a condition of employment, a necessary prerequisite to establishing a violation of Section 19(a)(2) of the Order has not been shown to have occurred. Therefore, I shall recommend that this allegation be dismissed.

4. The alleged failure of Wilson and Yocum to prevent duty-time decertification activity

The Union also contends that supervisors Wilson and Yocum lent support to the decertification effort by failure to prevent employees from engaging in duty-time pro-decertification conversations and meetings on July 25 and 26, 1973.<sup>37/</sup> I find this contention to be unsupported by the evidence adduced at the hearing. Thus the evidence merely establishes that some pro-decertification activities <sup>38/</sup> and conversations <sup>39/</sup> occurred on duty-time and some employees were

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<sup>37/</sup> Complainant argues that the parties' collective bargaining agreement does not permit similar duty-time Union activity and accordingly the Activity may not allow decertification activity on duty-time.

<sup>38/</sup> Some decertification leaflets were transferred between pro-decertification employees during duty-time.

<sup>39/</sup> Testimony offered relative to the precise nature of these discussions was sparse and conclusionary. One witness upon whose testimony the Union places substantial reliance testified that the decertification leaflet "was talked about by almost everybody." That witness acknowledged that he heard only "bits and pieces" of conversations and could only recall specifically that on one occasion the participants in the decertification discussion "were interested in the count of the votes."

observed by nonsupervisory employees conversing in groups more frequently than usual. However, the evidence does not establish that decertification was discussed in most of the incidences where employees were seen gathered in conversation. Moreover, there is no showing that Wilson and Yocum overheard, were present at, or had knowledge of any activities, meetings, or conversations where decertification was discussed. <sup>40/</sup> Accordingly, I shall recommend that this allegation be dismissed.

III. Case Nos. 63-4718(CA) and 63-4719(CA)

In these cases, Complainant contends that two computer programmer team leaders, Gaylyn Maxson and Robert Beck, employed by Veterans Administration Data Processing Center, Austin, Texas (hereafter called the Activity or Respondent DPC) were supervisors within the meaning of the Order and accordingly their participation in the decertification effort described supra, violated Section 19(a)(2) of the Order. Both Maxson and Beck admitted distributing pro-decertification leaflets sometime in August 1973. Maxson also admitted allowing his post office box to be used in furtherance of the decertification effort.

(a) Case No. 63-4718(CA)

For three to four years prior to the hearing herein, Gaylyn Maxson was computer programmer team leader in the Activity's Log 1 project. Log 1 is comprised of approximately thirteen employees including an acknowledged supervisor, Carl Yocum, grade GS-13 and two GS-12 computer programmer team leaders - Maxson and Ryan. The remaining employees are GS-11 computer programmers approximately half of whom work in the area for which Maxson is team leader.

A team leader's Position Description provides, inter alia:

"The incumbent is directly responsible for the development or maintenance of the programs in the

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<sup>40/</sup> I find no merit to the Complainant's argument that the facts herein are sufficient to circumstantially prove that Wilson and Yocum had knowledge of duty-time decertification activity.



project to which he is assigned. Serves as a Team Leader or has programming responsibility for extremely complex programs. As a Team Leader, is designated to assist subordinate programmers and to coordinate and incorporate their programs into a functioning system. Plans work to be accomplished by subordinates, sets priorities and establishes schedules for completion of work. Assigns work to subordinates based on priorities, giving careful consideration to the difficulty and requirements of the assignments and capabilities of employees. Evaluates performance of subordinates."

Project assignments which come to the Activity are received by Yocum. Thereafter team leader Ryan distributes the particular work assignments to project employees, sometimes after discussion with Maxson. Ryan's consultation with Maxson arises when questions arise of a technical nature relative to the assignment to be made.

The majority of Maxson's time is spent in programming, systems design and analyzing technical aspects of programs within his area of responsibility. Since Maxson is highly knowledgeable in the technical aspects of Log 1 work, programmers experiencing difficulty with their assignments frequently seek his assistance with problems they may have encountered. 41/ Although his position description indicates that he is responsible for the evaluation of subordinate's performance, Maxson has never evaluated the performance of an employee. Yocum evaluates all employees in the project. On occasion Maxson has been called upon to respond to questions Yocum may have relative to an employee's performance, but his advice in this regard is sought infrequently.

Whenever Yocum is absent from the Log 1 project area Ryan is usually designated acting supervisor of the project. In the event Yocum and Ryan are simultaneously absent from the project area for short periods, Maxson

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41/ While Maxson has "critized" employees for mistakes made on project work, the evidence fails to establish that this criticism constitutes "discipline" within the meaning of Section 2(c) of the Order.

then acts as project supervisor. 42/ This occurs approximately twice a year for a two to three hour duration each time. On one occasion in 1972 when Yocum and Ryan were both absent for a one to two week period, Maxson was made acting supervisor by written designation.

On March 30, 1973, Maxson was designated temporary supervisor of the AMIS project. The assignment while initially not to exceed sixty days, was not completed until approximately June 22, 1973. The parties agreed that during this period Maxson was a supervisor within the meaning of Section 2(c) of the Order.

I find that the evidence fails to support Complainant's contention that as a computer programmer team leader Maxson has granted leave to employees, made other than routine assignments of work, disciplined employees or adjusted their grievances, or that Maxson possesses any of the other indicia of supervisory authority within the meaning of Section 2(c) of the Order. 43/

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42/ Only as an "acting" supervisor does Maxson have authority to grant leave to employees.

43/ I do not consider Maxson's attendance at monthly Systems Division group leaders meetings to require a different conclusion. Thus, the primary purpose of these meetings is dissemination and discussion of technical information. The meetings are open to any supervisory or other employee who wishes to attend. As a result of these discussions, recommendations relative to various aspects of the Activity's work may be made to management. Suggestions which encompassed a substantial modification in work procedures would have to be approved by management before being put into effect while minor changes in computer techniques might merely be effectuated without further clearance. The only example given at the hearing of a change in procedures was increasing from ten to fifteen the maximum number of cards which could be brought to an express keypunch operator at any one time. This change was effectuated by management issuing a memorandum to employees. Accordingly, in these circumstances, I find that the record evidence with regard to attendance at these meetings and actions taken as a result thereof is insufficient to constitute indicia of supervisory or managerial authority.

Rather, I find that Maxson's role with other employees in the Log 1 project, when he is not an "acting" supervisor, is that of a more knowledgeable employee providing technical advice and guidance to lesser skilled employees in his project. 44/ Accordingly, since there is no evidence that Maxson's decertification activities occurred during periods when he was an "acting" or temporary supervisor and such periods were infrequent, I shall recommend that the complaint herein be dismissed.

(b) Case No 63-4719(CA)

During the period of the decertification effort described supra, and for approximately one year prior thereto, Robert Beck was a computer programmer team leader in the Activity's PAID project. 45/ The PAID project consists of approximately 19 employees including the project's acknowledged supervisor Charles Wilson, grade GS-13 and two GS-12 team leaders, Beck and Laverne McElrath. Beck had six GS-11 employees and one GS-9 employee on his team. The remainder of the project employees were on McElrath's team.

At all times material herein, Beck had the same job description as that of Gaylyn Maxson, set forth above. When work was received in the project, priorities and target dates for completion had already been set by the agency's central office in Washington, D.C. McElrath would take out those jobs over which she had responsibility and give to Beck those which were in his technical area of responsibility. Thereafter Beck passed out work to those on his team. 46/ All

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44/ See Treasury Department, Bureau of Customs, Region IV, A/SLMR No. 152; Army and Air Force Exchange Service, etc., Richards-Gebaur Air Force Base, Missouri, A/SLMR No. 219; and General Services Administration, Memphis, Tennessee,

45/ Since December 1973, Beck has been a supervisor computer programmer in the Activity's Facilities Planning and Construction section.

46/ Job assignment accounted for approximately five percent of Beck's work time.

the programmers on Beck's team were technically competent and accordingly, smaller jobs could be given by Beck to any of the programmers. Larger projects were given to those programmers who had prior experience working on that type of job. When Beck assigned a job, the programmer informed him of the amount of time it would take him to complete the assignment, taking into consideration the amount of work which was still to be completed. If the programmer estimated that he would not be able to finish the job by the assigned target date, Beck would give the task to another programmer who could meet the target date. Before assigning very large jobs, Beck sought Wilson's advice and together they decided who would receive that particular job. Beck kept Wilson continually advised of all assignments including who was assigned a particular job and why. Wilson personally assigned jobs and rotated project programmers for training purposes.

The vast majority of Beck's work day was spent programming, giving technical assistance to other programmers who were having difficulty with a particular assignment and maintaining production records. Beck's duties also included coordinating the work of several programmers who were working on separate "modules" of a job and joining the "modules" into an overall computerized product. One employee testified that Beck was a much more proficient programmer than those on his team and was regarded as the team's "encyclopedia".

Part of Beck's duties included keeping Wilson informed on an almost daily basis with regard to the progress of work within his area of responsibility. Beck advised Wilson of any job that was having trouble which might delay its completion, informing Wilson whether he thought the difficulty might be the fault of the programmer. In such a case, Wilson would personally check with the programmer, ascertain the nature of the problem and decide whether any adjustments were required.

Although the team leader position description states "evaluates performances of subordinates", Beck, as a team leader, has never performed this duty. Although Beck has kept Wilson advised as to the job performance

of his team members, the preparation of employee performance ratings and evaluations are Wilson's responsibility. Beck has never filled out any evaluation or rating forms nor has Wilson ever sought Beck's advice as to what rating an employee should receive.

When Wilson was absent from the office, McElrath was appointed acting supervisor by either written or oral designation. On occasion, when McElrath was acting supervisor and left the work area during the course of the workday, Beck "being third in line" became project supervisor during that period. Beck was never appointed acting supervisor by written designation.

Although Beck as acting supervisor in the absence of both Wilson and McElrath could grant emergency leave to a project employee if the situation arose, he did not possess independent authority to grant leave to employees on his team. However, if an employee desired leave he would inform Wilson and either prior or subsequent thereto "cleared" the matter with Beck since Beck was more aware of the individual employees' workload situation than Wilson.

I find that the evidence fails to support Complainant's contention that as a computer programmer team leader Beck possessed any indicia of supervisory authority within the meaning of Section 2(c) of the Order. 47/ Rather, like team leader Maxson, supra, Beck's duties and responsibilities were those of a more knowledgeable employee providing technical advice and guidance to lesser skilled employees in his project. 48/ Accordingly, I shall recommend that the complaint herein be dismissed.

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47/ With regard to Beck's attendance at Systems Division group leaders meetings, see discussion relative to these meetings, fn. 43, Part III, section (a) above.

48/ See Treasury Department, Bureau of Customs, supra; Army and Air Force Exchange Service, etc., supra; and General Services Administration, supra.

IV. Case No. 63-4815(CA)

On January 17, 1974, the Union filed the complaint herein alleging that Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, (hereafter called the Activity or Respondent DPC) violated Section 19(a)(1) and (6) of the Order when, on November 29, 1973, Charles Wilson, PAID project supervisor at the Activity, caused to be circulated to all PAID project employees an Activity memo entitled "Status of Agreement with NFFE Local 1745."

As stated above, the Union and the Activity were parties to a two year collective bargaining agreement which became effective on November 22, 1971. On November 15, 1973, Martha Boehm, the Union's Acting President met with Robert Bouldin, the Activity's Personnel Division Chief, at which time the parties conversed with regard to the status of the negotiated agreement. The parties discussed having an informal agreement to continue the terms of the expiring agreement. No agreement was reached since Boehm did not want to commit the Union until she could confer with other Union officials. The discussion did not touch on the subject of publicizing any agreement which the parties might reach on the matter.

On November 16, 1973, Mrs. Boehm wrote Mr. Bouldin the following letter:

"This is in reply to your memorandum of November 12, 1973, concerning the relationship between management and Local 1745 subsequent to November 22, 1973.

During our consultation discussion on November 15, 1973, you stated that it was desirable that management and Local 1745 have a verbal agreement that our relationships continue to be bound by the terms of our contract until such time as the representation issue raised by the decertification petition is resolved.

This matter has been discussed with the National Office of N.F.F.E. and brought before Local 1745's Executive Council. Since we consider that the agreement signed November 22, 1971, is still a binding contract, by vote of the Executive Council at its meeting November 15, 1973, we are agreeable to continuing under the terms of this contract until the representation issue is resolved."

Thereafter on November 27, 1973, the Activity circulated to its Division Chiefs a memorandum entitled "Status of Agreement with NFFE Local 1745." PAID project supervisor Wilson received a copy of the memorandum which he, in turn, routed to the employees in his project for them to read. 49/ The body of the memorandum states as follows:

"1. The purpose of this memorandum is to inform you of the current positions of the parties to the Agreement with regard to its termination.

a. Management Position: Because the pending representation issue (decertification petition) precludes negotiations, the Agreement terminated under the two-year duration provision contained in it. In the interest of orderly relations between the parties, however, management informally agrees to follow the procedures contained in the terminated Agreement until such time as the representation issue is resolved. This could mean the initiated negotiations may not be resumed, depending on the final resolution.

b. Union Position: Because the negotiations were initiated and not concluded, the Agreement remains in effect until such time as the representation issue is resolved.

2. Please see that all of your supervisors are informed of the respective positions of the parties concerned. The management position is to be strictly adhered to in all relations with the Local."

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49/ The Union in its brief suggests that the memorandum was passed around by Wilson "to all employees in his project with instructions to read the document, initial the attached routing slip, and pass (it) on." While Wilson acknowledged that he circulated the memorandum to employees "to read", he did not testify that employees were required to "initial" the routing slip. However, Boehm, a PAID project employee testified that the memorandum and "buck slip" was brought to her by another employee "who was ahead of (her) on the initialling." In all the circumstances, I find that the procedure used to circulate the memorandum also included initialling.

The complaint alleges that the Activity violated Section 19(a)(1) and (6) of the Order since the Activity had a duty to consult with it concerning both the content of the memorandum circulated by Wilson and the extent of its distribution prior to its formulation and distribution. The Union contends that the status of an agreement between an exclusive representative and an Activity and the manner in which employees are informed about the status of the agreement are matters affecting working conditions. Complainant is of the view that the memorandum was written in such a way as to make the Union look powerless and the distribution of the document was designed to discourage membership in Local 1745. 50/ However, Boehm admitted, and I find, that the memorandum accurately reflects the Union's position on the matter.

The Activity denies any obligation to consult with the Union relative to circulating the memorandum 51/ contending that the circulation of such a memorandum is not a personnel policy, practice, or matter affecting working conditions. The Activity also contends that it was the past practice in the PAID project to circulate such memoranda.

In Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, cited above, (Case No. 63-4716, part I, section 2), the Union therein filed an unfair labor practice complaint concerning, inter alia, the Activity's posting on bulletin boards minutes of a monthly labor-management meeting and a letter from the activity to the union's president, both of which were also sent to the union. With regard to the minutes of the meeting, it was found that such minutes, as recorded by the activity, consisted of six

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50/ Contrary to Complainant's contention, I find that the memorandum was not written in such a way as to make the Union look powerless.

51/ Respondent DPC takes the position that the complaint does not allege a failure to consult about distribution of the memorandum but merely alleges a failure to consult with regard to the content of the memo. The complaint specifically mentions that Wilson "caused a memo to be circulated to all employees in his project" and also specifically alleges that "the very writing and even limited distribution" violated the Order. Accordingly, I find, as I did at the hearing, that the language of the complaint encompasses the distribution of the memorandum.

pages and accurately reflected what occurred at the meeting. The Assistant Secretary held that, absent mutual agreement between an agency or an activity and an exclusive bargaining representative concerning the former's right to communicate directly with unit employees over matters relating to the collective bargaining relationship: ". . .by directly reporting to unit employees matters which have arisen in the context of the collective bargaining relationship, an agency or activity necessarily undermines an exclusive representative's rights set forth in Section 10(e) to be dealt with exclusively in matters affecting the terms and conditions of employment of the unit employees it represents. Any lesser standard clearly would be in derogation of the collective bargaining relationship."

However, the Assistant Secretary went on to find that the union was estopped in that case from contending that the posting of the minutes violated the Order since through mutual agreement and past practice the parties had established a procedure for posting on bulletin boards the minutes of the parties' monthly labor-management meetings.

As to the letter from the activity to the union's president, the Assistant Secretary found in the Department of the Navy, Naval Air Station, Fallon, Nevada case, that the activity's posting of the letter violated the Order since there was no agreement by the exclusive representative relative to the posting of such letters. The contents of the letter to the union's president reflected events which occurred at a special meeting between the activity and the president held to resolve a negotiating problem and an unfair labor practice charge. Although the letter accurately reflected what transpired at the meeting, the letter contained statements which were offensive to the Union. <sup>52/</sup> The Assistant Secretary held applicable to the letter the rationale he expressed with regard to posting the minutes of the meeting stating:

"As discussed above, absent agreement by an exclusive representative, I find that it is improper for agencies

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<sup>52/</sup> The activity characterized as "blackmail" the union's offer to withdraw an unfair labor practice charge if the activity would agree to the union's contract proposals with some modification.

or activities to communicate directly with unit employees with respect to matters relating to the collective bargaining relationship. The need for such a policy is clearly demonstrated in this instance where the Respondent's communication to unit employees created an unfavorable impression with respect to the actions of the Complainant's President and, in my view, necessarily tended to undermine the Complainant's exclusive bargaining status."

Based upon the Assistant Secretary's decision in the Department of the Navy, Naval Air Station, Fallon, Nevada case, I find that the Activity's direct communication to the employees herein relating to the parties' positions on the status of negotiations and the binding effect of the agreement was violative of Section 19(a)(1) and (6) of the Order. While the facts of the case herein are somewhat different from those in the Naval Air Station case, as they virtually always are in litigated cases, they are sufficiently analogous for the principle of Naval Air Station to apply. While the amount of information conveyed in the communication herein is substantially less than that contained in the minutes of the Naval Air Station meeting, both are reports of what transpired at a meeting and revealed the status of matters and the parties' positions relating to the collective bargaining relationship. The Assistant Secretary's prohibition in the Naval Air Station case is broad and not restricted to situations where the communication involved might reflect unfavorably upon the exclusive collective bargaining representative. Nor is there any indication that the quantum of matters relating to the collective bargaining relationship discussed and reported by an activity directly to employees is a determining factor. In such circumstances, I am constrained to find that Wilson's republication of the memorandum herein to PAID project employees constituted a violation of Section 19(a)(1) and (6) of the Order.

Respondent DPC contends that it was the past practice in the PAID project to circulate such memoranda to the employees. Respondent DPC attempts to support this contention based upon the testimony of Wilson given in response to cross-examination as follows:

"Q. (By Miss Cooper) Mr. Wilson, did you generally receive management memorandums of this sort? Had you received other memorandums"

A. Yes, ma'am.

Q. Was it generally your policy to send these memorandums around?

A. I felt if they have general interest to the employees, yes ma'am, I route them around for them to read."

However, according to the testimony of Martha Boehm,<sup>53/</sup> the parties had not agreed to publish the matter of the status of the agreement. Moreover, Boehm credibly testified that while there had been prior discussions with the Activity's management with regard to jointly publishing the subject matter of consultations, she did not recall having ever seen any other Activity distribution of memoranda concerning subject matters discussed in a consultation session.

Under all the circumstances, I find that there was no mutual agreement between the parties concerning the Activity's right to directly communicate with unit employees over matters relating to the collective bargaining relationship. I further find that the evidence does not establish the existence of a past practice with regard to the direct communication of such matters in the PAID project.

V. Case Nos. 63-4722(CA) and 63-4760(CA)

The cases herein were filed by the Union against Veterans Administration, Department of Data Management, Washington, D.C., hereafter called Respondent DMD. <sup>54/</sup>

(a) Case No. 63-4722(CA)

The complaint in Case No. 63-4722(CA) alleges that Respondent DMD violated Section 19(a)(1) of the

<sup>53/</sup> As hereinabove stated, (Case No. 63-4716), since March 27, 1973, Mrs. Boehm was an employee and Union steward in the PAID project and administrative assistant to the Union's President. In September 1973, Boehm became the Union's Vice President.

<sup>54/</sup> The name of Respondent DMD appears as amended at the hearing.

Order by certain alleged decertification activity <sup>55/</sup> of Larry Deinlein, an auditor employed by Respondent DMD. Complainant alleges that Deinlein is a management official or, by virtue of his particular duties, has a special status which precludes him from partaking in the decertification effort or making known his preferences concerning a labor organization or its decertification. <sup>56/</sup> The complaint specifically alleges that Deinlein: (1) participated in soliciting signatures for decertification on July 25, 1973; (2) discussed the petition for decertification with employees on July 25, during duty hours; (3) met with several employees who sponsored the petition during duty hours on July 25 and 26 in the Austin Center's second floor lobby; and, (4) on July 27 met for thirty minutes during duty hours with employees, ostensibly to discuss matters pertaining to the decertification effort.

Since August 1968, Larry Deinlein has been a GS-12 Systems Auditor employed by the ADP Systems Audit Division <sup>57/</sup> of Respondent DMD, performing his auditing duties at the Austin Center. Deinlein is responsible to Supervisory Systems Auditor, Harold Hart who in turn is responsible to the Audit Division's central office which is located in Washington, D.C. Audit Division employees are not under the supervision of

<sup>55/</sup> As discussed above, the decertification activity, occurred at the Veterans Administration Data Processing Center, Austin, Texas (hereinafter called the Austin Center).

<sup>56/</sup> Complainant relies, in part, on the provisions of Sections 1(b) and 3(b)(4) of the Order to support its contention. I find these provisions are inapposite to the issue herein and accordingly the contention based upon these provisions of the Order is rejected.

<sup>57/</sup> Hereafter called the Audit Division.

Austin Center personnel. Deinlein, at all times material hereto, was in charge of auditing programs in the Log 1 project and a number of other projects at Austin Center. His duties consist of testing computer projects processed in his assigned areas and seeing to it that the particular project meets specifications and is free of error. Deinlein's chief concern is that the computer program being tested correctly produces what it was designed to produce. According to his job description, Deinlein, as an auditor, inter alia, "(d)etermines that all output is correct and proper..." and "(e)valuates exceptions discovered in the audit as to whether the discrepancies were caused by improper or inadequate programming or by clerical maintenance operations." Deinlein's job description also provides that he "(r)evIEWS the system to determine that the procedures provide adequate external and internal controls, and audit trials". The job description further states: "The scope, techniques and methods for this work, which covers the auditing of all phases of integrated and automatic data processing, cannot be prescribed except in a general way; therefore, the problems encountered are to be resolved on the basis of judgment and experience. The incumbent will be guided by policies, procedures, instructions and accepted auditing techniques and methods."

If Deinlein discovers an error in the program it is returned to the responsible programmer with a written and/or oral explanation of the deficiencies. If a written report is made, a copy would go to the project supervisor. At times, the supervisor is also advised of any oral report given to the programmer. However, Deinlein is never asked how well a programmer performs his duties and the evidence does not establish that Deinlein's reports play any part in the evaluation of programmers.

The evidence adduced at the hearing established that Deinlein does not possess any indicia of supervisory or managerial authority within the meaning of the Order. I further find that it has not been established that Deinlein, by virtue of his duties and responsibilities possesses any "special status" which would preclude him

from partaking in the activity he allegedly engaged in as set forth in the complaint. 58/ Accordingly, I shall recommend that the complaint herein be dismissed. 59/

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58/ Cf. U.S. Geological Survey, Department of the Interior, Rolla, Missouri, A/SLMR No. 460; Federal Deposit Insurance Corporation, A/SLMR No. 459; and Department of Transportation, National Highway Traffic Safety Administration, A/SLMR No. 193.

59/ In any event, I find that the allegations contained in the complaint that Deinlein participated in soliciting signatures for decertification is totally unsupported by the evidence. Further, the allegations that Deinlein met with pro-decertification employees on duty time, presumably for pro-decertification reasons is also unsupported by the evidence. Not only do I find that Complainant has not proven that Deinlein met with pro-decertification employees in the conference room and lobby as alleged, but the testimony with regard to the nature and substance of any decertification discussion by Deinlein is insufficient to establish that such conversations were in furtherance of the decertification effort. I am unwilling to assume that every conversation had by employees during the period of substantial leafleting in support of the decertification drive was of such a nature as to constitute anti-union activity on duty time.

However, I do find that on July 25, 1973, Deinlein entered the Log 1 project, waived about a copy of a pro-decertification leaflet and loudly announced that if auditors could vote in the election, all the auditors would probably vote "yes". Nevertheless, in view of my finding above as to the status of Deinlein, I make no finding whether, under the circumstances herein, such a statement made by an appropriately responsible party would be a violation of the Order.

(b) Case No. 63-4760 (CA)

The complaint herein alleges that on two occasions, Larry Deinlein, as credit union treasurer, loudly discussed the Union President's financial difficulties and possibility of automobile repossession with the President's official representative and the Union's Acting President. It is alleged that these conversations involving personal, confidential matters occurred in areas where they could be overheard by others and were deliberately calculated to discredit the Union President and put the Union in a "bad light", thereby allegedly violating Section 19 (a) (1) and (2) of the Order.

For the reasons set forth above with regard to Deinlein's status, I similarly recommend that the complaint in this case be dismissed. 60/

Remedy

In its prayer for relief Complainant suggests that an appropriate remedy to violations of the Order related to Respondent's assistance in the decertification effort should include a dismissal of the decertification petition

60/ Moreover, I would not find that the Union has proven by a preponderance of the evidence that Deinlein's conversations with regard to the hospitalized Union President's financial arrangements with the credit union (an entity totally independent from the Veterans Administration) violated the Order, Deinlein's use of a louder than normal voice notwithstanding. The subject matter was appropriate for discussion by Deinlein with persons who had a significant relationship with the Union President. Further, it was reasonable for Deinlein to engage these individuals in a discussion in an effort to avoid having the hospitalized President's cars repossessed through default on repayment of a credit union loan. While Deinlein testified that he never discussed an employee's financial affairs with other employees, he also testified, without contradiction, that other cars had been repossessed by the credit union. Moreover, Deinlein further testified that he never had a prior situation arise where, as here, the person holding the loan was in a mental hospital at the time of the default (continued on next page)

currently pending with the U.S. Department of Labor (Case No. 63-4708 (DR)).

As I interpret the Regulations of the Assistant Secretary, under Section 202.2(f), matters concerning the adequacy and validity of the showing of interest to support a petition are initially under the sole jurisdiction of the Area Administrator. According to Section 202.2(f) (2), after the Area Administrator investigates a petition which has been challenged, the Regional Administrator "shall take such action as he deems appropriate...." However, in setting the cases before me for hearing, the Regional Administrator obviously did not deem it appropriate to set for hearing the matter of the validity of the decertification petition since the Notice of Hearing contains no mention of the petition. Accordingly, I conclude that under the scheme of the Regulations I am without authority to make a recommendation in these unfair labor practice proceedings with regard to the dismissal of the decertification petition.

Recommendations

In view of the entire foregoing, I make the following recommendations to the Assistant Secretary:

1. That Respondent DPC be found to have engaged in conduct violative of Section 19(a) (1) (2) and (6) of Executive Order 11491, as amended, as set forth above.

60/ - continued

and the individual's wife was unable to be reached.

As to the loudness of Deinlein's voice during these discussions, such loudness is insufficient, standing alone, to prove that in the circumstances herein, Deinlein attempted to broadcast the Union President's plight and discredit the Union on the chance that such conversations, of brief duration, would be overheard by other unit employees.



- 2. That an order which is designed to effectuate the policies of the Order, as hereinafter set forth, be adopted.
- 3. That any alleged violations of the Order not specifically found herein be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas shall:

1. Cease and desist from:

(a) Curtailing the movement of Union steward Martha Boehm, or any other Union steward, in order to appease anti-Union sentiments of employees;

(b) Revealing confidential or personal information received in the course of labor-management dealings with National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, where the effect is to dissuade employees from consulting with the Union or seeking the Union's assistance on matters concerning grievances, personnel policies and practices, or other matters affecting working conditions;

(c) Reading or circulating among employees for their reading communications pertaining to the collective bargaining relationship between Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, and National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, unless there exists a mutual agreement to permit such action;

(d) Partaking in or lending support to an effort to decertify National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative;

(e) Failing to take timely and adequate measures to disassociate Veterans Administration, Veterans Administration

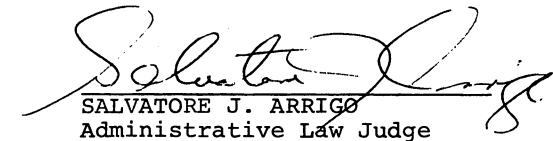
Data Processing Center, Austin, Texas, from the implication that it supports decertification of National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, by allowing the use of its internal mail distribution service in furtherance of decertification;

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

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

(a) Post at its facility at Veterans Administration Data Processing Center, Austin, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

  
SALVATORE J. ARRIGO  
Administrative Law Judge

DATED: February 7, 1975  
Washington, D. C.

## N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT curtail the movement of Union steward Martha Boehm, or any other Union steward, in order to appease anti-Union sentiments of employees.

WE WILL NOT reveal confidential or personal information received in the course of labor-management dealings with National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, where the effect is to dissuade employees from consulting with the Union or seeking the union's assistance on matters concerning grievances, personnel policies and practices, or other matters affecting working conditions.

WE WILL NOT read or circulate among employees for their reading communications pertaining to the collective bargaining relationship between Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, and National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, unless there exists a mutual agreement to permit such action.

WE WILL NOT partake in or lend support to an effort to decertify National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative.

WE WILL NOT fail to take timely and adequate measures to disassociate Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, from the implication that it supports decertification of National Federation of Federal Employees, Ind., Local 1745, the employees' exclusive representative, by allowing the use of its internal mail distribution service in furtherance of decertification.

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

\_\_\_\_\_  
(Agency or Activity)DATED \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2511, 911 Walnut Street, Kansas City, Missouri 64106.

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

DEPARTMENT OF DEFENSE,  
 NATIONAL GUARD BUREAU,  
 TEXAS ADJUTANT GENERAL'S  
 DEPARTMENT,  
 AUSTIN, TEXAS  
 A/SLMR No. 524

This case involved a petition for clarification of unit (CU) filed by the Department of Defense, National Guard Bureau, Texas Adjutant General's Department, Austin, Texas (Activity-Petitioner), seeking to exclude certain employee job classifications from the existing unit on the grounds that, due to reorganizations and changes since the certification of the unit on June 1, 1971, the employees in those job classifications in issue have become supervisors. Contrary to the Activity-Petitioner, the incumbent exclusive representative, American Federation of Government Employees, Texas Air National Guard Council of Locals, AFL-CIO, Grand Prairie, Texas (AFGE), contended that at the time of the certification the Activity-Petitioner had not challenged the inclusion of the disputed job classifications which encompass employees who have been included in the unit and that, although several of the job classifications had undergone changes in title, there had been no change in the duties performed by the employees in such job classifications.

Noting the duties and responsibilities related to the employee job classifications in contention which included the effective recommendation of the hiring of employees, the effective recommendation of subordinates for awards and the effective adjustment of grievances, the Assistant Secretary found that the employees in 7 of the 8 job classifications in contention had the indicia of supervisory authority within the meaning of Section 2(c) of the Order and, therefore, concluded that such job classifications should be excluded from the existing unit.

With respect to the job classification of Production Controller, the Assistant Secretary found that the employees in that job classification did not perform any supervisory functions within the meaning of Section 2(c) of the Order and, accordingly, concluded that this job classification should be included in the exclusively recognized unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,  
 NATIONAL GUARD BUREAU,  
 TEXAS ADJUTANT GENERAL'S  
 DEPARTMENT,  
 AUSTIN, TEXAS

Activity-Petitioner

and

Case No. 63-5261(CU)

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

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 Lloyd F. Dinsmore. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

The Activity-Petitioner filed a petition for clarification of unit (CU) seeking to exclude certain employee job classifications from the existing exclusively recognized unit on the grounds that, due to reorganizations and changes since the certification of representative was issued on June 1, 1971, the employees in these job classifications had become supervisors. 1/ The incumbent exclusive representative, American Federation of Government Employees, Texas Air National Guard Council of Locals, AFL-CIO, Grand Prairie, Texas, herein called AFGE, contends that at the time of the certification, the Activity-Petitioner did not challenge the inclusion of the disputed job classifications which encompass employees who have been included in the unit and that, although several of the job classifications have undergone changes in title, there has been no change in the duties performed by the employees in such job classifications. 2/

1/ At the hearing, the Activity-Petitioner amended its petition limiting to eight the number of job classifications it seeks to exclude from the unit.

2/ The AFGE was certified on June 1, 1971, as the exclusive representative of a unit of all Texas Air National Guard Technicians.

The Activity-Petitioner seeks to exclude the following eight job classifications from the existing unit: Supervisory Management Assistant, GS-8; General Supply Assistant, GS-7 (Materiel Control Supervisor); Production Controller, GS-9; Supply Technician, GS-6; General Supply Assistant, GS-7 (Item Accounting Supervisor); Purchasing Agent, GS-8; Training Technician, GS-8; and Health Technician, GS-9. The employees in these job classifications are stationed at one of the following three bases operated by the Activity: Ellington Air Force Base, Houston, Texas; Hensley Field, Dallas, Texas; or Kelly Air Force Base, San Antonio, Texas.

#### Supervisory Management Assistant

The incumbent is responsible for planning, organizing, directing, and controlling the maintenance analysis activity at the Ellington Air Force Base and has two subordinates with whom he works closely. The record indicates that his job description gives the incumbent the authority to, and he has in fact, interviewed and effectively recommended the hiring of employees. He also has the authority to recommend employees for awards and, in this regard, the record indicates that he has effectively recommended his subordinates for awards.

Under these circumstances, I find that the employee in this job classification is a supervisor within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the exclusively recognized unit.

#### General Supply Assistant (Materiel Control Supervisor)

The incumbents are responsible for overseeing the overall supply operation relative to equipment, parts and space as it affects maintenance. There are two employees in this job classification - one located at the Ellington Air Force Base and the other at Hensley Field. Each incumbent has two subordinates with whom he works closely. The record indicates that in their job description the incumbents are given the authority to interview and recommend hiring of employees. In this regard, the evidence establishes that the incumbents have effectively recommended that specific employees be hired.

Under these circumstances, I find that the employees in the above job classification perform supervisory functions within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the exclusively recognized unit.

#### Production Controller

The incumbent is responsible for, among other things, scheduling for inspection, flying schedules, and debriefings. There is one employee in this job classification located at the Ellington Air Force Base. The incumbent has five subordinates assigned to him but, because of the manner in which his operation functions, he is involved directly with only two

subordinates. The evidence establishes that the incumbent has never interviewed a job applicant nor recommended that an applicant be hired. Further, he has never recommended an employee for an award nor adjusted employee grievances. The incumbent works closely with his subordinates and, although he assigns them work, the record reveals that such assignments are routine in nature.

Under these circumstances, and noting that the record reflects that the employee in the above job classification does not perform any supervisory functions within the meaning of Section 2(c) of the Order, I find that the employee in this job classification is not a supervisor within the meaning of Section 2(c) of the Order and, therefore, should be included in the exclusively recognized unit.

#### Supply Technician

The incumbent is concerned primarily with the accounting, issuance and receipt of fuel, and the coordination of loading of aircraft at Hensley Field. There is one employee in this job classification who has two subordinates with whom he works closely. The evidence establishes that the incumbent handles employees' grievances and, through his efforts, grievances have been adjusted at his level.

Under these circumstances, and noting that the record reflects that the incumbent has effectively adjusted grievances, I find that the employee in the above job classification is a supervisor within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the exclusively recognized unit.

#### General Supply Assistant (Item Accounting Supervisor)

The incumbent is responsible for maintaining the supply publications for the supply complex and for identifying parts so that they can be procured. There are three employees in this job classification - one located at the Ellington Air Force Base; one at Hensley Field; and one at the Kelly Air Force Base. Each incumbent has two subordinates who have been advised by the head of maintenance that the incumbent is their supervisor. The evidence establishes that the incumbents have effectively recommended the hiring of employees and that they have effectively recommended subordinates for awards.

Under these circumstances, I find that the employees in the above job classification are supervisors within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the exclusively recognized unit.

#### Purchasing Agent

The incumbent is responsible for purchasing required items which are not listed in the regular Federal Supply System and for engaging services

and issuing contracts for such items. There are three employees in this job classification - one located at the Ellington Air Force Base; one at Hensley Field; and one at the Kelly Air Force Base. Each incumbent has one subordinate. The record indicates that the incumbents have effectively recommended the hiring of employees, have effectively recommended subordinates for awards, and have effectively adjusted grievances instituted by their subordinates.

Under these circumstances, I find that the employees in the above job classification are supervisors within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the exclusively recognized unit.

#### Training Technician

The incumbent administers a training and education program, handles classification upgrading and assignment actions, and maintains human reliability and personnel reliability programs. There are three employees in this job classification - one located at the Ellington Air Force Base; one at Hensley Field; and one at the Kelly Air Force Base. Each incumbent has one subordinate. The record indicates that the Training Technicians' job classification gives an incumbent the authority to initiate any personnel action required. In this regard, the evidence establishes that the incumbents have effectively recommended their subordinates for incentive awards.

Under these circumstances, I find that the employees in the above job classification are supervisors within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the exclusively recognized unit.

#### Health Technician

The incumbent is responsible for operating a health maintenance unit to provide daily medical service for the permanent technician work force. There are three employees in this job classification - one located at the Ellington Air Force Base; one at Hensley Field; and one at the Kelly Air Force Base. Each incumbent has one subordinate. The record indicates that the incumbents in this job classification have the authority to recommend effectively the hiring of employees and to recommend effectively their subordinates for incentive awards.

Under these circumstances, I find that the employees in the above job classification are supervisors within the meaning of Section 2(c) of the Executive Order and, therefore, should be excluded from the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which American Federation of Government Employees, Texas Air National

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Guard Council of Locals, AFL-CIO, Grand Prairie, Texas, was certified on June 1, 1971, be, and herein is, clarified by including in said unit the position classified as Production Controller and by excluding from said unit the positions classified as Supervisory Management Assistant, GS-8; General Supply Assistant (Materiel Control Supervisor) GS-7; Supply Technician, GS-6; General Supply Assistant (Item Accounting Supervisor), GS-7; Purchasing Agent, GS-8; Training Technician, GS-8; and Health Technician, GS-9.

Dated, Washington, D.C.  
June 30, 1975

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

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

PUGET SOUND NAVAL SHIPYARD,  
 DEPARTMENT OF THE NAVY,  
 BREMERTON, WASHINGTON  
 A/SLMR No. 525

In his Decision and Remand in A/SLMR No. 425, the Assistant Secretary found that the Administrative Law Judge had relied on certain written and oral evidence related to documents encompassed by his Request for Production of Documents which the Respondent had refused to honor. Accordingly, he remanded the case to the Administrative Law Judge for the purpose of issuing a Supplemental Report and Recommendation without considering such related evidence. The case involved an unfair labor practice complaint filed by the Bremerton Metal Trades Council on behalf of its affiliate member American Federation of Government Employees, Local 48, AFL-CIO (Complainant) against Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington (Respondent), alleging that the latter violated Section 19(a)(1) and (2) of the Order by denying a promotion to one of its employees because of his union activities.

Pursuant to the Decision and Remand, the Administrative Law Judge excluded from evidence all of the documents relating to the promotion of the employee which the Respondent had sought to introduce and which were covered by the Requests for Production of Documents, together with all written and oral evidence related to the documents. Upon finding no evidence of anti-union animus on the part of the Respondent or its agents to warrant a conclusion that the employee was not promoted because of his union activities, the Administrative Law Judge recommended dismissal of the complaint. In this regard, the Administrative Law Judge credited the testimony of the Respondent's supervisor.

The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PUGET SOUND NAVAL SHIPYARD,  
 DEPARTMENT OF THE NAVY,  
 BREMERTON, WASHINGTON

Respondent

and

Case No. 71-2572

BREMERTON METAL TRADES COUNCIL  
 on behalf of its affiliate member  
 AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, LOCAL 48, AFL-CIO

Complainant

SUPPLEMENTAL DECISION AND ORDER

On April 29, 1974, Administrative Law Judge Milton Kramer issued his original Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not violated Section 19(a)(1) and (2) of the Order by its failure to promote James M. Byrd to the position of Metal Inspector "A" as alleged in the complaint. However, based on, among other things, the Respondent's "patently unjustified" refusal to honor Requests for Production of Documents issued by the Administrative Law Judge, the latter recommended that the Respondent be required to promote Byrd to the above-noted position.

In a Decision and Remand dated August 28, 1974, 1/ I found, in agreement with the Administrative Law Judge, that the Respondent's refusal to comply with the Administrative Law Judge's Requests to produce documents was unjustified. In this connection, I concluded that all written and oral evidence related to those documents covered by such Requests should have been excluded from the record by the Administrative Law Judge and not considered in the determination of the matter. Regarding the Administrative Law Judge's recommendation that the Respondent be required to promote employee Byrd because of its failure to comply with the Requests to produce documents, I found that such a remedy based solely on a failure to comply with the Assistant Secretary's Regulations was punitive in nature and would not effectuate the purpose and policies of the Order. Noting that in his Report and Recommendations the Administrative Law Judge had relied on certain written and oral evidence which was

1/ A/SLMR No. 425.

related to the documents which the Respondent refused to produce, the case was remanded to the Administrative Law Judge for the purpose of issuing a Supplemental Report and Recommendation without considering such related evidence.

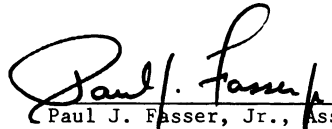
On March 7, 1975, the Administrative Law Judge issued his Supplemental Report and Recommendation finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Supplemental Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made in his Supplemental Report and Recommendation. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Supplemental Report and Recommendation and the entire record in this case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, 2/ conclusions, 3/ and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-2572 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 30, 1975

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

2/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

On page 6 of his Supplemental Report and Recommendation, the Administrative Law Judge inadvertently referred to Byrd rather than Lewis in his finding that Lewis did not, in fact, say or mean to imply that Byrd required more than normal supervision because of his union activities. This inadvertent error is hereby corrected.

3/ Although not specifically excluded by the Administrative Law Judge, I find that exhibit R4, entitled "Work Performance Appraisal", was related to the Requests for Production of Documents. As this exhibit was not relied upon by the Administrative Law Judge in reaching his determination herein, I find that his failure specifically to exclude such exhibit did not constitute prejudicial error.



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: In the Matter of :  
: :  
: PUGET SOUND NAVAL SHIPYARD :  
: DEPARTMENT OF THE NAVY :  
: BREMERTON, WASHINGTON :  
: Respondent :  
: :  
: and : Case No. 71-2572  
: :  
: BREMERTON METAL TRADES COUNCIL :  
: on behalf of its affiliate member :  
: AMERICAN FEDERATION OF GOVERNMENT :  
: EMPLOYEES, LOCAL 48, AFL-CIO :  
: Complainant :  
: :  
: .....

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For the Respondent

Before: MILTON KRAMER  
Administrative Law Judge

SUPPLEMENTAL REPORT AND RECOMMENDATION

Preliminary Statement

The original Report and Recommendations in this case was issued April 29, 1974. It held that on the basis of the record before me the Complainant had not sustained its burden of showing that James A. Byrd had not been given a promotion to Metals Inspector "A" from Metals Inspector "B" because of his union activities. In reaching that conclusion I excluded from consideration certain exhibits 1/ introduced by the Respondent because of the Respondent's refusal to comply with my Requests that it produce those documents before the hearing on the merits began for use by the Complainant. The Respondent's refusal was based on its contention that my Requests were invalid, but it produced some of those documents during the trial as part of its own case on the merits. The details are set forth in my original Report and Recommendations under the caption "Requests for Production of Witnesses and Documents", pages 2-7. However, I did consider evidence related to those exhibits on the ground that to disregard all related evidence as well as the exhibits would result in a decision contrary to what we knew were the facts, and that the Respondent's recalcitrance was sincere although sorely mistaken.

Although I concluded that the Complainant had not proven its case on the merits, I nevertheless recommended that the Respondent promote Byrd. This recommendation I attempted to justify on the theory that: to dismiss the complaint for failure of proof would permit unjustified recalcitrance to pass without meaningful sanction; to require the Respondent to promote Byrd would not require it to promote a person unqualified for promotion because Byrd was concededly highly qualified for the higher position; the normal ratio of Metals Inspector "A" to other Metals Inspectors was about one to three but fluctuated above or below that ratio because of turnover; and to require the Respondent to promote Byrd would therefore not significantly prejudice the public interest and would require the Respondent to do something significant it did not want to do and thus would be a meaningful sanction for its recalcitrance.

The Assistant Secretary held in this case, in A/SLMR No. 425, that to order the Respondent to promote Byrd, solely on the basis of failure to comply with the Regulations, would be punitive in nature and would not effectuate the purpose and policies of Executive Order 11491 as amended. He held further

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1/ Exhibits R3, R5, and R9 through R16.

that while it was proper to exclude from consideration the documents sought by the Administrative Law Judge which the Respondent refused to produce pursuant to the Requests but offered as part of its own case, not only those documents but all evidence related to those documents should have been excluded from consideration,--not as a punitive measure but to effectuate the purpose and policies of the Executive Order.

Accordingly, the Assistant Secretary remanded the case to the Administrative Law Judge to issue a Supplemental Report and Recommendation without considering not only the documents in question but without considering related evidence. He stated that the parties should be afforded an opportunity to submit briefs on the question of which evidence was related to the subject documents and the effect the exclusion of such evidence would have on the merits of the case.

Opportunity was given to the parties to file supplemental briefs. In accordance with extensions of time granted pursuant to joint requests, the parties filed supplemental briefs on November 11, 1974.

Discussion and Conclusions

The Complainant takes the position that pursuant to the Assistant Secretary's order of remand all the evidence presented by the Respondent must be excluded from consideration. This is so, argues the Respondent, because it is fair to assume that the documents not produced contain information fatally damaging to the Respondent's case and because it is also fair to assume that the Respondent's oral evidence "was or may have been related to those documents not produced." At the close of the Complainant's evidence in chief the Respondent moved that the complaint be dismissed for having failed to have proven a cause of action. The motion was denied. It follows, argues the Complainant, that such ruling held that a prima facie case had been proven, and that since all of Respondent's evidence must be disregarded under the Assistant Secretary's order of remand, a prima facie case has been established and is unrefuted.

With respect to the specific testimony of Respondent witnesses which should be excluded, the Complainant goes to similar extremes. For example, the Complainant would have us exclude all the testimony of the members of the rating panel because Exhibit R3, one of the tainted exhibits, shows who were the members of the panel and therefore, argues the Complainant, their testimony is related to that exhibit. Similarly, the Respondent would have us exclude all testimony concerning the procedures used in evaluating candidates because such testimony allegedly "directly relates" to Exhibit R9, another of the tainted documents, which sets forth the



Vacancy Announcement including the statement of required qualifications which standards were supposed to have been applied.

I believe such "relationship" to be too distant to be included within the Assistant Secretary's proscription of the evidence to be considered. And the Complainant attributes too much significance to an Administrative Law Judge denying a motion to dismiss at the close of the Complainant's evidence in chief. An Administrative Law Judge does not have authority to grant such a motion; he can only deny it or recommend that it be granted. To follow the latter course would mean closing the hearing with a substantial likelihood it would have to be reopened with a concomitant substantial delay. To be sure, a respondent may stand on its motion to dismiss at the close of a complainant's case in chief, as was done in Internal Revenue Service, Fresno Service Center, A/SLMR No. 489. A denial of a motion to dismiss at the close of the complainant's case in chief, and the affirmance of such ruling by the Assistant Secretary in a blanket procedural ruling, are not an adjudication that the complainant's case in chief established a prima facie case. But even if it were, I cannot conclude that under the order of remand I must disregard all the testimony and other evidence offered by the Respondent. I understand the order of remand to mean that I should disregard all Respondent's evidence "related" to Exhibits R3, R5, and R9 through R16 or related to other documents included in my Requests to Produce and not produced.

Exhibit R3 consists of three parts. The first part is the "Element Rating Sheet" on which two raters appraised Byrd's abilities in seven categories. The second and third parts are two "Appraisal of Potential" of Byrd by two other supervisors in ten aspects.

Under the Order of remand, all evidence presented by the Respondent concerning Byrd's ratings on his abilities and potential should be disregarded. But it should be remembered that Byrd's abilities and potential are not issues in this case. We do not sit in review of the Respondent's exercise of judgment in selecting candidates in making its promotions. Our task is to determine whether Byrd's non-promotion was motivated, in whole or in part, by his union activities. See pages 10-11 of my original Report and Recommendations.

Exhibit R5 is a printed Quality Assurance Office Instruction on "Career Development Policy and Procedures for Ungraded Nondestructive Test Personnel (Non-Nuclear)." It is dated May 26, 1972, before the promotions here involved. No evidence related to this Exhibit was given consideration in reaching any significant finding or conclusion.

Exhibit R9 is simply the Vacancy Announcement including the qualifications required. Any evidence related to this Exhibit would pertain, if relevant at all, to the merits of the Respondent's selection of the six to be promoted, not to its motivation. Again, the merits of the Respondent's selection of which candidates should be promoted,--the soundness of its exercise of judgment,--are not before us.

Exhibit R10 is a listing of those candidates found "Qualified" (24 of them, including Byrd), four who were found "Ineligible", and one whose application was held in suspense. No evidence related to this Exhibit had any bearing on the conclusions I reached in my original Report and Recommendations except my finding that Byrd was found qualified for promotion, a finding that did not prejudice Complainant's case.

Exhibits R11 through R16 are the six tabulations on each of the Element Rating Sheets pertaining to the six candidates who were selected for promotion to the six vacancies. Under the Order remanding this case to me, I disregard the evidence of the Respondent that the six who were selected were rated higher than Byrd was rated.

The other documents not produced pursuant to the Requests are only described in the Complainant's motion; we know nothing else about them or even which of them exist.

I have examined my original Report and Recommendations in the light of the Order remanding the case to me, and have considered what evidence of Respondent is related to Exhibits R3, R5, and R9 through R16 or related to other documents not produced. By disregarding all such evidence, I change only one conclusion that may be considered significant. In my original decision I found that Lewis had nothing to do with the promotions to Metals Inspector "A". I now find and conclude that he was the "subject-matter expert" in those promotions, i.e., he rated the value of prior experience.

Stripped to its barest essentials, the case comes down to a relatively simple situation:

On February 4, 1971, Reynold E. Lewis, a Senior Supervisor and Byrd's third tier supervisor, said to Byrd after Byrd had gone to his supervisor over a matter Lewis thought Byrd should have handled without the aid of a supervisor, that when the time came for rating Metals Inspectors "B" for promotion to Metals Inspectors "A" Byrd could not be well rated because he required more than normal supervision. Lewis had been told prior to this incident by Byrd's supervisors that Byrd required more than normal supervision. Byrd and Alfred D. Malloy, a union steward who was present, understood Lewis to have said


Byrd required more than normal supervision because of his union activities. Byrd did not in fact say or mean to imply that Byrd required more than normal supervision because of his union activities. Byrd at the time was Chief Steward of his union local. There is no other indication of anti-union animus on the part of Lewis or anyone else.

Nineteen months later, in September 1972, there were promotions to Metals Inspector "A". Lewis was the subject-matter expert; he appraised the value of prior experience. There were 24 applicants for the promotion, including Byrd. Seventeen of the 24 were rated highly qualified, and Byrd was rated fifteenth of the seventeen. 2/ Byrd was not one of the six selected by the Shipyard Commander for promotion. There is no persuasive evidence that Byrd's position on the list, or that the Commander's selection of the six to be promoted, was influenced by consideration of Byrd's union activities.

The foregoing constitutes an insufficient basis on which to predicate a conclusion that Byrd was not given a promotion because of his union activities.

Recommendation

The complaint should be dismissed.

  
MILTON KRAMER  
Administrative Law Judge

Dated: March 7, 1975  
Washington, D. C.

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

GENERAL SERVICES ADMINISTRATION,  
REGION 5, QUALITY CONTROL DIVISION,  
FEDERAL SUPPLY SERVICE  
A/SLMR No. 526

This case involves a severance request by the National Federation of Federal Employees, Local 1300 (NFFE) for a unit of five quality assurance specialists in the geographical area of the lower peninsula of the State of Michigan currently represented in a broader unit by the American Federation of Government Employees, AFL-CIO, Local 2075 (AFGE). The Activity contended 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. Further, it asserted that the AFGE has fairly and effectively represented the employees in the unit for which it is the exclusive representative.

Applying the policy enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, the Assistant Secretary denied the severance request and dismissed the NFFE's petition. In this regard, he noted the absence of any evidence that the AFGE had failed or refused to represent any unit employees, including those in the claimed unit.

2/ This is established by Byrd's own testimony. Tr. 200.

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,  
REGION 5, QUALITY CONTROL DIVISION,  
FEDERAL SUPPLY SERVICE

Activity

and

Case No. 52-5716(RO)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1300

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 2075

Intervenor

## DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Gregory A. Miksa. 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, National Federation of Federal Employees, Local 1300, herein called NFFE, seeks an election in a unit of all employees of the Quality Control Division (QCD), Federal Supply Service (FSS), General Services Administration (GSA), Region 5, in the geographical area of the lower peninsula of the State of Michigan, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors. By its petition herein, the NFFE seeks to sever a unit of five Quality Assurance Specialists from a broader unit currently represented on an exclusive basis by the American Federation of Government Employees, AFL-CIO, Local 2075, herein called AFGE.

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. Further, it asserts that the AFGE has fairly and effectively represented the employees in the existing unit.

Region 5 of GSA is headquartered in Chicago, Illinois, and encompasses the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. Organizationally, the FSS is one of four GSA services, 1/ each of which reports to the Regional Administrator. It is composed of 8 divisions and 17 branches. The Quality Assurance Specialists in the claimed unit are employed in the QCD which reports to a Regional Commissioner who, in turn, reports to the Regional Administrator. The QCD is concerned with the administration of GSA contracts awarded to manufacturers and, in this regard, ensures that contract requirements are met with respect to timeliness and quality.

Quality Assurance Specialists are responsible for the field administration of GSA awarded contracts and, at times, are the only individuals on behalf of the GSA who have direct contact with the contractors. The record reveals that the specialists have distinctive job responsibilities, knowledge and skills which require specific training. The evidence establishes that the AFGE has been the exclusive representative for all nonprofessional and nonsupervisory GSA employees in the area of the lower peninsula of the State of Michigan, including the employees in the claimed unit (with the exception of units of GSA employees in Kalamazoo and Battle Creek, Michigan represented by another AFGE Local), since 1973. With respect to the type of representation it has offered to unit employees, the record indicates that the AFGE holds monthly membership meetings, publishes a newspaper, and issues a monthly newsletter. Further, the President of the AFGE is in frequent contact with the Activity's Chief of Employee Relations with regard to all matters affecting the unit employees. While, at present, the Quality Assurance Specialists do not have their own steward, the record reflects that there has been a Quality Assurance Specialist steward in the past. It appears from the record that the majority of grievances are handled informally with immediate supervisors and have not reached the formal stage. There is no evidence that the AFGE ever has refused to handle a grievance of any unit employee, nor is there any evidence that it has refused to represent the claimed employees or has treated them in a disparate manner.

I find that the petitioned for unit of all Quality Assurance Specialists in the geographical area of the lower peninsula of the State of Michigan is not appropriate for the purpose of exclusive recognition. Thus, it has been held previously that a separate unit carved out of an existing unit will not be found appropriate except in circumstances where the evidence

1/ The other three services are the Public Buildings Service, the Automated Data and Telecommunications Service, and the Office of Administration.

establishes that the employees sought have not been represented fairly and effectively. <sup>2/</sup> I find no such circumstances in the instant case. Thus, there is no evidence that the AFGE has failed or refused to represent any unit employees, and the record reveals that a harmonious bargaining relationship has been maintained since 1973 between the Activity and the AFGE covering the unit employees in the lower peninsula of the State of Michigan, including those petitioned for herein. Accordingly, I find the unit sought by the NFFE is inappropriate for the purpose of exclusive recognition, and I shall, therefore, dismiss its petition.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 52-5716(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 30, 1975

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

<sup>2/</sup> See United States Naval Construction Battalion Center, A/SLMR No. 8 and Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, FLRC No. 72A-24.

June 30, 1975

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

DEPARTMENT OF THE ARMY,  
HEADQUARTERS, UNITED STATES ARMY  
ARMAMENT COMMAND,  
ROCK ISLAND ARSENAL,  
ROCK ISLAND, ILLINOIS  
A/SLMR No. 527

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R7-68 (Complainant) alleging that the Respondent Activity had violated Section 19(a)(6) of the Executive Order by failing to meet and confer prior to implementing a directive from higher agency management to revise certain career appraisal practices. On April 10, 1973, the Army Materiel Command directed the Respondent, and a number of other activities employing scientists and engineers, to revise downward the numerical ratings of employee performance in most future career appraisals in order that the varying capabilities of the employees would be more accurately indicated. Thereafter, the scientists and the engineers of the Respondent received new career appraisals which reflected this downward revision in numerical ratings. Although the President of the Complainant read a memorandum from the Respondent which concerned the revision and which had been posted on a bulletin board on August 20, 1973, the Respondent's officials did not discuss the matter with the Complainant's officials until December 7, 1973.

The Administrative Law Judge found that the decision concerning career appraisals was not subject to bargaining under Executive Order 11491, as amended, inasmuch as this decision issued by the higher level authority required that the policy be implemented by the management of several subordinate elements, including the Respondent, which were engaged in similar activities, and that the policy be uniformly applied throughout subordinate elements. However, the Administrative Law Judge found that while there was no duty to meet and confer regarding the policy set forth in the higher level directives, the Respondent violated Section 19(a)(6) of the Order by failing to inform the Complainant of the change in policy prior to its effectuation and, thereby, failed to afford the Complainant a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the higher level decision, and on the impact of this decision on adversely affected employees.

Although the Assistant Secretary agreed with these conclusions, he noted that the Administrative Law Judge's recommended remedy of rescinding all career appraisals issued by the Respondent pursuant to the higher agency decision was not necessary. In this regard, the Assistant Secretary noted that representatives of the Complainant and the Respondent met on December 7, 1973, concerning the policy on career appraisals, and that the unfair labor practice complaint in this matter and the Complainant's brief to the Administrative Law Judge requested only that all career appraisals prepared prior to this meeting be rescinded.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions consistent with his decision, including the rescission of only those career appraisals which were issued before the aforementioned meeting in accordance with the higher agency policy directives.

A/SLMR No. 527

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
HEADQUARTERS, UNITED STATES ARMY  
ARMAMENT COMMAND,  
ROCK ISLAND ARSENAL  
ROCK ISLAND, ILLINOIS

Respondent

and

Case No. 50-11102(CA)

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R7-68

Complainant

DECISION AND ORDER

On February 10, 1975, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent and the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the parties, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, except as modified below.

The Administrative Law Judge found, and I concur, that the Respondent Activity was not obligated to meet and confer with the Complainant in regard to the decision of higher level authority to reduce the numerical code levels of career appraisals, inasmuch as the directives of the higher level authority required that the policy be implemented by the management of several subordinate elements, including the Respondent, which were engaged in similar activities, and that the policy be uniformly applied

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1/ The Department of the Army, Office of the Deputy Chief of Staff for Personnel, Washington, D.C., filed additional exceptions which were untimely and, therefore, not considered.

throughout these subordinate elements. <sup>2/</sup> Further, the Administrative Law Judge found that while there was no duty to meet and confer regarding the policy set forth in the higher level directives, the Respondent violated Section 19(a)(6) of the Order by failing to inform the Complainant of the change in policy prior to its effectuation and, thereby, failed to afford the Complainant a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the higher level decision, and on the impact of this decision on adversely affected employees.

While I agree with the above findings of the Administrative Law Judge, I disagree with a portion of his recommended remedial order. Thus, I find that under the particular circumstances herein, it is not necessary to order the rescission of all career appraisals issued by the Respondent in implementation of the policy established by higher level authority, as recommended by the Administrative Law Judge. In this regard, it was noted that the record indicates that representatives of the Complainant and the Respondent met on December 7, 1973, concerning the policy on career appraisals and that both the unfair labor practice complaint in this matter and the Complainant's brief to the Administrative Law Judge request only that appraisals issued prior to that meeting be rescinded. Under these circumstances, I find it appropriate to limit the remedial order in this respect to a rescission of those career appraisals which were issued prior to the parties' meeting of December 7, 1973, in accordance with the higher agency policy directives.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Headquarters, United States Army Armament Command, Rock Island Arsenal, Rock Island, Illinois, shall:

1. Cease and desist from:

Utilizing or giving effect to any career appraisals of engineers and scientists represented exclusively by the National Association of Government Employees, Local R7-68, issued prior to December 7, 1973, pursuant to the April 10, 1973, directive of the Army Materiel Command, as augmented by the directives issued May 4 and August 20, 1973, by the U.S. Army Armament Command.

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

(a) Notify the National Association of Government Employees, Local R7-68, of any directives or instructions received from a higher level command on the application of career appraisal criteria for engineers and scientists and, upon request, meet and confer in good faith, to the extent

<sup>2/</sup> Cf. United Federation of College Teachers, Local 1460 and Merchant Marine Academy, FLRC No. 71A-15.

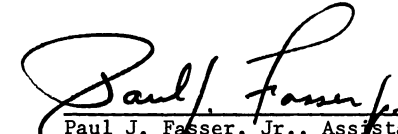
consonant with law and regulations, on the procedures and the methods which management will observe in implementing such directives or instructions and on the impact which such directives or instructions will have on adversely affected employees.

(b) Rescind all career appraisals for engineers and scientists which were issued prior to December 7, 1973, pursuant to the April 10, 1973, directive of the Army Materiel Command, as augmented by the directives issued May 4, and August 20, 1973, by the U.S. Army Armament Command.

(c) Post at its facility at the Rock Island Arsenal, Rock Island, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they should be signed by the Commander of the Headquarters, United States Army Armament Command, Rock Island Arsenal, Rock Island, Illinois, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
June 30, 1975

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



NOTICE TO ALL EMPLOYEES

PURSUANT TO  
A DECISION AND ORDER OF THE  
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS  
and in order to effectuate the policies of  
EXECUTIVE ORDER 11491, AS AMENDED  
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT utilize or give effect to any career appraisals of engineer and scientist employees represented exclusively by the National Association of Government Employees, Local R7-68, issued prior to December 7, 1973, pursuant to the April 10, 1973, directive of the Army Materiel Command, as augmented by the directives issued May 4 and August 20, 1973, by the U.S. Army Armament Command.

WE WILL notify the National Association of Government Employees, Local R7-68, of any directives or instructions received from a higher level command on the application of career appraisal criteria for engineers and scientists and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures and methods which management will observe in implementing such directives or instructions and on the impact such directives or instructions will have on adversely affected employees.

WE WILL rescind all career appraisals for engineers and scientists which were issued prior to December 7, 1973, pursuant to the April 10, 1973, directive of the Army Materiel Command as augmented by the directives issued May 4 and August 20, 1973, by the U.S. Army Armament Command.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 1033B, Federal Office Building, 230 South Dearborn Street, Chicago, Illinois 60604.

.....  
In the Matter of: :  
DEPARTMENT OF THE ARMY, :  
UNITED STATES ARMY ARMAMENT COMMAND, :  
ROCK ISLAND ARSENAL, : CASE NO. 50-11102 (CA)  
ROCK ISLAND, ILLINOIS :  
Respondent :  
and :  
LOCAL R7-68, NATIONAL ASSOCIATION :  
OF GOVERNMENT EMPLOYEES :  
Complainant :  
.....

APPEARANCES:

JOHN A. ROCK  
Moline, Illinois  
For the Respondent  
PAUL J. HAYES  
Bellville, Illinois  
For the Complainant

BEFORE: GORDON J. MYATT  
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a complaint filed on February 21, 1974, under Executive Order 11491, as amended, by Local R7-68, National Association of Government Employees (hereinafter called the Union) against Department of the Army, U.S.

Armament Command, Rock Island Arsenal, (hereinafter called the Respondent Activity), a Notice of Hearing on Complaint was issued on May 9, 1974. The complaint alleged, among other things, that the Respondent Activity violated Section 19(a)(6) of the Executive Order.

A hearing was held in this matter on July 18, 1974, in Moline, Illinois. All parties were represented and afforded full opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. Oral argument was made at the conclusion of the hearing on behalf of the Respondent Activity and a subsequent brief was filed by the Complainant.

On the entire record hearing, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following:

Findings of Fact

A. Background Facts

The Respondent Activity is a subordinate element of the U.S. Armament Command (ARMCOM) which in turn is a subordinate command of the U.S. Army Materiel Command (AMC). The Army Materiel Command has the responsibility for acquisition and support of all Army materiel. The Respondent Activity is divided into four operating elements, one of which is the Rodman Laboratory where the engineers and scientists involved in this matter are employed. Rodman Laboratory has approximately 750 employees, 50 percent of which are classified as engineers and scientists. The Respondent Activity parallels four other similar activities under ARMCOM. 1/ Rodman Laboratory itself is subdivided into five operating Directorates and a Planning and Control office.

The Union herein was certified as the exclusive representative of the employees in the following unit on April 28, 1972:

All non-supervisory, professional employees, located at the Headquarters, U.S. Army Weapons Command, Rock Island, Illinois

1/ The other arsenals engaged in similar activities are (1) Edgewood Arsenal, Aberdeen Proving Ground, MD.; (2) Frankford Arsenal, Philadelphia, PA.; (3) Watervliet Arsenal, Watervliet, NY.; and (4) Picatinny Arsenal, Dover, NJ.

[Excluding] Management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors, guards, non-professional GS employees and WG employees.

There is no evidence on this record that at the time of the alleged unlawful conduct, the Union and the Respondent Activity had negotiated a collective-bargaining agreement.

B. The Alleged Unlawful Conduct

On April 10, 1973, Dr. R. B. Dillaway, Functional Chief's Representative for Engineers and Scientists, issued a memorandum regarding career appraisals. 2/ The memo expressed the concern of the Engineer and Scientist Career Planning Board (Department of the Army) over the failure of the current career appraisal system to provide an effective means for identifying potential candidates, and to differentiate between their capabilities for openings in the E&S career field. According to the memo, the present rating system (Employee Career Appraisal, DD Form 1559) had deteriorated to the point where the average of the ratings assigned to the seven elements evaluated was very close to the numerical rating of four; which was the highest rating an employee could receive. 3/ The memo directed that effective May 1, 1973 -- the period when the ratings of employees at the GS-15 level would commence -- all supervisors rating and reviewing engineers and scientists would undertake to rate their personnel in a realistic fashion based on the guidance set out in Civilian Personnel Regulation (CPR) 950-1. This regulation related to "Career Management Basic Policies and Requirements." Attention was drawn to the portion of CPR 950-1 which stated that "average, numerical code 2, is used when the employee potential is equal to that normally expected for a person at his grade." The memo further directed the rating supervisors to enforce the regulation immediately, and that it was expected that the average for the rated employees would move "recognizably closer to the stated average by the next reporting period."

2/ Dillaway was attached to the headquarters of the Army Materiel Command (AMC) as Deputy for Laboratories. He was also the Career Manager for engineers and scientists Army-wide.

3/ The numerical code levels assigned to the career appraisals were as follows:

[continued on next page]



In a recognition of anticipated concern among employees because of the directed change in the appraisal application, the Dillaway memo contained the following paragraph:

While I recognize that this may create concern among employees that they will be adversely affected by this change when it is not carried out at the same time in other Department of the Army career fields, I have satisfied myself that as long as this policy is implemented throughout our career field that it should not adversely affect any employee and it will certainly aid in recognizing those employees who are truly outstanding, capable personnel.

On May 4, 1973, J. A. Brinkman, Deputy Director for Research and Development for ARMCOM and the Career Program Manager for engineers and scientists of ARMCOM, issued a memo enclosing and referring to the Dillway memo. This memo was distributed to all subordinate elements under

ARMCOM employing engineers and scientists. The Brinkman memo restated the directives contained in the Dillaway memo, and emphasized that the purpose of career appraisal were "to provide an evaluation of an employees potential for future development and progression." The Brinkman memo directed that the statistics of the rating level distribution be provided on a quarterly basis, and that it was expected that "the average for engineers/scientists, not only within WECOM [Weapons Command] but throughout Army, will not move recognizably closer to the stated average."

The memos were received by the Respondent Activity approximately on May 10, 1973. Dr. Royce Beckett, Director of Rodman Laboratory and Career Manager of engineer and scientist personnel for the Respondent Activity testified that when he received the Dillaway and Brinkman memos, he discussed their contents with his subordinate directorate chiefs at their weekly staff meeting. According to

3/ - continued

- 0-unsatisfactory
- 1-marginal
- 2-average
- 3-above average
- 4-outstanding

Beckett, he instructed the directorate chiefs to advise their supervisors of the memos and they in turn were to inform the employees involved. Beckett also instructed his secretary to post copies of the memos on the bulletin board located immediately outside his office near the main entrance to the building. 4/ The undisputed testimony indicates that the memos were posted at least by the 30th of May and that they remained posted for several days. 5/ Beckett acknowledged, however, that it never occurred to him to advise or meet with the officials of the Union regarding the directives contained in the memoranda. Beckett stated that he felt he had no discretion in implementing the policy of the directives.

On August 20, 1973, Beckman issued another memorandum referring to the prior memoranda cited herein, and setting forth the results of the quarterly report on the rating reductions for the employees at the GS-15 grade levels. The second Beckman memorandum on this topic contained the following statement:

Based on the initial report, only a token effort has been made in the downward revision of employee numerical code ratings. Every effort will be made by all rating supervisors to apply regulatory numerical code values in evaluating their employees' career potential.

4/ The record testimony indicates that the building in which Beckett's office was located was not the only building occupied by the laboratory. Apparently the laboratory consisted of a series of buildings located in a complex.

5/ There is some contention on the record that a large number of the employees did not use this entrance when entering the building. However, there is undisputed testimony that at the time of the posting, the Respondent customarily posted matters which concern employees on the bulletin board outside of Beckett's office. There is also undisputed testimony that items posted only were allowed remain two or three days. The manner and place of posting, however, is not important to the ultimate decision in this case beyond recognition of the fact that there was a brief posting of the memoranda.

Furthermore, the goal will be for averages of all grades to be within the realistic rating average of 2.0-3.0 during the present fiscal year.

This document reminded the rating officials that the next report was due October 1, 1973, and would include ratings of grades GS-10 and below, and grade GS-11.

This memo was also posted on the bulletin board by management officials and was subsequently seen by John Furman, President of the Union. Furman testified that until he saw the August 20 memo, he had not been made aware of the initial Dillaway and Beckman memos regarding career appraisals; either in an official or unofficial capacity. Having seen the document of August 20, Furman made no effort to contact the management officials regarding the reduction in the ratings of the career appraisals. He testified that he waited to see if management would contact him, as the chief representative of the Union.

In the interim, ongoing appraisals of the engineer and scientist employees were being effectuated by the officials of the Respondent Activity. It was the practice to rate the employees in groupings by grade levels. Therefore, the initial appraisals immediately after the issuance of the Dillaway and Brinkman memoranda only involved employees at grade level GS-15. Appraisals of other employees at lower grade levels were made at different periods of time prescribed by internal regulations.

On November 20, 1973, the Union filed charges with the Respondent Activity alleging violation of Section 19 of the Executive Order regarding the downward revision of the career appraisals. Beckett testified that receipt of the charges was the first knowledge he had of any dissatisfaction on the part of the Union with the implementation of the directives regarding the appraisal ratings. Representatives of the Union and the Respondent Activity met on December 7, 1973, and as a result, Beckett met with employees of each subordinate directorate of the laboratory to explain the Dillaway-Beckman directives, and how management was seeking to implement it. These meetings took place between December 7, 1973 and

January 10 of the following year. In addition, management officials reviewed and recalled all of the GS-12 appraisals for reconsideration. Beckett testified this was done to insure that all five operating directorates were implementing the Dillaway-Beckman directives in an equitable manner throughout the laboratory. The management officials were of the opinion, following a meeting with the Union officials, that no inequities existed in the appraisals of employees below the level of GS-12. Accordingly, these appraisals were not recalled. The Union, however, insisted that all appraisals issued under the guidance of the Dillaway-Beckman directives be rescinded, and all appraisals in process be held in abeyance. The Union also insisted that management meet and confer regarding the downward revision of the numerical code levels applied to the appraisals.

#### C. The Impact of the Dillaway-Beckman Directives on the Unit Employees

Several employees testified as to how they were personally affected by the emphasis on the downward revision of the numerical code ratings in their career appraisals. Thomas Frandsen, a GS-11 engineer assigned to the Aircraft and Air Defense Weapons Systems Directorate, stated he received his appraisal on October 26, 1973. Subsequently, on January 10, 1974, he received another appraisal for the same period, but the numerical rating was higher. Frandsen had no knowledge of the reason why his rating had been increased.

Jack Manata, a GS-12 engineer in the Research Directorate, testified he received his rating on November 19, 1973. <sup>6/</sup> Manata's rating showed a decrease in his numerical average from 3.2 to a rating of 2.4. When Manata questioned his supervisor about the decrease, he was informed that it was a result of the Dillaway directive to reduce all numerical code ratings of the career appraisals. Manata filed a formal grievance regarding this matter, and on December 20, 1973, was given a new appraisal covering the same period. His rating was increased to 2.85.

<sup>6/</sup> Manata was also the Vice President of the Union.

Charles Schertz, a co-worker of Manata, also received his appraisal at approximately the same time. Schertz's appraisal indicated a reduction from 3.7 to 2.4. Manata represented Schertz in filing a formal grievance, and this employee's appraisal was subsequently reevaluated and raised to the numerical rating of 2.71.

Employee Dennis Beug, a GS-12 engineer in the Aircraft and Air Defense Systems Directorate, testified that he received his appraisal as a GS-11 in September 1973. When he questioned that his numerical rating was below that of the prior year, he was informed by his supervisor of the requirements of the Dillaway directive. Beug refused to sign his appraisal until his supervisor showed him a copy of the directive. He subsequently signed the document, but only after a notation was put on the appraisal form stating it did not indicate a "degradation of the quality of the employee's work, but was to comply with the directive to maintain an average of 2 as an established average in the appraisals." Beug was subsequently promoted to a GS-12 on June 30, 1973.

Richard Maguire, Deputy Director of the Application Engineering Directorate, testified he had served on rating panels and also as a single rater of employee candidates for promotion actions. According to Maguire, one of the factors considered in screening out candidates is the numerical code level rating on their career appraisals for the latest rating period. While Maguire indicated it was not the only factor to be considered, the numerical rating was put on the rating sheet in order to assist in refining the list of the candidates for promotion.

D. Contention of the Parties

The Union contends the Dillaway-Beckman directives constituted a new guidance, which had a definite impact on the promotion potential and overall future of the engineer and scientist employees in the bargaining unit. Because the matter affected personnel policy and practice as well as working conditions of the employees, the Union contends the Respondent Activity was placed under a duty by Section 11(a) of the Executive Order to meet and confer with it as the exclusive representative prior to the implementation of the directives. It follows from this premise that the failure to do so is contended to be a violation of Section 19(a) (6) of the Order.

The Respondent Activity acknowledged that it did not contact the representatives of the Union regarding the directives, but stated that it never refused to consult and confer with the Union once a demand was made. It is the contention of the Respondent Activity that the Union had knowledge of the directives, at least by August 20, 1973, but never requested a meeting with management until charges were filed on November 20, 1973. Therefore, the Respondent Activity argues the burden was on the Union, once it acquired knowledge to request a meeting with management, and the failure to do so precludes the finding of a violation of Section 19 (a) (6)

Section 11(a) of the Executive Order provides, in pertinent part:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as maybe 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....

Concluding Findings

The initial question to be addressed here is whether the Dillaway directive itself, issued by a higher echelon in the agency, properly falls within the scope of bargaining at the local level. The decision precedents clearly indicate, in the circumstances presented here, the Respondent Activity had no obligation under the Executive Order to bargain with the Union regarding the policy decision contained in the directive; i.e., that the numerical grade levels of the career appraisals must be reduced in order to achieve a more realistic average of "2." <sup>7/</sup> The policy established by

<sup>7/</sup> United Federation of College Teachers, Local 1460 and Merchant Marine Academy, FLRC No. 71A-15, Report No. 30 (November 20, 1972); Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, FLRC No. 73A-64, Report No. 58 (November 20, 1974).

the Dillaway memorandum, as augmented by the Beckman memorandum, was directed to the management of the several subordinate elements of the command engaged in similar activities and employing the classes of employees -- engineers and scientists -- affected thereby. It clearly dealt with the administration of a subject matter common to the subordinate activities and was to be uniformly applied throughout each subordinate level.

On this basis, I find and conclude that the Respondent Activity was under no duty to meet and confer with the Union regarding the decision of the higher level authority to reduce the numerical code levels of the career appraisals for the employees in the bargaining unit. In so finding I am not unmindful of the decision of the Assistant Secretary in Department of Navy Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390 (May 15, 1974). There a higher level echelon, Navy Ship Systems Command (NAVSHIPS) issued instructions regarding mobility requirements of all of the subordinate activities of NAVSHIPS with respect to new and vacant positions and positions in which incumbent employees had volunteered. The Supervisor of Shipbuilding, Conversion and Repair (SUPSHIPS), Pascagoula, issued an instruction at the local level patterned after the NAVSHIP instruction. The subordinate activity and the Union had a negotiated agreement which contained a provision relating to the subject matter of the NAVSHIPS instruction. The Assistant Secretary determined that the NAVSHIPS instruction was a regulation of a higher echelon in the same agency, and as such, it was not the regulation of an "appropriate authority" within the meaning of the Executive Order. Thus, the Assistant Secretary held that an instruction from a higher echelon within the same agency could not serve as a valid basis for unilateral modification of a negotiated agreement between the parties during its term. The rationale of that case does not apply, however, to the instant case. Here there is no negotiated agreement in existence, and hence, there can be no unilateral modification of a current contract provision. Therefore, SUPSHIPS, Pascagoula, is distinguishable on its facts, and the holding is inapposite here.

By concluding that the Executive Order did not place the Respondent Activity under an obligation to bargain about the decision to revise the numerical code levels downward does not imply, nor do I find, that the Respondent Activity

was relieved of all obligation to meet and confer with the Union regarding the subject matter. The career appraisals involved personnel policies and practices and were directly related to working conditions in that employee career advancement was inextricably involved. The Union, as the exclusive representative, had a legitimate interest in the manner and the methods by which management was going to proceed to implement the Dillaway directive. The Union also had an equally strong interest in the effect that the downward revision of the appraisals would have on the promotion and career advancement potential of the employees. For this reason, I find that while there was no duty to meet and confer regarding the decision to reduce the grade levels of the career appraisals, there was a duty imposed under the Executive Order to meet with the Union and consult regarding the means by which the policy of the directive would be implemented and the resultant impact upon the employees affected. United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital Illinois, A/SLMR No. 289 (July 25, 1973). 8/

The argument of the Respondent Activity that it was relieved of any obligation to meet and confer with the Union because there was never such a request after it acquired knowledge of the directive is, in my judgement, without merit. The facts of this case show that the Respondent Activity was made aware of the directive by at least May 10, 1973. There was never an attempt to discuss the matter with the Union, nor to inform the Union representatives of the directive. The brief posting of the Dillaway and Beckman memoranda on the bulletin board outside of the Director's office does not, in my opinion, serve as proper notification to the Union officials. By Beckett's own account, the posting period could not have been more than three days. The terms of the directive required the Respondent Activity to initiate the downward revision of the career appraisals effective May 1, commencing with the GS-15 employees. This meant that the career appraisals

8/ Cf. Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31, Report No.31 (November 27, 1972), and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, Report No. 41 (June 29, 1973)

were in the process of being conducted and the policy of the directive was being implemented by the Respondent Activity long before the Union representatives acquired knowledge of its existence. Crediting the testimony of the Union president, the earliest point in time the Union became aware of the directive was August 20, 1973. At which time the implementation of the directive was fait accompli -- at least with respect to a substantial number of employees. Therefore, reliance upon the rationale in Norton Air Force Base 9 / and Great Lakes Naval Hospital Center 10/ on this point by the Respondent Activity is misplaced.

In both of those cases the complaining Union was made aware of the pending action to be taken by the agency prior to its implementation, and never made a timely request to meet and consult. The facts of the instant case, however, show otherwise. This is not to suggest that the Union president acted wisely in waiting to see if management would contact him, but rather that the Respondent Activity cannot rely on the failure, at this juncture, to relieve it of the obligation imposed by the Executive Order. This is especially true since the Respondent Activity had in fact implemented the new policy at least two and a half months prior to the Union acquiring knowledge of its existence.

In view of the above, and considering the totality of the circumstances in this case, I find and conclude that the Respondent Activity violated Section 19(a)(6) of the Executive Order by failing to inform the Union of the change in policy mandated by the Dillaway directive and thereby affording the Union a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the directive and on the impact of such new policy on adversely affected employees prior to the implementation of that policy. New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico,

9/ US Department of Air Force, Norton Air Force Base, A/SLMR No. 261 (April 30, 1973).

10/ United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, supra.

A/SLMR No. 362 (February 28, 1974); Great Lakes Naval Hospital, Illinois, supra; Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic, City, New Jersey, A/SLMR No. 329 (November 28, 1973).

Remedy

Having found that the Respondent Activity violated Section 19(a)(6) of the Executive Order and considering the circumstances of this case, the only meaningful remedy that can be afforded here is to rescind all career appraisals issued as a result of the implementation of the new policy. To hold otherwise would mean that the Union's status as the exclusive representative would be relegated to nothing more than an empty facade and the bargaining obligation under the Executive Order would in fact be meaningless.

On the basis of the foregoing findings of fact and conclusions of law and upon the entire record herein, I recommend that the Assistant Secretary adopt the following Recommended Order designed to effectuate the policy of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary for Labor-Management Relations, hereby orders that the Department of the Army, United States Army Armament Command, Rock Island Arsenal, Rock Island, Illinois, shall:

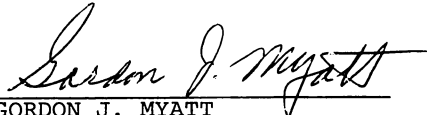
1. Cease and desist from:
  - (a) Effectuating a downward revision of the numerical code levels of the career appraisals of engineer and scientist employees represented exclusively by Local R7-68, National Association of Government Employees, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the

procedures or methods which management will observe in implementing the directive requiring the downward revision of career appraisals, and on the impact of the downward revision on the employees adversely effected by such action.

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

- (a) Notify Local R7-68, National Association of Government Employees, or any other exclusive representative, of any directives or instructions received from a higher command to revise downward the numerical code levels of employees' career appraisals and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures and the methods which management will observe in implementing the directives, and on the impact the new career appraisal policy will have on the employees adversely affected by such action.
- (b) Post at its facility at the Rock Island Arsenal, copies of the attached notice marked "Appendix", on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained by him for sixty(60) consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

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

  
GORDON J. MYATT  
Administrative Law Judge

Dated: February 10, 1975  
Washington, D.C.

## NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT continue to implement the April 10, 1973, directive from the Army Materiel Command (AMC), as augmented by the directives issued May 4 and August 20, 1973, by the Army Armament Command (ARMCOM), requiring the downward revision of the numerical code levels of the career appraisals of our Engineer and Scientist employees exclusively represented by LOCAL R7-68, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, or any other exclusive representative, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures and methods management will follow in effectuating the mandate of the directives, and on the impact of the downward revision of the numerical code levels on the employees adversely affected by such action.

WE WILL rescind all employee career appraisals issued in implementation of the April 10, May 4 and August 20, 1973, directives and will notify LOCAL R7-68, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, or any other exclusive representative, of the policy requirement mandating the downward revision of the numerical code levels of the career appraisals of our Engineer and Scientist employees.

WE WILL, upon request, meet and confer in good faith with LOCAL R7-68, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, or any other exclusive representative, to the extent consonant with law and regulations, on the procedures and methods management will follow in effectuating the policy requirement regarding the downward revision of the numerical code levels assigned to Engineer and Scientist career appraisals, and on the impact of such policy on the employees adversely affected by such action.

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

\_\_\_\_\_  
(Agency or Activity)DATED \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director, for Labor-Management Services, U.S. Department of Labor, whose address is 712 Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, Illinois 60604.

June 30, 1975

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

GENERAL SERVICES ADMINISTRATION,  
REGION 5, PUBLIC BUILDINGS SERVICE,  
CHICAGO FIELD OFFICES  
A/SLMR No. 528

This case involved an unfair labor practice complaint filed by Local 739, National Federation of Federal Employees (NFFE) alleging that the General Services Administration (GSA), Region 5, Public Buildings Service, Chicago Field Offices (Respondent) violated Section 19(a)(6) of the Order by contracting out work at particular locations without notifying the NFFE as required by the negotiated agreement. In this regard, the parties' negotiated agreement provided, in part, that ".....[C]ontracting out will be carried out in such a manner as to minimize displacement of GSA employees. The Union representative will be notified when work normally performed by GSA employees at a particular location is contracted out." The NFFE alleged that at two locations painting work was contracted out while painting work was being performed at those locations by GSA painters. The Respondent moved that the complaint be dismissed on the basis that the matter involved a question of contract interpretation and, as required by Section 13(a) of the Order, the negotiated agreement provided a means for resolving grievances over interpretations or application of the agreement.

In recommending the denial of the motion to dismiss the complaint, the Administrative Law Judge noted that while not every breach of a contract is an unfair labor practice, a breach of contract may be an unfair labor practice, as, for example, a flagrant or persistent breach of the agreement or a clear unilateral change in the contract as the Complainant alleges was the situation herein. In such circumstances, the Administrative Law Judge noted that Section 19(d) permits a complainant to pursue the matter through either the grievance or unfair labor practice route, but that if it chooses the unfair labor practice route in a matter involving contract interpretation, it must establish that there was a patent breach of the contract that constituted a unilateral change in the contract.

In the instant proceeding, the Administrative Law Judge concluded that the facts did not warrant the conclusion that the Respondent had violated Section 19(a)(6) of the Order. In this regard, he found that the contract awarded by the Respondent was for a major renovation at one location only, and included painting, as was customary; that the NFFE was not notified; that the NFFE had not been notified in the past when that type of contract was awarded; and that the NFFE had never complained before about such contracting out. Further, he found that the two GSA painters involved had not been previously assigned under a single work order painting of the magnitude set forth in the contract which was awarded, and, finally, that they had continued to perform their regular work on a full-time basis while the contracted out work was performed. The Administrative Law Judge concluded the basic issues involved the meaning of two phrases in the negotiated agreement, i.e. "minimize displacement of GSA employees" and

"work normally performed by GSA employees"; that these were "questions on which reasonable people can differ"; and that there was insufficient evidence in the record to conclude that the Respondent's interpretation and application were not in good faith. He concluded that even if there had been a breach of the negotiated agreement, it was not one which clearly constituted an attempted unilateral revision of the agreement by the Respondent but, rather, was one which arose out of a simple and sincere disagreement over the proper interpretation and application of the agreement and, therefore, was not violative of Section 19(a) of the Order. Based on the foregoing, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,  
REGION 5, PUBLIC BUILDINGS SERVICE,  
CHICAGO FIELD OFFICES

Respondent

and

Case No. 50-11103(CA)

LOCAL 739, NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On April 2, 1975, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation that dismissal of the complaint is warranted.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-11103(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 30, 1975

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



.....  
In the Matter of :  
: GENERAL SERVICES ADMINISTRATION :  
: REGION 5, PUBLIC BUILDINGS SERVICE :  
: Respondent :  
: and : Case No. 50-11103 (CA)  
: LOCAL 739, NATIONAL FEDERATION OF :  
: FEDERAL EMPLOYEES :  
: Complainant :  
: .....

Robert J. Gorman  
Council of NFFE Locals, GSA Region 5  
National Federation of Federal Employees  
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Chicago, Illinois 60611

Napoleon Bonaparte  
President, Local 739  
National Federation of Federal Employees  
1946 West Warren Boulevard  
Chicago, Illinois 60612  
For the Complainant

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Assistant General Counsel  
Hayden J. Price, Esq.  
Deputy Assistant General Counsel  
General Services Administration, Room 3106  
18th and F Streets, N. W.  
Washington, D. C. 20405  
For the Respondent

Before: MILTON KRAMER  
Administrative Law Judge

DECISION

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated and filed February 27, 1974. The complaint alleged that from about June or July of 1973 the Respondent had been contracting out work performed at particular locations without first notifying union representatives as required by the collective bargaining agreement between the Respondent and the GSA Region 5 Council of NFFE Locals. This continuous alleged violation of the agreement was alleged to constitute a violation of Section 19(a) (6) of Executive Order 11491 as amended. Specifically, the complaint alleged that at 536 South Clark Street and at 844 North Rush Street painting work was contracted out while painting work was being performed at those locations by GSA painters.

Under date of March 19, 1974 the Respondent filed a response to the complaint. It stated that the complaint was the first notice to the Respondent of a contention that there had been an unfair labor practice at 844 North Rush Street and the Respondent therefore "moves to dismiss this location from the complaint so that the allegations may be dealt with under informal negotiations procedures." 1/ The response also denied that an unfair labor practice had been committed or that the Respondent had violated the agreement between the parties. On April 1, 1974 the Complainant filed an answer to the Respondent's response to the complaint.

Pursuant to a Notice of Hearing dated August 12, 1974 issued by the Assistant Regional Director, a hearing was held on October 2 and 3, 1974 in Chicago, Illinois. The Complainant was represented by the Chief Union Negotiator of the GSA Region 5 Council of NFFE Locals and by the President of Local 739. The Respondent was represented by the Assistant General Counsel and Deputy Assistant General Counsel of General Services Administration. Timely briefs were filed by the parties on November 4, 1974.

The Motion to Dismiss Complaint

Prior to the issuance of the Notice of Hearing the Respondent had submitted to the Assistant Regional Director a Motion to Dismiss Complaint. The Assistant Regional Director denied the Motion. At the beginning of the hearing

1/ The record before me does not show that this motion was acted on.

the Respondent renewed the Motion by filing it with me 2/ together with a supporting memorandum. 3/

The Respondent's Motion is predicated on Section 13(a) of the Executive Order and the existence of a grievance procedure in the collective agreement of the parties for resolving grievances over the interpretation or application of the agreement. Section 13(a) provides in pertinent part:

"(a) 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...shall be the exclusive procedure available to the parties and the employees in the unit for resolving such grievances...."

The Respondent argues that since the dispute here involved turns on the interpretation or application of the agreement, the grievance procedure is the "exclusive procedure" and the only means available to resolve it and the Assistant Secretary is therefore without jurisdiction to resolve it in an unfair labor practice proceeding.

While not every breach of contract is an unfair labor practice, a breach of contract can be an unfair labor practice. When it is, it may be presented either as a grievance under the grievance procedure or it may be presented as an unfair labor practice under the Executive Order. That is exactly what is provided in Section 19(d) of the Order. The second sentence of that Section provides:

"Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures."

Under the Respondent's interpretation of Section 13(a) of the Order, Section 19(d) would be inapplicable to conduct pursuant to an attempted unilateral change in the agreement; the aggrieved party would always be relegated to its contract remedy.

2/ Exhibit R1.

3/ R1-A.

A breach of contract can be not only a breach but under certain circumstances can be also an unfair labor practice. For example, if sufficiently flagrant and persistent, a breach of contract may rise to the seriousness of a unilateral change in the contract and hence a violation of Section 19(a)(6) of the Executive Order. 4/ The Complainant takes the position that that is the situation here, and therefore presents the matter as an unfair labor practice as it is given the right to do by Section 19(d) of the Executive Order. 5/ The Complainant may be in error in so viewing the situation. If it is in error the complaint should be dismissed, not for lack of jurisdiction to entertain it but because the Complainant has failed to establish the case it asserts. Section 19(d) gives the Complainant the choice of following the grievance route or the unfair labor practice route, but not both. If it chooses the latter it assumes a more onerous burden, that of establishing not only that there was a breach but that it was so patent a breach as to imply that the Respondent could not reasonably have thought otherwise and thus constituted an attempted unilateral change in the agreement in violation of Section 19(a)(6) of the Executive Order.

The Motion to Dismiss Complaint should be denied.

Facts

The Complainant has been the exclusive representative of employees of Respondent in several crafts, including painting, since January 21, 1966. It is a component of GSA Region 5 Council of NFFE Locals. At all times relevant to this case there was a collective bargaining agreement (the "General Agreement") in effect between the Council and the Respondent which became effective December 24, 1970. Section 26.5 of the General Agreement provides:

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- 4/ Veterans Administration Hospital, Charleston, S. Carolina, A/SLMR No. 87, at page 5; NASA, Kennedy Space Center, A/SLMR No. 223, at page 3; Veterans Administration Center, A/SLMR No. 335; Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, A/SLMR No. 485.
  - 5/ Other examples would be a breach of contract prompted by anti-union motivation to discourage union membership, of which there is no indication here, which would violate Section 19(a)(2); or a breach of contract motivated by considerations in violation of Section 19(a)(4), of which there is also no intimation in this record.

"Contracting out will be in accordance with the directives of the Civil Service Commission and the General Accounting Office. Contracting out will be carried out in such a manner as to minimize displacement of GSA employees. The Union representative will be notified when work normally performed by GSA employees at a particular location is contracted out."

The building at 536 South Clark Street in Chicago is a ten story building occupying a square block occupied by the United States Government and containing almost a half-million square feet of floor space. It is operated by the General Services Administration. Normally, and at all times relevant, GSA employed two painters full time in this building.

In 1973 GSA awarded a contract for a major renovation of the building pursuant to competitive bids. The award was made on June 29, 1973 to Dushan Vujoshevich doing business as Dushan Electric Company in the amount of \$275,000. Of that amount, \$50,000 was for painting. Work under the contract commenced August 1, 1973; the painting part of the work under the contract began in October 1973. The union representative was not notified that the contract was going to be awarded nor that it had been awarded. The two painters employed by GSA in the building at the time the contract was awarded continued to be employed at their normal work throughout the performance of the Dushan contract; they were still so employed at the time of the hearing in this case.

Painting involved in construction work under a contract was normally included in the construction contract. The volume of painting involved in the Dushan contract was far beyond the amount normally performed by GSA through "force account", i.e., work done by its own employees; regular painters of the Respondent were never assigned that much work under a single work order. It would have taken the two regular painters employed at 536 South Clark at least six months full time work to have performed the painting included in the Dushan contract; while the contractor was performing it the two regular painters in the building continued to work full time in the building performing their regular work. The Dushan contract included painting forty-two toilet rooms; some exterior painting; interior painting of the stair wells; lobbies on each floor; the corridors on the first, second, eighth, ninth, and tenth floors; and some office areas on the fifth and sixth floors.

The Complainant had never complained before when it was not notified of painting work contracted out. Normally the Respondent notified the union, pursuant to Section 26.5 of the General Agreement, only of work contracted out for less

than \$2,000. The union complained in this case because two employees it represented in the Government building at 844 North Rush Street were eliminated pursuant to a reduction-in-force at about the same time.

The two employees referred to who were eliminated in a RIF were employed at 844 North Rush, employees named Curtin and Perrow. In 1972 the Respondent abolished or downgraded some of its supervisory positions because the number of employees supervised declined when the Postal Service took over from GSA the maintenance and repair of Post Offices. Some supervisors whose jobs were eliminated or downgraded bumped employees in the building crafts. Curtin was an employee in a craft, a plasterer. He worked at a post office, and when post office work was lost he was moved to 844 North Rush to keep him working. Plasterers did some painting. On August 4, 1973 his position was abolished because there was not much need for a plasterer in that building. He was offered a lower-graded job, refused it, and received \$3,400 in severance pay. Perrow had not been in active service since July 1973. He had an application pending for disability retirement. At the time of the RIF on August 4, 1973 he was offered and accepted a laborer's position but never worked in that position because of disability. In December 1973 his application for a disability pension was granted.

Discussion and Conclusion

Both parties assumed, apparently, that the only contracting out directly involved in this case was the Dushan contract at 536 South Clark Street. No substantial evidence was introduced concerning contracting out at 844 North Rush Street. That aspect of the complaint should therefore be dismissed.

As explicated above under the caption "The Motion to Dismiss the Complaint", the issue before us is not whether there was a breach of contract but whether there was a breach so clear that it shows an attempted unilateral revision of the contract by the Respondent. I cannot conclude that there was such a breach.

The Respondent had not in the past notified the union when it had contracted out painting work involved in remodeling the building, and the union had never before claimed that such absence of notification was a violation of the agreement. The Complainant contends that this shows a pattern of persistent violations. While plausible, it is just as plausible that the Respondent reasonably believed, rightly or wrongly, that the union agreed notification was not required in such cases. Similarly, the Respondent had not in the past notified the union when it contracted out painting of the magnitude involved in the Dushan contract,

and the union had never before claimed such absence of notification violated the agreement. Here again, the union contends this shows a pattern of persistent violations amounting to a unilateral change. It is just as plausible to conclude that the Respondent reasonably believed that the union agreed notification was not required in such situations.

There are two basic issues in this dispute. First, what does "minimize displacement of GSA employees" mean in the second sentence of Section 26.5 of the General Agreement, and is it violated when one employee, at another location, was displaced? Second, what is "work normally performed by GSA employees" within the meaning of the third sentence of Section 26.5; does it refer to the type of painting done or can painting be outside the meaning of that phrase because of the volume involved? These are questions on which reasonable people can differ. There is insufficient evidence in the record to conclude that the Respondent's interpretation of the second sentence and its application of the third sentence with respect to the Dushan contract were not sincere.


I do not conclude that there was not a breach of contract, because that is not the issue before me. I conclude only that if there was a breach it arose out of a simple and sincere disagreement over the proper interpretation of the second sentence of Section 26.5 of the General Agreement and the proper application of the third sentence of Section 26.5 to the Dushan contract. Such a breach, if it occurred, was not a violation of Section 19(a) of the Executive Order.

This makes it unnecessary to consider whether the Respondent's conduct was protected, as contended by the Respondent, by Section 12(b)(5) of Executive Order 11491.

Recommendations

I recommend:

1. The Respondent's Motion to Dismiss Complaint for lack of jurisdiction to entertain it be denied.
2. The complaint be dismissed because the Complainant has not sustained the burden of proof imposed by Section 203.14 of the Regulations.

  
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 MILTON KRAMER  
 Administrative Law Judge

Dated: April 2, 1975  
Washington, D. C.

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

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

DEPARTMENT OF THE NAVY  
and  
U.S. CIVIL SERVICE COMMISSION  
A/SLMR No. 529

DEPARTMENT OF THE NAVY

Respondent

and

Case No. 72-4718

FEDERAL EMPLOYEES METAL TRADES COUNCIL  
LONG BEACH, CALIFORNIA

Complainant

U.S. CIVIL SERVICE COMMISSION

Respondent

and

Case No. 72-4759

FEDERAL EMPLOYEES METAL TRADES COUNCIL  
LONG BEACH, CALIFORNIA

Complainant

DECISION AND ORDER

On January 30, 1975, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaints, and recommending that the complaints be dismissed in their entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 1/

1/ In reaching the disposition herein, I find it unnecessary to pass upon the conclusion reached by the Administrative Law Judge that the Equal Employment Opportunity (EEO) hearing held on this matter was not a "formal discussion" within the meaning of Section 10(e) of the Order.

This case arose as the result of complaints filed by Federal Employees Metal Trades Council, Long Beach, California (Complainant) against Department of the Navy (Navy) and U.S. Civil Service Commission (CSC) alleging violation of Section 19(a)(1), (2) and (6) of the Order based upon the asserted conduct of a complaints examiner appointed by the CSC to hear an Equal Employment Opportunity (EEO) complaint filed by an employee of the Long Beach Naval Shipyard (Shipyard) in refusing to allow a representative of the Complainant to attend the hearing as an observer, in alleged contravention of the Complainant's rights under Section 10(e) of the Order.

The Administrative Law Judge found that, with respect to the Navy, no bargaining obligation was owed to the Complainant inasmuch as the Complainant was recognized as the bargaining agent by the Shipyard for certain of its employees. Moreover, there was no independent 19(a)(1) violation by the Navy as it had taken no part in the EEO hearing nor met with the EEO complainant or any other Shipyard employee concerning the EEO matter. Further the Administrative Law Judge found that the CSC owed no bargaining obligation to the Complainant and that the CSC did not attempt to deal with the Complainant or with individual employees as an alter ego of the Shipyard. In this regard, he viewed the independent status of the complaints examiner under the provisions of Part 713 of the Federal Personnel Manual, as detracting from any alleged nexus between the Shipyard and the CSC. On the basis of these findings, the Administrative Law Judge recommended that the complaints be dismissed.

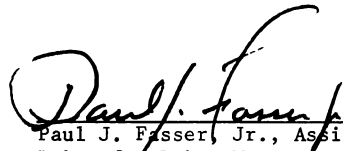
In adopting the findings, conclusions and recommendations of the Administrative Law Judge, the Assistant Secretary noted that, under the particular circumstances of this case, the CSC did not meet the definition of "Agency management" set forth in Section 2(f) of the Order. In this regard, the Assistant Secretary determined that the CSC was acting herein under authority granted by various statutes and executive orders relating to EEO matters and pursuant to Part 713 of the Federal Personnel Manual, which was promulgated to implement and effectuate such statutes and executive orders, and that neither the CSC nor its complaints examiner was subject to the jurisdiction or authority of the Navy or the Shipyard. Accordingly, the Assistant Secretary ordered that the complaints herein be dismissed.

In agreement with the Administrative Law Judge, I find that, under the particular circumstances of this case, the Respondent Civil Service Commission (CSC) owed no obligation to meet and confer with the Complainant under Section 11(a) of the Order and that its conduct herein was not in derogation of the exclusive bargaining relationship between the Long Beach Naval Shipyard and the Complainant. In this regard, it was noted particularly that the CSC was acting herein under authority granted by various statutes and executive orders relating to EEO matters 2/ and pursuant to Part 713 of the Federal Personnel Manual, which was promulgated by the CSC to implement and effectuate such statutes and executive orders, and that neither the CSC nor its complaints examiner was subject to the jurisdiction or authority of either the Department of the Navy or the Long Beach Naval Shipyard. Accordingly, I find that, under the particular circumstances of this case, the CSC did not meet the definition of "Agency management" set forth in Section 2(f) of the Order. 3/ Compare U.S. Army Civilian Appellate Review Agency, Department of the Army, Sacramento, California, A/SLMR No. 488.

ORDER

IT IS HEREBY ORDERED that the complaints in case Nos. 72-4718 and 72-4759 be, and they hereby are, dismissed.

Dated, Washington, D.C.  
June 30, 1975

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

2/ See e.g. 86 Stat 111; 5 USC Sections 1301, 3301, 3302, 7151-7154; 7301; Executive Order 10577, 3 CFR 1954-1958 Comp. p. 218; Executive Order 11222, 3 CFR 1964-1965 Comp. p. 306; Executive Order 11478, 3 CFR 1966-1970 Comp. p. 803.

3/ Section 2(f) provides: "'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."

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



..... :  
In the Matter of :  
DEPARTMENT OF THE NAVY :  
Respondent :  
and :  
FEDERAL EMPLOYEES METAL TRADES COUNCIL :  
LONG BEACH, CALIFORNIA :  
Complainant :  
and :  
U.S. CIVIL SERVICE COMMISSION :  
Respondent :  
and :  
FEDERAL EMPLOYEES METAL TRADES COUNCIL :  
Complainant :  
..... :

CASE NOS.  
72-4718  
72-4759

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BEFORE: WILLIAM NAIMARK  
Administrative Law Judge

DECISION

Statement of the Case

This proceeding <sup>1/</sup> arises under Executive Order 11491, as amended (herein called the Order) pursuant to a Notice of Hearing issued by the Assistant Regional Director for Labor-Management Services Administration San Francisco Region on September 13, 1974. A complaint was filed by Federal Employees Metal Trades Council (herein called Complainant) in Case No. 72-4718 on April 22, 1974 against the Department of the Navy (herein called Respondent Navy). A complaint was also filed by Complainant union in Case No. 72-4759 on May 29, 1974 against the U.S. Civil Service Commission (herein called Respondent Commission).

Both complaints alleged violations by Respondents of Sections 19(a)(1), (2) and (6) of the Order by reason of Complainant's observer having been evicted from an EEO hearing on March 25, 1974 by a hearing examiner of the Respondent Commission. It is alleged, further, that Complainant had the right under Section 10(e) of the Order to attend the hearing as the bargaining representative of the employees of Long Beach Naval Shipyard (herein called the Shipyard) with whom it has a collective bargaining agreement. Complainant alleged that the EEO hearing was being conducted by the Respondent Navy and that the EEO examiner acted as its agent of the Shipyard; that Respondent Commission, through the hearing examiner whom it employed, denied Complainant the right to attend the EEO hearing. Due to the close nexus between respondents, it is averred that both parties denied Complainant its right to be present at the hearing in contravention of 19(e) of the Order - all of which constituted a refusal to consult, confer, or negotiate and amounted to interference and restraint of employees.

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<sup>1/</sup> Both of the instant cases were consolidated by an Order issued on September 13, 1974.

restraint of employees.

Respondent Navy contends as follows: (a) it is not a proper party to this proceeding since it did not employ the EEO hearing examiner, nor did it exercise any control of supervision over her actions, and no exclusive recognition was accorded Complainant by this respondent; (b) no jurisdiction lies with the Assistant Secretary under 19(d) of the Order, since Complainant could have appealed the hearing examiner's exclusion of the union observer to the Civil Service Commission as part of the discrimination matter itself; (c) the conduct of the examiner is properly reviewable by the Commission, not the Assistant Secretary, as an abuse of direction.

Respondent Commission joins the Navy in contending that no jurisdiction lies herein by virtue of the applicability of Section 19(d) of the Order. It also maintains that 10(e) requires an employer-employee relationship to give rise to rights thereunder, and no such relationship exists between Complainant and the Commission since the union does not represent its employees. It is contended, moreover, (a) that the hearing examiner was not an agent of either respondent, nor was the Commission responsible for the examiner's actions; (b) the right of Complainant under 10(e) to have an observer present was satisfied by the EEO employee having selected a union official as his personal representative thereat, (c) since the EEO hearing did not deal with an implementation of personnel policies, no absolute right, until then, flowed to Complainant under 10(e) to be present at said hearing; (d) the issue is moot since a clarifying FPM letter was subsequently issued permitting the exclusive representative to have an observer present at EEO hearings, and it would not effectuate the purposes of the Order to require a remedy herein.

A hearing was held before the undersigned on November 14, 1974 at Los Angeles, California. All parties were represented by counsel and were afforded full opportunity to be heard, to present evidence to examine and cross-examine witnesses, and to make oral argument. Thereafter all parties filed briefs <sup>2/</sup> with the undersigned which have

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<sup>2/</sup> In its post hearing brief Complainant does not urge that Respondents violated 19(a)(2) of the Order.

been duly considered.

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

1. At all times material herein Complainant has been the exclusive bargaining representative of all ungraded employees, numbering about 5,000, employed at the Long Beach Naval Shipyard, Long Beach, California.

2. Both Complainant and the Shipyard are parties to a collective bargaining agreement 3/ which, by its terms, is effective from February 11, 1974, the date of its approval, through June 30, 1975.

3. Article XXVIII of the aforesaid agreement provides inter alia, that the union will maintain an active Civil Rights Committee to afford employees counselling and representation regarding their employment and civil rights matters; that the union will have representation on the EEO committees of the Shipyard and its departments; and that employees who have difficulties re equal employment opportunity on the basis of race, color, religion, sex, or national origin may be represented by the union in attempting to resolve their differences.

4. Robert White, a black individual, had been employed by the Shipyard as a sheet metal limited mechanic. White was a member of the Sheet Metal Union, one of twelve labor unions comprising the Complainant Council, and he was included in the unit of employees represented by Complainant.

5. As a result of being discharged by his employer, White filed an Equal Employment Opportunity (EEO) complaint against the Shipyard, 4/ contending that his termination was due to racial discrimination, and the employee requested a hearing pursuant to Part 713 of the Federal Personnel Manual (FPM). 5/

3/ Complainant's Exhibit No. 1.

4/ Neither the date of White's discharge, nor the date of filing said EEO complaint, appears in the record, but such dates are not necessary to a determination of the alleged unfair labor practice.

5/ Commission's Exhibit No. 1.

6. The pertinent regulations in FPM, Part 713, dealing with EEO complaints and a hearing thereon, provide, in substance, as follows:

a) the hearing is held by a complaints examiner who, in nearly all instances, must be an employee of another agency;

b) the agency where the complaint arose must request the Commission to supply the name of an examiner certified by the Commission to conduct the hearing;

c) the agency reimburses the Commission for all expenses re the investigation;

d) attendance at the hearing is limited to persons determined by the complaints examiner to have a direct connection with the complaint.

7. The EEO complaint was not resolved informally, and thus White requested a hearing thereon. The Shipyard asked the Respondent Commission's San Francisco office to furnish a complaints examiner in accordance with FPM Part 713 to conduct a formal hearing.

8. The Commission assigned Edna Francis, an employee of the Commission itself, to conduct the hearing which was held on March 25, 1974 at the Shipyard. The hearing was convened at that date by complaints examiner Francis. It was attended by an unidentified management representative for the Shipyard, and Seymour Buder, a union steward, who appeared at the request of, and as the personal representative for the complainant Robert White.

9. Complainant union was desirous of having a representative present at the EEO hearing on March 25, 1974. Accordingly, Russell Hatfield, president of said organization, sent Sam Gallo, vice-president of Complainant, to attend the hearing as its observer. Hatfield testified that Gallo was sent, not to represent White, but on behalf of the 5,000 other represented unit employees; that the union considered this hearing a "formal" meeting between management and employees at which the bargaining representative was required to attend and protect the interests of all employees; that Buder was present, not as a designee or representative of the union, but as White's personal representative; that the EEO hearing, while not a union matter, concerns the Complainant since the EEO hearing and



decision might affect the employment conditions and interests of other unit employees.

10. At the onset of the hearing on March 25, 1974 Examiner Francis asked Gallo what he was doing there, and the latter replied he was present as a union observer. The hearing examiner stated she would not permit a union observer at the hearing and insisted that Gallo leave the proceeding. Whereupon, Gallo left but noted to Francis that he was leaving under protest.

11. Upon learning what transpired, Hatfield protested Gallo's eviction at the hearing to James Houston, Director of Industrial Relations at the Shipyard. He also complained to LMRA area administrator, Thomas Stover, and to the Commission's Chief Hearing Examiner Krouge in Washington, D.C.

12. The Discrimination Complaint Examiners Handbook and the guidance directives, in effect at the time of the EEO hearing, provided that (a) these hearings were not open to the public, (b) apart from the complainant, witnesses, and attorneys, representative of the complainant and agency could attend the EEO hearing as well as those being trained to conduct hearings or who have responsibilities in this field, (c) no observer is allowed to participate in the hearing, (d) an observer from the union which is the exclusive bargaining representative could attend the hearing if the agreement between the agency and the said bargaining representative provides for an observer's attendance at Discrimination Complaint Hearings. If, however, the complainant objected to the observer's attendance on the ground that his privacy was involved, the union observer could be excluded if the examiner found merit to the objection.

13. Subsequent to the EEO hearing, FPM System Letter No. 713-29, dated September 12, 1974, was issued for guidance of EEO complaint examiners. 6/ It provided, in substance, that an observer from a labor organization with exclusive recognition may attend the hearing. Further, it stated that if the employee objects to such attendance on the grounds of privacy - and the Examiner finds the objection valid - the

6/ Respondent Commission maintains this letter merely clarified existing regulations and instructions and constituted no change therein.

union observer may be excluded. Moreover, the Examiner may exclude the observer if he determines such action serves the best interests of the complainant, a witness, or the Government.

CONCLUSIONS

Jurisdiction of Assistant Secretary  
To Entertain this Matter Under  
Section 19(d) of the Order

Both Respondents insist that under 19(d) of the Order the Assistant Secretary lacks jurisdiction herein. Respondent Navy postulates its argument on the premise that the Civil Service Commission's procedure in FPM Chapter 713 is a statutory appeals procedure contemplated order Section 19(d). Further, the Complainant could have appealed the ruling of the examiner - which excluded Complainant from the EEO hearing - as part of employee White's discrimination case. It is argued that no evidence exists to support the conclusion that Respondent Commission was precluded from considering the unfair labor practice allegation herein, i.e., exclusion of the union from the hearing, and this issue could have been considered when the Commission reviewed the EEO transcript. Respondent Navy thus concluded that since the issue concerning the exclusion of Complainant from the hearing could have been raised under the foregoing appeals procedure, it may not be raised herein.

Respondent Commission, in arguing the applicability of 19(d), contends that the present matter involves a removal of an employee and is thus covered under Part 771 of the Federal Personnel Manual. Since the issue concerns an adverse action, it is argued, the employee could have filed his claim under 771 where all matters related to the removal, including the right of Complainant to be present at the EEO hearing, could have been reviewed. Thus, the Commission claims the issue re Complainant's right to be present at said hearing was cognizable under that appeals procedure and 19(d) bars the instant case.

A similar argument to the Navy's contention was made in Veterans Administration, Veterans Benefit Office A/SLMR No. 246 where two employees alleged they were discharged

for union activities. Inasmuch as one individual had filed a complaint with his employer pursuant to Executive Order 11478 - which governed equal employment and a prescription against discrimination based on sex, race, color, religion, or national origin - the employer contended there was no jurisdiction under 19(d) to handle the unfair labor practice complaint. The contention of the respondent therein was rejected, and the Assistant Secretary affirmed the Administrative Law Judge's holding that the unfair labor practice issue could not be raised in a Section 713 proceeding - and thus that section was not an appeals procedure within the meaning of 19(d) of the Order.

Respondent Navy attempts to distinguish the matter herein from the cited case by alluding to the fact that the question presented herein concerns the EEO procedures themselves. Such an argument does not, in my opinion, alter the central question as to whether the unfair labor practice issue is properly before the Commission on appeal in the EEO proceeding. An examination of the appeal provision 7/ of the EEO regulation reveals that the complainant, in that proceeding, is afforded the opportunity to appeal after a final decision is rendered by the agency on his complaint. I cannot conclude that the union herein would have the right to appeal the agency's decision and thus pose before the Commission the propriety of excluding the union observer from the EEO hearing. Moreover, and apart from that consideration, the sole issue involved in the discrimination proceeding concerns the discharge by the Navy of employee White. As the appellate procedure so provides, a review to the Commission would be limited to the merits of the complainant's case. I am not persuaded that the Commission could review the question as to whether the union was improperly excluded from the hearing as the bargaining representative under 10(e) of the Order. This is particularly true where the complainant White did not raise that issue, or attempt to appeal the exclusion to the Commission.

In respect to the Commission's insistence that FPM 771 affords an opportunity for the Commission to review, on an appeal from the adverse action which involved the discharge of White, the exclusion of the union from the

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7/ Section 731.231

hearing, I reject that contention. Appeals from adverse actions, under that regulation and the statutory provision pertaining thereto, would necessarily pertain to adverse actions (removal from jobs) involving the individual involved. The claim by the union is a separate and distinct "cause of action", and I do not deem it an integral part of the adverse action directed toward the employee. As I view it, the right of appeal flows to the employee who is the subject of the adverse action. Moreover, I am not convinced that the union's unfair labor practice would be properly before the Commission in an appeal based on the employee's removal from employment.

By reason of the foregoing, I conclude that the issue herein was not properly appealable to the Commission, and accordingly, I find that 19(d) does not oust the Assistant Secretary of jurisdiction herein.

Alleged 19(a)(6) Violations By  
Respondents Based on Complainant's  
Observer Being Excluded from EEO Hearing

Complainant maintains that under 10(e) of the Order, as well as Article XXVIII of the contract with the Shipyard, it was entitled to have a representative present at the EEO hearing on March 25, 1974. This hearing, it is argued, was a formal discussion under 10(e) affecting the working conditions of all employees. Moreover, Complainant contends that since the EEO examiner was an employee of the Commission, the latter acts as an agent of the activity, the Long Beach Naval Shipyard.

Both Respondents take the position that they are not the proper parties. The Navy insists the union's exclusive status was conferred by the activity (the Shipyard) and that the agency, (Department of Navy), owes no obligation to the Complainant under 19(a)(6) of the Order. It further argues that the agency exercised no control over the EEO complaints examiner who, Respondent contends, was not a representative of management under Section 2(f) of the Order. The Commission denies that it was either the employer or the alter ego of the Shipyard, maintaining also that the examiner was an independent adjudicator for whose actions the Commission should not bear responsibility. It

also maintains that the hearing was a fact finding proceeding, as distinguished from a meeting to implement a post EEO hearing decision; and that it was this meeting which the union observer could attend under the Assistant Secretary's ruling. Finally, it urges that the employee selected a union representative to attend, and therefore the union's right to represent employees at the hearing had been satisfied.

In addition to the foregoing, Respondent Navy suggests that the Assistant Secretary not police the rules and regulations of the Commission, and thus policy considerations should dictate a dismissal. 8/ The Commission asserts that the matter is moot 9/ in view of the memo clarifying its directive to explicitly permit union observers to attend EEO hearings.

(1) Responsibility of Respondent Navy

Apart from any other concepts pertaining to the obligations of an employer for acts of its branches, I feel constrained to rule that the case at bar, in respect to certain issues, is governed by the Assistant Secretary's decision in National Aeronautics and Space Administration, Washington, D.C. (NASA), A/SLMR No. 457. In the cited case the union was accorded exclusive recognition as the bargaining representative of the employees at Lyndon B. Johnson Space Center, NASA. When a representative from NASA, Washington, D.C. interviewed or met with employees at the

8/ The Navy cites OEO, Region V, Chicago, Ill., A/SLMR No. 334 in support hereof. That case involved an agency grievance procedure which did not result from rights accorded employees or unions under the Order. Thus, a failure to process a grievance thereunder could not interfere with rights assured by the Order. I do not conclude that the EEO procedure is an agency grievance procedure so as to make the OEO case controlling.

9/ In view of my conclusion with respect to the merits of the 19(a)(1) and (6) allegations, I make no recommendation as to the mootness of the issues herein.

Johnson Space Center, to discuss the EEO program, and the union was refused permission to have an observer present, a 19(a)(1) and (6) complaint was filed against both NASA, Washington, D.C. and the Johnson Space Center NASA.

A distinction was drawn in the cited case between an agency, as an entity, and its activity. It was concluded that the obligation was owed to the union by the Johnson Space Center, the Activity, to meet and confer with it as the bargaining representative. However, no such obligation flowed from Washington, D.C. NASA, the Agency, to the union since the latter was not accorded recognition by, and had no bargaining relationship with, the Agency. Since the obligation to meet and confer under Section 11(a) of the Order, according to the Assistant Secretary, applies only in the context of that relationship between the exclusive representative and the agency or activity which accords recognition, I cannot find the Respondent Navy to be charged with such an obligation. In the instant case, similarly as in the NASA matter, the Respondent agency accorded no recognition to Complainant union. The contract was negotiated with the Shipyard (Activity) and recognition was accorded by it to Complainant as the exclusive representative of the unit employees. Neither does it appear that the Respondent Navy exercised any control over, or directed the conduct of, the complaint examiner who held the EEO hearing. In this posture, I find that this Respondent was not obligated to meet and confer with the union herein, and thus, apart from any rights inuring to the benefit of Complainant under 19(e) of the Order, no finding is warranted that Respondent Navy violated 19(a)(6) thereof.

A finding was made, however, in the NASA case, supra, that the agency, while not violating 19(a)(6), did commit an independent violation of 19(a)(1) of the Order. This finding was premised on the implicit suggestion made by the agency's EEO representative to employees that they could deal directly with the agency concerning their conditions of employment. Such unilateral dealings with employees was deemed inconsistent with, and in derogation of, the exclusive bargaining representative. It was held to be interference, restraint and coercion under 19(a)(1). Apart from the fact that it is difficult to comprehend how the agency, which was under no obligation to bargain with the union, can be considered to have bypassed that union in violation of the Order, Respondent Navy did not in any

event take action similar to the agency representative in the NASA case. It undertook no participation in the grievance inquiry, nor met with employee White to resolve same. Thus, I find no independent violation by Respondent Navy of 19(a)(1).

(2) Responsibility of Respondent Commission

In seeking to hold the Commission responsible for evicting the union's observer from the hearing, Complainant has indulged in a type of syllogistic reasoning. It contends: (a) the Assistant Secretary has, in U.S. Department of Army Transportation Motor Pool, Fort Wainwright, Alaska A/SLMR No. 278, determined that EEO hearings are formal discussions which the observer for the bargaining representative has the right to attend under 10(e), and to exclude it is a violation of 19(a)(6); (b) Respondent Commission, through its complaints examiner who conducted the EEO hearing herein, acted as the agent of the Shipyard, (c) the Commission, by excluding the Complainant's observer, has violated 19(a)(6) of the Order.

Complainant's argument, however, fails to be persuasive upon examination of its first premise and the Ft. Wainwright case, supra. The union, in the cited case, was not excluded from the EEO hearing but at the formal discussion, subsequent to the hearing, which was held to implement the hearing examiner's decision. The denial to the employee therein of his request to have his union representative present at such a discussion was held violative of 19(a)(1). But no case appears where the union representative 10/ has been denied the right to attend the EEO hearing itself and the Assistant Secretary has ruled on the propriety thereof in light of 19(e) of the Order.

It may well be that the EEO hearing was a "formal" proceeding in respect to the alleged discrimination against

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10/ Although Seymour Buder was the union steward and attended the EEO hearing at White's request, I do not find, nor agree with Respondent Commission, that Complainant was thus represented thereat. The record reflects Buder appeared as White's personal representative at the employee's request. Moreover, Buder did not state he appeared on the union behalf, nor did Complainant consider that he so appeared.

employee White. Nevertheless, I am not convinced that it is the type of discussions between management and employees concerning grievances, and other matters affecting working conditions of employees, which is envisaged by 10(e) of the Order. Part 713, Subpart B, Section 713.218 of the EEO regulations provides for a hearing so that the examiner shall . . . "bring out pertinent facts." The hearing so conducted by the complaint examiner is thus a logical extension of the original investigation by the agency itself. It was not, in my opinion, a discussion or meeting between management and the employee regarding a proposed decision in regard to the grievance, nor was it a discussion with respect to the implementation of a recommendation or finding of the hearing examiner concerning White's grievance. While, under the regulations, the grievant is entitled to have his representative present, the employee herein was accorded this right and was so represented by Buder thereat. Accordingly, I would conclude that, insofar as 10(e) is concerned, no right attaches to the Complainant union to be present at an EEO hearing held to inquire into alleged racial discrimination toward an employee when the latter has chosen his personal representative to attend. 11/

The Respondent Commission, it is true, did conduct the hearing at the behest of the Shipyard, and in accord with the EEO regulations. But I do not consider such participation - apart from any agency relationship created thereby - as sufficient to endow the Commission with the status required to impose upon it a bargaining obligation under 11(a) of the Order. If, as stated in the NASA case, supra, Complainant's rights as exclusive representative are predicated on exclusive recognition accorded it by the Activity, no such right exists vis a vis the Commission. The latter did not attempt to stand in the Shipyard's place as an employer, nor to deal with the union in derogation of the Activity itself. The status of the examiner, as an independent designee, detracts from the alleged nexus between the Shipyard and the Commission. His findings and

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11/ Cf. Federal Aviation Administration, Cleveland ARTC Center, A/SLMR No. 430; Federal Aviation Administration, Las Vegas Air Traffic Control Tower, A/SLMR No. 429.

recommendations are not made as an employee or representative of the Activity, and thus I do not accept the contention that the Commission is the alter ego of the Shipyard.

Complainant relies, in part, on Article XXVIII of the agreement with the Activity, to support its rights to appear at the EEO hearing. However, that provision entitles the bargaining agent to be represented on EEO committees of the Shipyard. It does not confer, and doubtless could not, a right upon the union to send an observer to the hearing subject to the review of the Commission. The examiner, in conducting the hearing, must necessarily be guided by the EEO regulations 12/ pertaining to the hearing rather than the contractual arrangement between the parties.

Accordingly, and in view of the foregoing, I conclude that Respondent Commission owed no obligation, either directly or indirectly, to meet and confer with Complainant under 11(a) of the Order; and, further, that its conduct was not in derogation of the exclusive bargaining relationship between the Shipyard and the Complainant. Hence, I find no violation by the Commission of 19(a)(1), (2) or (6) of the Order.

RECOMMENDATIONS

Upon the basis of the foregoing findings and conclusions the undersigned recommends that the complaint in Case No. 72-4718 against Respondent Department of Navy and the complaint in Case No. 72-4759 against Respondent U.S. Civil Service Commission herein be dismissed.

  
\_\_\_\_\_  
WILLIAM NAIMARK  
Administrative Law Judge

DATED: **JAN 30 1975**  
Washington, D.C.

12/ While Respondent Navy urges that, at most, the examiner's ruling is an abuse of direction which forecloses a finding of an unfair labor practice, I do not agree. If an obligation flowed to Complainant from either Respondent, discretionary abuse would not constitute a defense herein.

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

DEPARTMENT OF THE AIR FORCE,  
366th COMBAT SUPPORT GROUP,  
MOUNTAIN HOME AIR FORCE BASE,  
MOUNTAIN HOME, IDAHO  
A/SLMR No. 530

The Petitioner, International Association of Firefighters, Local Union F-179 (IAFF), sought an election in a unit of all nonsupervisory, nonprofessional General Schedule firefighters, crew chiefs, and fire inspectors employed at and by Mountain Home Air Force Base in Idaho.

Since November 1966, the National Federation of Federal Employees, Local Union 1200 (NFFE), has represented a unit of all eligible United States Air Force appropriated fund employees serviced by the Central Civilian Personnel Office of Mountain Home Air Force Base. The evidence established that at least two nonsupervisory, civilian crew chief positions had been occupied almost continuously since the granting of exclusive recognition to the NFFE in 1966. By the time of the hearing in this matter, there were 37 civilian authorized positions with 36 incumbents, including 7 civilian supervisors. Further, the evidence disclosed that the civilian firefighters are serviced by the same central civilian personnel office as are the other civilian employees in the bargaining unit. At the time the IAFF filed its petition in the instant case, the Activity and the NFFE were parties to a negotiated agreement. Finally, no record evidence was presented that the parties sought or intended, at any time during their bargaining history, to exclude the civilian firefighter classifications from the base-wide unit.

The Assistant Secretary found that the unit of firefighters sought by the IAFF was part of the exclusively recognized, base-wide unit represented by the NFFE and was covered by a current negotiated agreement. Therefore, the instant petition in the subject case was found to have been filed untimely. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,  
366th COMBAT SUPPORT GROUP,  
MOUNTAIN HOME AIR FORCE BASE,  
MOUNTAIN HOME, IDAHO

Activity

and

Case No. 71-3013(RO)

INTERNATIONAL ASSOCIATION OF  
FIREFIGHTERS, LOCAL UNION F-179

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 Daniel P. Kraus. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including 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, International Association of Firefighters, Local Union F-179, herein called IAFF, seeks an election in the following unit:

All non-supervisory, GS Fire Fighters, Crew Chiefs, and Fire Inspectors employed at and by Mountain Home Air Force Base, Idaho, excluding all supervisors, professionals, guards, management officials, and employees engaged in Federal personnel work, except in a purely clerical capacity within the meaning of the Order. 1/

1/ The incumbent exclusive representative, National Federation of Federal Employees, Local 1200, herein called NFFE, did not intervene in the instant case. The record reveals that the NFFE has been the exclusive representative since November 1966 of "all eligible United States Air Force appropriated fund employees serviced by the Central Civilian

The Activity contends that at the time the IAFF filed the petition in the instant case, the employees sought were covered by an existing negotiated agreement with the NFFE which constituted a bar to the instant petition. 2/ The IAFF asserts, in substance, that the fire-fighter classification is not part of the existing unit but is, in effect, a new employee classification which is unrepresented.

The employees in the claimed unit are in the Fire Protection/Crash Rescue Branch -- one of seven branches of the 366th Civil Engineering Squadron. The Squadron plans, directs, supervises, and coordinates all civil engineering activities of the 366th Combat Support Group which, in turn, is responsible for providing the overall command, direction, plans, and staff supervision in the fulfillment of the mission of the 366th Tactical Fighter Wing. The mission of the Wing is to execute directed tactical fighter missions and to provide replacement training of combat aircrews and tactical maintenance personnel. Mountain Home Air Force Base is the home base of the Fighter Wing and is a part of the Tactical Air Command.

The Fire Protection/Crash Rescue Branch is divided into three components: an administrative section, composed of the Fire Chief, Deputy Fire Chief, four supervisory firefighters, and a clerk-typist; the Technical Services Section, whose function is primarily that of fire prevention and orientation; and the Operations Section, which includes all of the firefighters and their firefighting equipment. At the time of the hearing in this matter, the complement of the Branch included 53 authorized military positions with 45 military incumbents and 37 civilian authorized positions with 36 incumbents, including 7 civilian supervisors.

The record indicates that the Fire Protection/Crash Rescue Branch began to convert during the first quarter of fiscal year 1974 (July through September 1973) from an essentially military to a civilian operation. However, the evidence establishes that at least two non-supervisory, civilian crew chief positions had been occupied almost

1/ Personnel Office, Mountain Home Air Force Base, Idaho, excluding management officials, supervisors, and employees engaged in Civilian Personnel work, other than those in a purely clerical capacity, and professional employees."

2/ The IAFF filed its petition in the instant case on August 12, 1974. The Activity and the NFFE were parties to a negotiated agreement which had been approved on January 22, 1973. The term of the agreement was for one year with automatic renewal for an additional year.

(Continued)

continuously prior to that time since the granting of exclusive recognition to the NFFE in 1966. 3/ Further, the record shows that the firefighters are serviced by the same central civilian personnel office as are the other employees in the bargaining unit and that firefighters, like other Activity employees, are advised during their "desk" orientations and periodic group orientations of the exclusive representative status of the NFFE. There is no record evidence that the Activity or the NFFE sought or intended, at any time during their bargaining history, to exclude the civilian firefighter classifications from the base-wide unit.

Based on the foregoing circumstances, I find that the employees sought by the IAFF are part of the existing unit at the Activity covered by a negotiated agreement and that the instant petition, therefore, was filed untimely 4/ under Section 202.3(c) of the Assistant Secretary's Regulations. 5/ Thus, in my view, the January 22, 1973, negotiated agreement, which covered all eligible United States Air Force appropriated fund employees serviced by the Central Civilian Personnel Office, Mountain Home Air Force Base, Idaho, encompassed the employees in the claimed unit and, therefore, constituted a bar to the instant petition. Accordingly, I find that the dismissal of the instant petition is warranted.

3/ Between 1966 and September 1973, neither nonsupervisory, civilian crew chief position was vacant more than twice and never simultaneously. During this period, one of the positions was vacant for two periods of approximately 4½ and 3 months; the other position was vacant for two periods of approximately 1 and 6 months.

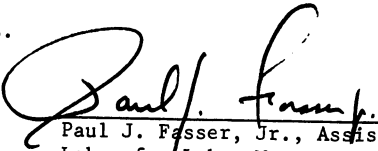
4/ See United States Department of the Air Force, Davis-Monthan Air Force Base, Arizona, A/SILMR No. 462; FLRC No. 74A-92. I find also that the evidence did not establish that the employees in the claimed unit had been denied effective and fair representation by the NFFE.

5/ Section 202.3(c) provides, in pertinent part, that "When an agreement covering a claimed unit has been signed and dated by an activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows: (1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed and dated...."

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 71-3013(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 30, 1975

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

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

DEPARTMENT OF THE AIR FORCE,  
 321st COMBAT SUPPORT GROUP,  
 GRAND FORKS AIR FORCE BASE,  
 NORTH DAKOTA  
 A/SLMR No. 531

The Petitioner, Local F-181, International Association of Firefighters, AFL-CIO (IAFF), sought an election in a unit of all nonsupervisory, nonprofessional General Schedule firefighters, crew chiefs and fire inspectors employed at and by Grand Forks Air Force Base in North Dakota.

The record evidence established that, at the time the IAFF filed its petition in the instant case, the Activity and the Intervenor, Local 1347, National Federation of Federal Employees (NFFE), were parties to a negotiated agreement encompassing "all eligible Air Force civilian employees paid from appropriated funds employed on Grand Forks Air Force Base, North Dakota, including on-base tenant organizations..." The parties stipulated that four nonsupervisory, civilian firefighter positions had been occupied prior to the NFFE's first negotiated agreement with the Activity and this number remained relatively constant from October 1967 until October 1973; that, by the time of the hearing in this matter, there were 31 positions eligible for inclusion in the IAFF's proposed unit; and that civilian firefighters are serviced by the same central civilian personnel office as are all civilian General Schedule employees at the base. No record evidence was presented that the Activity or the NFFE sought or intended, at any time during their bargaining history, to exclude the civilian firefighter classifications from the base-wide unit.

The Assistant Secretary found that the unit of firefighters sought by the IAFF was part of the exclusively recognized base-wide unit represented by the NFFE and was covered by a current negotiated agreement. Therefore, the instant petition in the subject case was found to have been filed untimely. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,  
 321st COMBAT SUPPORT GROUP,  
 GRAND FORKS AIR FORCE BASE,  
 NORTH DAKOTA 1/

Activity

and

Case No. 60-3747(RO)

LOCAL F-181, INTERNATIONAL ASSOCIATION  
 OF FIREFIGHTERS (AFL-CIO) 2/

Petitioner

and

LOCAL 1347, NATIONAL FEDERATION OF  
 FEDERAL EMPLOYEES

Intervenor

## DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer 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 briefs filed by all of the parties, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The IAFF seeks an election in the following unit:

All non-supervisory, GS Fire Fighters, Crew  
 Chiefs, and Fire Inspectors employed at and by

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

2/ The name of the Petitioner, Local F-181, International Association of Firefighters (AFL-CIO), herein called IAFF, appears as amended at the hearing.



Grand Forks Air Force Base, North Dakota, excluding all supervisors, professionals, guards, management officials, and employees engaged in Federal personnel work, except in a purely clerical capacity within the meaning of the Order.

The Intervenor, Local 1347, National Federation of Federal Employees, herein called NFFE, which had been granted exclusive recognition in 1968, and the Activity contend that at the time the IAFF filed the petition in the instant case, the employees sought were covered by an existing negotiated agreement which constituted a bar to the petition. <sup>3/</sup> The IAFF asserts, in substance, that the firefighter classification is not part of the existing unit but is, in effect, a new employee classification which is unrepresented.

The employees in the claimed unit are in the Fire Protection Branch of the 321st Civil Engineering Squadron. The Squadron is one of the subordinate service elements composing the 321st Combat Support Group which is located at Grand Forks Air Force Base. <sup>4/</sup>

The Fire Protection Branch is divided into three components: an administrative section; the Technical Services Section; and the Fire Operations Section. At the time of the hearing in this matter, the complement of the Branch consisted of 71 total authorized positions, of which 31 positions were stipulated by the parties to be eligible for inclusion in the IAFF's proposed unit.

<sup>3/</sup> The IAFF filed its petition herein on August 12, 1974. The parties stipulated that their current negotiated agreement is identical to the negotiated agreement cited in United States Air Force, 321st Combat Support Group, Grand Forks Air Force Base, North Dakota, A/SLMR No. 319, FLRC No. 73A-58. In that case, the evidence established that the negotiated agreement between the Activity and the NFFE became effective on October 26, 1972, had a duration of three years and was renewable on a year to year basis thereafter. It was noted, however, that the parties further stipulated that one of the Activity's exhibits "is a present" negotiated agreement between the Activity and the NFFE. This agreement was approved on December 17, 1973, and has the same duration language as the October 26, 1972, agreement. Moreover, both agreements have the same unit description: "...all eligible Air Force civilian employees paid from appropriated funds employed on Grand Forks Air Force Base, North Dakota, including on-base tenant organizations...."

<sup>4/</sup> With respect to the Activity's mission and command structure and the job functions and working conditions of the claimed employees, the parties stipulated that there are no material differences between the facts in the present case and those which were present in United States Department of the Air Force, Davis-Monthan Air Force Base, Arizona, A/SLMR No. 462, FLRC No. 74A-92.


The parties stipulated to the following facts: (1) the Fire Protection Branch began to convert during the first quarter of fiscal year 1974 (July through September 1973) from an essentially military to civilian operation; (2) four nonsupervisory, civilian firefighter positions had been occupied prior to the NFFE's first negotiated agreement with the Activity and this number remained relatively constant from October 1967 until October 1973; (3) civilian firefighters are serviced by the same central civilian personnel office as are all other Civil Service employees at the base; (4) appraisals, awards, classification appeals, equal employment opportunity matters, grievances, injury compensation, suggestion processing, merit promotion, and placement affect civilian firefighters in the same manner as they affect all other civilian General Schedule employees at the base; and (5) during their initial orientation, new civilian firefighters employed by the Activity are advised of their right to join or to refrain from joining the NFFE. There is no record evidence that the Activity or the NFFE sought or intended, at any time during their bargaining history, to exclude the civilian firefighter classifications from the base-wide unit.

Based on the foregoing circumstances, I find that the employees sought by the IAFF are part of the existing unit at the Activity covered by a negotiated agreement and that the instant petition therefore, was filed untimely <sup>5/</sup> under Section 202.3(c) of the Assistant Secretary's Regulations. <sup>6/</sup> Accordingly, I find that the dismissal of the instant petition is warranted.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 60-3747(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 30, 1975

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

<sup>5/</sup> See United States Department of the Air Force, Davis-Monthan Air Force Base, Arizona, cited above. It was noted that the parties stipulated that "there is no dispute regarding the quality and sufficiency of NFFE representation of employees within its bargaining unit, including fire department employees."

<sup>6/</sup> Section 202.3(c) provides, in pertinent part, that "When an agreement covering a claimed unit has been signed and dated by an activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely filed as follows: (1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed and dated..."

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

DEPARTMENT OF THE ARMY,  
 PICATINNY ARSENAL,  
 DOVER, NEW JERSEY  
 A/SLMR No. 532

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees (AFL-CIO), Local Union 225, (Complainant) alleging essentially that the Respondent violated Section 19(a)(1) and (4) of the Order by the discriminatory conduct of the Respondent's Branch Chief in handling requests for training from the Complainant's President in a manner different from that used by him in handling similar requests from other employees, because the Complainant's President had filed previously an unfair labor practice complaint against the Respondent.

Noting that the Branch Chief, who was charged with a previous unfair labor practice by the Complainant, did not approve or disapprove the requests for training but, rather, forwarded the requests to his supervisors who subsequently approved them without any unusual delay, the Administrative Law Judge concluded that the Respondent did not discriminate against the Complainant's President in violation of Section 19(a)(1) and (4) of the Order.

The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
 PICATINNY ARSENAL,  
 DOVER, NEW JERSEY

Respondent

and

Case No. 32-3793(CA)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES (AFL-CIO),  
 LOCAL UNION 225

Complainant

## DECISION AND ORDER

On April 29, 1975, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, including the Complainant's exceptions,<sup>1/</sup> I hereby adopt the Administrative Law Judge's findings, conclusions <sup>2/</sup> and recommendations.

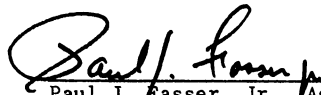
<sup>1/</sup> In its exceptions, the Complainant asserted that its right to a fair and impartial hearing was impaired by the assignment in this matter of the same Administrative Law Judge who had heard a previous case involving the same parties at a time when exceptions to the Administrative Law Judge's Report and Recommendations in the previous case were pending before the Assistant Secretary. Noting the Complainant's failure to raise such objection at the hearing and, thus, affording the Administrative Law Judge the opportunity to withdraw if he considered such action necessary, and the lack of any record evidence that a fair and impartial hearing was not conducted in this matter, I hereby reject the Complainant's contention in this regard.

<sup>2/</sup> Additionally, I do not find that any statements made by Director Koch during his conversation of August 19, 1974, with the Complainant's Vice President, George Kelly, constituted interference, restraint, or coercion within the meaning of Section 19(a)(1) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 32-3793(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 30, 1975

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

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



.....  
Department of the Army :  
Picatinny Arsenal :  
Dover, New Jersey :  
Agency : CASE NO. 32-3793 (CA)  
and :  
Local Union 225 :  
American Federation of Government :  
Employees, AFL-CIO :  
Complainant :  
.....

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BEFORE: RHEA M. BURROW  
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arose upon the filing of an unfair labor practice complaint on October 9, 1974 by George A. Kelly, Vice President, Classification Act Employees, American Federation of Government Employees, AFL-CIO, Local Union 225, (hereinafter referred to as Complainant and/or Union), against the Picatinny Arsenal, Department of the Army, (hereinafter referred to as the Respondent), alleging that the Respondent engaged in certain conduct during the week of August 11, 1974 violative of Sections 19(a)(1) and (4) of Executive Order 11491, as amended, (hereinafter referred to as the Order). The complaint alleged, in substance, that Albert Nash, Chief of Fuze Engineering Branch, ADED discriminated against the President of AFGE Local 225, Ms. G. Nancy McAleney, because of Ms. McAleney's previous filing of a formal Unfair Labor Practice charge under the provisions of the Executive Order. The specific discrimination involves Mr. Nash's handling of Ms. McAleney's application or request made on August 8, 1974, for two courses of training under the Upward Mobility Program, in a manner different than that used by him in handling similar requests from other employees under his supervision. Mr. Nash's attempt to justify his action because of his involvement in another Unfair Labor Practice was not justified and constituted the latest incident of harassment in a series of discriminatory actions taken against Ms. McAleney by him. The complaint further alleged that in a discussion on August 19, 1974 between Union Representative George A. Kelly and William F. Koch, (Chief of the Training Branch at the Arsenal) regarding Mr. Koch's efforts to secure approval of the training forms he, Kelly, was told that Mr. Nash refused to sign the forms because he was a litigant in an Unfair Labor Practice complaint that had been filed against and which involved him and Ms. McAleney. The situation became further involved when Mr. Koch revealed that he had spoken to Mr. Saxe and found Mr. Saxe of the opinion that Ms. McAleney was using her Union position to "blackmail" his organization out of training and he would not sign the forms but would send them on to the Ammunition Development and Engineering Directorate. The following day Mr. Koch informed Mr. Kelly that he had spoken to Colonel Hein, Director, ADED and explained the situation and the Training Forms would be signed in the Director's Office which was promptly done.

A hearing was held in the above-entitled matter on March 26, 1975 at Dover, New Jersey. The parties through their Counsel were afforded the opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues herein and to present oral argument and file briefs in support of their positions. There were no briefs filed by either party for the undersigned to consider.

Based on the entire record, including my observation of the witnesses and their demeanor and upon the relevant evidence adduced at the hearing, I make the following findings of fact, conclusions of law and recommendation:

I

Preliminary Motion

At the beginning of the hearing Counsel for the Complainant and Respondent stipulated the issue to be "Did Albert Nash (Chief, Fuze Engineering Branch) violate the Executive Order (Section 19(a)(1) and (4)) when he did not approve or disapprove the two training requests of Ms. McAleney, but referred such requests to his higher supervisors for appropriate action because he (Mr. Nash) was at that time under a previously filed Unfair Labor Practice charge (See Case No. 32-3626(CA) involving a similar issue) of unfair labor practices."

The following fact was also stipulated "Ms. McAleney did receive timely approval for the two courses in question. The approval was signed by Victor Lindner, Deputy Director, Ammunition Development and Engineering Directorate, a higher supervisor of Mr. Nash."

Complainants' Counsel expressed the opinion that the foregoing stipulation was made to permit a decision by the Assistant Secretary under 29 CFR 203.5(b) without a hearing. 1/

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1/ 29 CFR 203.5(b) provides that: "Upon the filing of a complaint, the parties may submit to the Area Administrator a stipulation of facts and their request for a decision by [continued on next page]"

The matter had not been referred to the Area Administrator before the date set for hearing and I did not regard the Stipulation and record as being sufficiently comprehensive without additional facts for a decision by the Assistant Secretary or me. Whereupon, I directed that the parties proceed with further proof in the matter.

II

The material facts in this proceeding as presented by the oral testimony and introduction of documentary evidence at the hearing are not in essential dispute and found to be as follows:

(1) At all times material herein, Complainant Union has been the exclusive bargaining representative of Respondents non professional employees at Picatinny Arsenal.

(2) Nancy McAleney is a clerk-typist GS-4 in the Fuze Engineering Branch of the Department of the Army's Picatinny Arsenal, Dover, New Jersey, where she has been an employee and a student for several years under the Upward Mobility Program. She is a member of AFGE Local Union No. 225 and is currently serving as its President. Basically, all of her training under the Upward Mobility Program prior to the requests that are involved in this proceeding had been approved by her supervisor Albert Nash.

(3) In a previously filed Unfair Labor Practice proceeding 2/ arising between the same parties, Complainant alleged discriminatory treatment by Albert Nash against Nancy McAleney in violation of Section 19(a)(1) and (2) of the Order.

1/ - continued

the Assistant Secretary without a hearing. The stipulation shall be forwarded to the Assistant Regional Director for Labor-Management Services by the Area Administrator."

2/ Case No. 32-3626(CA). The case is currently before the Assistant Secretary for Labor-Management Relations on appeal for final disposition.

(4) On August 8, 1974 Ms. McAleney submitted two requests for training to take two non-government facility courses commencing on September 10 and 11, 1974 at Morris County College. 3/ She submitted the forms to her Section Chief's secretary and they were subsequently forwarded to the office of Albert Nash who had approved her former requests for training under the Upward Mobility Program.

(5) About August 16, 1974, Nancy McAleney made inquiry as to the status of her two requests for training and learned that they had been sent to Mr. Nash who in turn had forwarded them to Frederick Saxe 4/ without having approved or disapproved them.

(6) Either on the day of receipt of the training forms or the following day Albert Nash forwarded the training requests to Frederick Saxe with a note stating in effect that;

I have been under a charge of harassment by Ms. McAleney and I feel that I should stand aside in this matter pertaining to her and I would appreciate it that you would act in my stead. 5/

(7) There were other employees who had training requests pending at the same time of Nancy McAleney's that were subsequently approved. One was Michael Dellaterza and another was Elaine Case, but only Elaine was under the Upward Mobility Program. Albert Nash had approved her Upward Mobility Training being aware that she was a Local Union official. 6/

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3/ See Assistant Secretary's Exhibit 1(d)

4/ Frederick Saxe, Chief of Fuze Development and Engineering Division of the Ammunition Development Engineering Directorate and at the next higher management level to Albert Nash.

5/ See Transcript P. 48.

6/ See Transcript pp. 20 and 89.

(8) Frederick Saxe, after receiving the forms from Mr. Nash and ascertaining from the Training Branch that relevancy of the two requested courses of training had been established sent them to the office of the Director of the Ammunition Development and Engineering Directorate for approval; they were signed by Victor Lindner, Deputy Director.

(9) Mr. Saxe did not sign the applications prior to referral because he admittedly did not feel that he had sufficient familiarity with the Upward Mobility Program to act intelligently on it; he knew nothing of the background as to what the course requirements were and felt that he was being put in an awkward position to approve something he knew nothing about. Another reason for forwarding the request was that this was a sensitive matter since there was a grievance or Unfair Labor Practice charge pending at the time on the part of Ms. McAleney against Mr. Nash and he, (Mr. Nash) wished to disqualify himself from having any part in the proceeding.

(10) Nancy McAleney was informed by William F. Koch, Director, Training Branch, when she first made inquiry of him as to the status of her requests about August 16, 1974 to go ahead with her plans as her training would be approved and when he confirmed the matter with Colonel Hein he notified George Kelly the day following her inquiry.

(11) The training requests for the two courses were approved about August 19 or 20, 1974 without causing any unusual delay in registration, or entry into training about September 10, 1974 and she subsequently completed the requirements for the two courses.

III

The issue comprehends and presents the basic question as to whether Albert Nash violated Sections 19(a)(1) and (4) of the Order when he did not approve or disapprove the two requests for training under the Upward Mobility Program of Nancy McAleney but forwarded them to higher supervisors for appropriate action because at that time he was under accusation of having previously committed an unfair labor practice involving a similar issue.

Section 19 of the Order relating to Unfair Labor Practices provides:

(a) Agency management shall not -

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under the Order.

Under Section 1(a) of the Order, "Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization representative including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority"...

IV

Admittedly in this case, Albert Nash, a second line supervisor and Frederick Saxe, third level official above Nancy McAleney forwarded her two application forms for training courses under the Upward Mobility Program to the office of their Directorate head without any action or recommendation for approval or disapproval. Both were aware of Ms. McAleney's position as President of the Local Union and of the previously filed and pending Unfair Labor Practice charge of harassment that had been made against Mr. Nash that was the subject of a prior complaint. I have reviewed the oral testimony introduced at the hearing and the documentary evidence submitted. I am not persuaded that Mr. Nash or Saxe's actions were violative of Section 19(a)(1) and (4) of the Order.

In the first place it is neither alleged, contended, or established by the evidence that Nancy McAleney was in any manner disciplined by reason of having filed the two requests for training in issue under the Upward Mobility Program.

Second, Ms. McAleney's right to have impartial agency action on her two requests for training is not questioned. It was precisely to assure impartial action on her requests that Albert Nash referred them to a higher management level without any action or comment as to the merit of the requests on his part. The fact that he had approved her prior requests for training or approved similar requests from other under circumstances different from those involved herein is not determinative of the current issue as to whether there was a violation of the Order.

Under the circumstances in this case, I find no reason to fault his referral of the matter to a higher management level and there is no discrimination against Nancy McAleney shown to have resulted by reason of such action. In fact, when she made inquiry as to the status of her requests and called the matter to the attention of Mr. Koch, he assured her that her training was in order and he expedited the processing and approval of her application forms.

Third, in the complaint it was alleged that in a conversation between George Kelly and Mr. Koch, the latter revealed that he had spoken to Mr. Saxe and found him of the opinion that Ms. McAleney was using her union position to blackmail his organization out of training and he would not sign the forms. The allegation is not supported by the evidence and certainly not in the context stated. The allegation was predicated on a hearsay conversation; Mr. Saxe had not talked to Nancy McAleney or Mr. Kelly. The testimony was conflicting as to whether the term blackmail had been used in the conversation of Mr. Saxe with Mr. Koch, but even assuming that it was, I find it used in the sense that he (Saxe) was under pressure from the Training Section of the Agency to sign the application forms and not because of any action on the part of Ms. McAleney. This is supported by the testimony of Mr. Koch on redirect examination. The evidence shows that very few employees had applied for Upward Mobility training in Mr. Saxe's department and those that he had signed had been after they had been reviewed by the employee's immediate supervisor, and he had the benefit of his opinion and recommendation.

In view of the foregoing, I conclude that the evidence does not establish that Agency Management disciplined or otherwise discriminated against Nancy McAleney because of

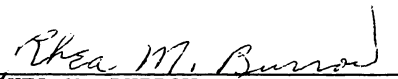
her having filed a complaint or given testimony under this Order in violation of Section 19(a)(4).

Further, the record is devoid of any threats or acts on the part of management officials to interfere with, restrain or coerce Nancy McAleney in any manner because of her union activities or in the exercise of the rights assured to her under the Order. Further, she was granted all of the benefits and the particular training courses that she had requested.

Based on the entire record, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated Sections 19(a)(1) and (4) of the Order.

Recommendation

Upon the basis of the foregoing findings, conclusions and the entire record, I recommend that the Assistant Secretary dismiss the complaint against the Respondent in its entirety.

  
 RHEA M. BURROW  
 Administrative Law Judge

DATED: April 29, 1975  
 Washington, D. C.

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

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

FEDERAL AVIATION ADMINISTRATION,  
AIRWAY FACILITIES SECTOR,  
SAN DIEGO, CALIFORNIA  
A/SLMR No. 533

FEDERAL AVIATION ADMINISTRATION,  
AIRWAY FACILITIES SECTOR,  
SAN DIEGO, CALIFORNIA

Respondent

and

Case No. 72-4741

This case involved an unfair labor practice complaint filed by National Association of Government Employees, Local R12-56 (NAGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to consult with the NAGE prior to its institution of an employee rating system. The Respondent contended, among other things, that it was under no obligation to consult or confer with the NAGE concerning the staffing readjustment plan because it was not the "employer" named in the negotiated agreement.

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R12-56

Complainant

The Assistant Secretary found, contrary to the Administrative Law Judge, that the Respondent did not violate Section 19(a)(1) and (6) of the Order as, in his view, the obligation to meet and confer under the Order applies only in the context of the exclusive bargaining relationship between the exclusive representative and the activity or agency which had accorded exclusive recognition and as the Respondent was not a party to the bargaining relationship herein, the Respondent owed no bargaining obligation to the NAGE.

DECISION AND ORDER

On December 20, 1974, Administrative Law Judge Thomas W. Kennedy issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices, and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendation. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

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

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

This case arose as the result of a complaint filed by the National Association of Government Employees, Local R12-56, herein called Complainant, alleging that the Federal Aviation Administration, Airway Facilities Sector, San Diego, California, herein called Respondent, violated Section 19(a)(1) and (6) of the Order by failing to consult with the Complainant prior to its institution of an employee rating system.



The Respondent, through several of its field offices, including the Miramar Airway Facilities Sector Field Office, San Diego, California, herein called Miramar, is responsible for the field maintenance of the navigational aids and equipment used in the air traffic control system involved in controlling military and civilian aircraft. At all times material herein, the Complainant was the exclusive representative for a unit of all nonsupervisory electronics technicians employed at Miramar.<sup>1/</sup>

In August 1969, the employees of Miramar were notified that most of the equipment of the Miramar Field Office was scheduled to be replaced with more modern and complicated systems over the next few years and that the electronics technicians should plan for training necessary to qualify them for maintenance assignments. As the system changeover gradually took place and electronics technicians were detailed for training, additional electronics technicians were assigned to Miramar so that by the end of 1973, there were 12 electronics technicians assigned to the Miramar Field Office.<sup>2/</sup> By the end of 1973, it was generally known that the Miramar facility was overstaffed and that some of the electronics technicians would have to be transferred to other FAA locations.

On March 6, 1974, Sector Manager Max Kelch, sent a memorandum to Ronald Rudolph, Chief of Miramar, which contained a formula for deciding which electronics technicians would be retained at Miramar and which ones would be transferred elsewhere. The plan contained a specific framework with respect to what criteria would be evaluated and compiled so as to determine who were the best qualified and most highly trained technicians. Prior to this time, Rudolph was unaware of the details of the plan and the Complainant had not been informed that a staffing and rating plan was under study at the Sector level.

Rudolph received the above-noted memorandum on March 7, 1974, and, after studying the plan, on March 11, 1974, met with David Edwards, President of the Complainant, one of the electronics technicians at Miramar. Edwards testified that although he knew that Miramar was overstaffed and that someone might lose his job or be transferred, he was unaware that a plan had been fully developed until his meeting with Rudolph on March 11. At the March 11 meeting, Edwards testified that there was no discussion of the merits of the plan; that he was simply informed that this was the plan that was going to be used; and that Rudolph was going to meet with all of the electronics technicians the following day to explain the plan. At the conclusion of the meeting, Rudolph told Edwards that he would appreciate any "input" Edwards had concerning the plan outlined in the

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<sup>1/</sup> At the time of the alleged unfair labor practices herein, there was a negotiated agreement in effect between Miramar and the Complainant.

<sup>2/</sup> In August 1969, there were eight electronics technicians assigned to Miramar.

memorandum. Edwards replied that he felt that any layoffs or transfers should be accomplished through established reduction-in-force procedures rather than through the rating system outlined in the memorandum. On March 12, 1974, Rudolph met with all of the electronics technicians who were on duty at the time to explain the plan and then posted the memorandum for all to read and to initial. The Complainant sought no further discussions on the matter and the plan, with certain modifications, eventually was put into effect. <sup>3/</sup>

The Administrative Law Judge found essentially that the Respondent's failure to keep the Complainant informed with reference to development of its staffing plan at Miramar, and its failure to afford the Complainant a meaningful opportunity to discuss the matter and its effect on unit employees, constituted a violation of Section 19(a)(1) and (6) of the Order. In reaching this conclusion, the Administrative Law Judge found that while the Complainant's "representative status was limited to a unit of electronics engineers at the Miramar Field Office, the employer was the agency, Federal Aviation Administration and the Complainant has properly named the agency's Airway Facilities Sector as the Respondent." In this regard, he noted that the "Respondent was a higher echelon completely in charge of the 'Employer' named in the contract and responsible for its staffing," and that the instructions issued in this case applied only to the Miramar Field Office.

I disagree with the Administrative Law Judge's conclusions concerning the Respondent's obligation to meet and confer concerning the staffing readjustment. Thus, it has been found previously that the obligation to meet and confer under the Order applies only in the context of the exclusive bargaining relationship between the exclusive representative and the activity or agency which has accorded exclusive recognition.<sup>4/</sup> As noted above, the evidence herein established that the Miramar Field Office, and not the Respondent, accorded exclusive recognition to the Complainant. <sup>5/</sup> Under these circumstances, as the Respondent was not a

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<sup>3/</sup> Page 7 of the Administrative Law Judge's Report and Recommendation contained several inadvertent errors in identifying the individuals involved. Such inadvertent errors are hereby corrected.

<sup>4/</sup> See National Aeronautics and Space Administration (NASA), Washington, D.C., A/SLMR No. 457.

<sup>5/</sup> As the Miramar Field Office was not named in the complaint in this matter and is not a party to this proceeding, I make no findings as to whether or not its conduct in the instant case violated Section 19(a) of the Order.

party to the bargaining relationship herein, I find that its conduct in establishing a formula for deciding which electronics technicians would be retained at Miramar and which ones would be transferred elsewhere, was not violative of Section 19(a)(1) 6/ and (6) of the Order.


U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-4741 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
June 30, 1975

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

6/ With respect to the Section 19(a)(1) of the instant complaint, National Aeronautics and Space Administration (NASA), Washington, D.C., cited above, was considered factually distinguishable. Thus, unlike the situation in that case, here there was no bypassing of the exclusive representative herein by virtue of a higher level management representative dealing directly with unit employees concerning their terms and conditions of employment.

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In the Matter of :  
:   
FEDERAL AVIATION ADMINISTRATION :  
AIRWAY FACILITIES SECTOR :  
SAN DIEGO, CALIFORNIA :  
:   
Respondent :   
:   
and :   
:   
NATIONAL ASSOCIATION OF GOVERNMENT :  
EMPLOYEES, LOCAL R12-56 :  
:   
Complainant :  
..... :

Case No. 72-4741

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For the Complainant

BEFORE: THOMAS W. KENNEDY  
Administrative Law Judge

REPORT AND RECOMMENDATION

I. Statement of the Case

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued on August 20, 1974, by the Assistant Regional Director, Labor-Management Services Administration, San Francisco Region, based on a Complaint, Amended Complaint, and Second Amended Complaint filed on May 14, 1974, August 6, 1974, and August 12, 1974, respectively, by National Association of Government Employees, Local R12-56 (herein called Complainant or Union). The Second Amended Complaint alleged that Federal Aviation Administration, Airway Facilities Sector, San Diego, California (herein called Respondent) violated Section 19, subsections (1) and (6) of the Order in that "[t]he agency did not consult or confer with the local prior to its unilateral institution of the ranking system evidenced in the 6 February 1974 letter as required by Executive Order 11491, as amended."

A hearing was held before the undersigned duly designated Administrative Law Judge on September 9 and 10, 1974, in San Diego, California. All parties were represented and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Opportunity was also afforded the parties to argue orally and to file briefs. Both Respondent and Complainant filed briefs, which have been duly considered by the undersigned.

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

II. Findings

A. Background

At all times material herein Complainant was the exclusive representative for collective bargaining purposes in a unit of Respondent's employees employed at Miramar Airway Facilities Sector Field Office, San Diego, California. The collective bargaining agreement in effect between Respondent and Complainant from January 3, 1969, to April 18, 1974, (in evidence as Joint Exhibit 1), was

a two-year contract, renewable for one-year periods. It was replaced by the current contract (in evidence as Joint Exhibit 2), which became effective upon approval by the Director, Western Region, Federal Aviation Administration on April 18, 1974. Like the earlier contract, it is for a two year period, renewable for one-year periods. While neither contract defines the unit, the evidence shows, and I find, that the Union at all times material herein represented all the non-supervisory electronics technicians employed at Respondent's Miramar Field Office housed at a Naval installation on the outskirts of San Diego, California. 1/

The Federal Aviation Administration, a national agency under the direction of the Department of Transportation, is divided into geographical Regions, each under the control and supervision of a Regional Director. 2/ In each Division there are Airway Facilities Sector Offices, each under the control and supervision of a Manager. Among such offices is the one involved herein, the Airway Facilities Sector Office, San Diego, California. The Manager of that office at all times material herein was Mr. Max Kelch. Each Sector is responsible within its own area for the field maintenance of the navigational aids and equipment

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1/The "Employer" is defined in Article I of the earlier contract as "the Chief, Airway Facilities Sub-Sector 18729, a facility of the Western Region, Federal Aviation Administration." The current contract defines "Employer" as "the Chief, Miramar Airway Facilities Sector Field Office, San Diego, California." Despite what may be described as inartful language in the contracts, I find that at all times material herein the employer was the Federal Aviation Administration. The Union's representative status, insofar as this matter is concerned, was limited to the unit of electronics engineers employed at the Employer's Miramar Airway Facilities Sector Field Office.

2/Both collective bargaining agreements, described supra, were approved by the Director, Western Region, such approval being required by the terms of the agreements as a condition to their becoming effective.

used in the air traffic control system involved in controlling military and civilian aircraft. To accomplish this mission there are several field offices in each Sector, such as the one involved in this case, Miramar Field Office, under the supervision of Mr. Ronald Rudolph, Chief of that field office during the period involved herein.

B. The Alleged Unfair Labor Practices

As early as 1969 it was known that most of the equipment at the Miramar field office was scheduled to be replaced with more modern (and in most cases more complicated) systems. Thus, in August 1969 the employees at Miramar were notified that the changes would take place over the next few years and that the technicians should plan for training necessary to qualify them for maintenance assignments. At that time there were eight electronics technicians assigned to Miramar, and the training required for maintenance of the new equipment varied with each system and depended on prerequisite training already accomplished by each electronics technician. Among the new projected systems to be installed was ARTS III (Automated Radar Terminal System) to replace ARTS II. This was considered the most important projected systems change, since it would constitute the major facility or work load at Miramar and since the maintenance of the new equipment involved in that system required training obtained through residence at the FAA Academy in Oklahoma City for a period in excess of six months.

As the system changeovers gradually took place and as electronics technicians were detailed for training, additional technicians were assigned to Miramar, so that by the end of 1973 there were twelve Electronics Technicians assigned to the Miramar Field Office. Not all had yet been fully trained with regard to the new systems but it was generally felt or known by all that the Miramar facility was overstaffed and that as training was completed and the new systems put into operation something would have to give. And that something would result in the transfer of Electronics Technicians to other FAA locations.

On March 6, 1974, something did happen. On that day Sector Manager Kelch sent to Chief Rudolph a two-page memo under the subject: "Staffing Readjustment, Miramar AFSFO." 3/ That memo announced a complicated formula for ranking the Electronics Technicians for retention in one of three categories, depending on which systems they were trained and certified for maintenance assignments. The emphasis was on the system known as ARTS (described supra). In category I were to be those who were trained and certified in all three named systems. Category II was to contain those trained and certified in ARTS and one of the other two systems. In Category III were to be placed those whose training and certification did not include ARTS but did include one or both of the other two systems. Technicians within each group were then to be ranked by a numerical score derived from the Performance Evaluation Record (PER) and training grades received in courses involving the three systems. Points were assigned for various degrees of efficiency, with extra points assigned for awards or Quality Within-Grade promotions, and the Training Score was to be arrived at through the following formula:

$$\frac{\text{Average grade} - 70}{2} = \text{Training Score}$$

The memo concluded with the following instructions:

Rank each employee within groups I, II and III using the above, the sum of the PER and training scores.

Should you desire training grade information, etc., this office will furnish any date you may require to accomplish the above.

Using the retention groups as listed, you should furnish to this office not later than March 15, 1974, the names of eight individuals determined to be the highest ranking, starting with Group I, then through Groups II and III. The remaining four employees will be offered reassignment within the Sector, or positions outside the Sector when they are available.

3/ The memo, in evidence as Joint Exhibit 3, contains the date of February 6, 1974, but it was stipulated by the parties that the memo was actually typed and sent on March 6, 1974.

The author of that memo, Sector Manager Max C. Kelch, had been considering for some time the promulgation of a ranking system for retention purposes at the Miramar installation. That location was the only one of six in Manager Kelch's Sector which was scheduled to employ the new ARTS III system, and he wanted to complete the study on staffing and ranking before his scheduled transfer to a different position in March, 1974. He had discussions with, and sought input from, the Maintenance Operations Branch concerning staffing and he discussed the matter of a formula for ranking for retention purposes with the Manpower Division. He had no discussions with any representatives of the Union, and Chief Rudolph had only "general knowledge" that a staffing and ranking plan were under study at the Sector level. 4/

Manager Kelch's memo was received by Chief Rudolph on Thursday afternoon, March 7, 1974. It was not until Monday afternoon, March 11, that he discussed the memo with the president of the Union, David Edwards, one of the Electronics Engineers employed at Miramar. At that time Chief Rudolph had studied the memo over the week-end and had made notes as an aid to preparing the required response. Among those notes was a tentative ranking of the employees, but the training scores had to be obtained from the Sector office before the ranking could be finalized.

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4/ How "general" the knowledge was is conjectural. According to Rudolph, his input was limited to advice that "we were going to have to develop a plan which is equitable to everybody" and a statement that "I must have people who can do the job." It is clear, however, that Rudolph was kept advised to some extent, since he received a copy of the February 12 memo to Kelch from the Chief, Recruiting/Replacement Staff, making certain suggestions in the Personnel Evaluation Plan which were later incorporated in the retention formula set out in the March 6 memo. (See Complainant's Exhibit 3).

Although Davis had felt that the Miramar installation was overstaffed and feared that some of the Electronics Technicians may lose their jobs or be transferred, it was not until his conversation with Kelch on March 11 that Davis learned that a plan had been fully developed with a ranking formula to determine who would be retained at Miramar. And that conversation with Kelch did not involve a discussion of the merits of the ranking system; rather it was a notification of a plan decided upon, with Kelch stating that he was preparing to respond by the deadline imposed and was going to explain the memo to the Electronics Engineers at an "All Hands" meeting scheduled for the following day. At the conclusion of the meeting of March 11, Kelch told Davis he would appreciate any "input" Davis had concerning the plan outlined in the March 6 memo. Davis replied that he felt that any lay-offs or transfers should be accomplished through established Reduction-in-Force (RIF) procedures rather than through the ranking system outlined in the memo.<sup>5/</sup> On March 11 Kelch explained the contents of the March 6 memo to those Electronic Engineers who were on duty at the time and then posted the memo for all to read and initial. There were no further discussions with the Union, and the plan, with a few modifications, was eventually put into effect. 6/

### III. Positions of the Parties

Complainant alleges that the unilateral formulation of the staffing readjustment plan at Miramar constituted a violation of Section 19(a)(6) of the Order and derivatively a violation of Section 19(a)(1) of the Order. Although the 19(a)(2) allegation contained in the initial complaint was later amended out, Complainant argues in its brief that Respondent's readjustment plan was the final step in a

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5/ Davis' concern over the staffing problem at Miramar and what might happen to some of the Union's members had previously been expressed by Davis in letters to his union's headquarters, which in turn communicated with Respondent (See Complainant's Exhibits 4 through 9).

6/ Budgetary considerations delayed the implementation of the plan for several months, so certain changes were necessary to reflect the changed conditions. Other changes came about through voluntary offers to transfer. Otherwise the plan put into effect was as originally promulgated.

scheme to "bust" the Union and that favoritism was shown non-union employees in selection for training. 7/

Respondent's position is that it was under no obligation to consult or confer with the Union concerning the staffing readjustment plan, since it was not the "Employer" named in the contract. The argument is that the promulgation of the plan was effected by a higher level which was under no obligation to deal with the Union. Respondent further asserts a Section 19(d) defense, arguing that any employee who was adversely affected by the staffing readjustment plan should pursue his remedy through the established grievance procedure. Finally, Respondent contends that the only "Employer" herein on whom there was any obligation to meet and confer with the Union was Ronald Rudolph, Chief of the Miramar Field Office, and that he fulfilled any obligation he had under the Order.

IV. Conclusions

The only issue to be resolved in this case is whether or not Respondent had an obligation to consult and confer with the Union about the staffing readjustment plan, which incorporated the complicated retention formula described above. I deem it appropriate at the outset to dispose of the Section 19(d) defense asserted by Respondent, since in my opinion little discussion is required. Respondent argues that any employee adversely affected by the promulgated plan should seek redress through the established grievance procedure. In the first place Section 19(d) gives the

7/ I do not consider a Section 19(a)(2) violation to be in issue in this case, since it was not alleged in the complaint as amended. Evidence was allowed, however, for the limited purpose of showing anti-union animus or motive on the part of Respondent. While I have not deemed it appropriate or necessary to set out such evidence in detail, suffice it to say that it consisted, for the most part, of opinion testimony, and complainant has failed to prove that Respondent was motivated by anti-union considerations in its selection for training or that the staffing readjustment program was part of an over-all plan by Respondent to rid itself of the Union.

employee a choice of seeking redress through a grievance procedure or the applicable provisions of the Order. But even assuming that Respondent means to argue the existence of an appeals procedure, which would bring into play the other portion of Section 19(d), that, too, must fall because more important is the fact that the obligation to consult and confer is an obligation owed the Union and the right to such consultation is a right of the Union, not of the employees (See, International Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448). More complicated is Respondent's argument that it is not the employer and therefore had no obligation whatsoever to the Union.

Respondent cites the contract (Joint Exhibit 1) to show that it was not the employer. But Respondent was a higher echelon completely in charge of the "Employer" named in the contract and responsible for its staffing. We are not here dealing with regulations issued by a higher echelon to several lower echelons: here we have a complicated formula derived for one installation, which was promulgated without any discussion with the Union representing the employees affected. And even though the same or similar formula may later be applied to the other field offices in the sector, the instructions issued in this case applied only to the Miramar Field Office, the only field office where the ARTS III system was to be installed, and there was an obligation to bargain about the formula to be used for retention purposes (See, United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 20, 1972); Department of Defense, Air Force Language Institute, Lackland Air Force Base, FLRC No. 73A-64 (October 25, 1974)). To uphold Respondent's contention that there was no obligation to consult or confer with the Union would, as the Council stated in U.S. Merchant Marine Academy, supra, "be holding, in effect, that an agency may unilaterally limit the scope of its bargaining obligation on otherwise negotiable matters peculiar to an individual unit, in a single field activity, merely by issuing regulations from a higher level. We believe the bargaining obligation in Section 11(a) of the Order may not be diluted by unilateral action of this kind."

While, as stated in the findings above, the Union's representative status was limited to a unit of electronics engineers at the Miramar Field Office, the employer was the agency, Federal Aviation Administration, and Complainant has properly named the agency's Airway Facilities Sector as the Respondent. In that respect this case is distinguishable from Iowa State Agricultural Stabilization and Conservation Office, Department of Agriculture, A/SLMR No. 453 (November 5, 1974). In that case the Assistant Secretary adopted the

findings and conclusions of the Administrative Law Judge dismissing the case on the grounds that the implementation of the RIF involved in that case was the product of a higher echelon and not a result of any decision or planning on the part of the respondent named in the complaint and that the named respondent "did not do anything or fail to do anything in violation of the executive order." The instant case does not suffer from any such pleading defect. Respondent was obligated, either through the Sector office or through its manager of the Miramar Field Office, to discuss with the Union, not the administrative decision that the field office was overstaffed and must be reduced, but the means used to accomplish the reduction, the formula to be used, and the effect it would have on the employees. This Respondent failed to do. And this fact is not changed by the semantic argument that Respondent did not refuse to bargain because Respondent was not requested to bargain. The simple fact is that the plan was fait accompli by the time the Union learned of its existence. The polite request for "input" at that time hardly fulfilled the obligation as contemplated by Section 11(a) of the Order. (cf. Department of Defense, Air Force Language Institute, A/SLMR No. 322; Albany Metallurgy Research Center, A/SLMR No. 408).

While I have found, contrary to Complainant's assertion, that Respondent was not engaged in a plan to get rid of the Union and did not engage in discriminatory selection for training based on Union considerations, evidence of such anti-union animus or motive is not a prerequisite to finding a refusal or failure to bargain in the circumstances of this case. It is noteworthy that in all of the memoranda or correspondence from the Sector Office to the Miramar Field Office concerning the staffing and training problems and programs the Union was never mentioned. There were exhortations to discuss the matter with the employees involved and there were instructions to post the new staffing plan on the bulletin board. There were even statements expressing the importance of being fair. But the representative status of the Union, whether by design or otherwise, was totally ignored. Such conduct is inconsistent and incompatible with the provisions of Section 11(a) of the Order, and I conclude that in the circumstances set out above Respondent's failure to keep the Union informed with reference to development of its staffing plan at its Miramar Field Office and its failure to afford the Union a meaningful opportunity to discuss the matter and its effect on the unit employees

constituted a violation of Section 19(a)(6) of the Order. I further find and conclude that Respondent's improper conduct in this regard necessarily had a restraining influence upon employees and has a concomitant coercive effect upon their rights assured by the Order. Accordingly, I conclude that Respondent's conduct herein also violated Section 19(a)(1) of the Order.

#### V. Recommendation

Having found that Respondent, by unilaterally developing the retention formula incorporated in the staffing readjustment plan for its Miramar Field Office, has engaged in conduct which is in violation of Section 19, subsections (1) and (6) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of Executive Order 11491, as amended.

#### RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Respondent, Federal Aviation Administration Airway Facilities Sector, San Diego, California, shall:

1. Cease and desist from:

(a) formulating and promulgating any staffing readjustment plan involving employees at the Miramar Field Office, or any other matters affecting general working conditions of employees in the unit, without giving National Association of Government Employees, Local R12-56, the employee's exclusive representative, the opportunity to consult and confer with responsible management representatives concerning such matters.

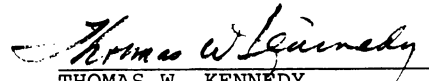
(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

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

(a) Notify National Association of Government Employees, Local R12-56, and give it the opportunity to consult and confer with Respondent concerning any staffing readjustment plan or retention formula, or any other matters affecting general working conditions of employees in the unit.

(b) Post at its Miramar Field Office facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Manager of Respondent's Airway Facilities Sector Office, San Diego, California, and they shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

  
THOMAS W. KENNEDY  
Administrative Law Judge

Dated: December 20, 1974  
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT formulate or promulgate any staffing readjustment plan involving employees at the Miramar Field Office, or any other matter affecting general working conditions of employees in the unit, without giving National Association of Government Employees, Local R12-56, the employees' exclusive representative, the opportunity to consult and confer with responsible management representatives concerning such matters.

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

WE WILL notify National Association of Government Employees, Local R12-56, and give it the opportunity to consult and confer with Management concerning any staffing readjustment plan or retention formula, or any other matters affecting general working conditions of employees in the unit.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.



July 29, 1975

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

FEDERAL AVIATION ADMINISTRATION,  
MUSKEGON AIR TRAFFIC CONTROL TOWER  
A/SLMR No. 534

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This case involved an unfair labor practice complaint filed by the Professional Air Traffic Controllers Organization - MEBA, AFL-CIO, (PATCO), alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by: (1) refusing the PATCO, the exclusive bargaining representative, an appropriate opportunity to represent an employee facing a possible suspension in discussions with the Activity concerning the suspension, and (2) failing to provide the employee and the PATCO with all relevant information regarding the proposed suspension. The Respondent contended, among other things, that the PATCO was precluded by Section 19(d) of the Order from filing a complaint in this matter inasmuch as it had previously filed a grievance under the parties' negotiated grievance procedure addressed to the same issues.

The Administrative Law Judge found, and the Assistant Secretary concurred, that the PATCO was not precluded by Section 19(d) of the Order from filing an unfair labor practice complaint concerning limitations placed on the union representative at a meeting held on November 19, 1973, between the Tower Chief, the employee involved, and his union representative to discuss proposed discipline of the employee, even though this issue had been included in a previously filed grievance that had been rejected as untimely. In this regard, it was noted that the untimely filed grievance did not in any real sense invoke the grievance procedure and, therefore, Section 19(d) did not preclude consideration of the matter under the unfair labor practice procedures of the Executive Order. However, with respect to this aspect of the unfair labor practice complaint, the Assistant Secretary found that the Respondent's conduct did not violate Section 19(a)(1) and (6) of the Order as the meeting involved was not a "formal discussion" within the meaning of Section 10(e) of the Order; the union representative did, in fact, ultimately participate in a substantial manner in the discussion at the meeting; and the Tower Chief's position concerning the role the union representative reflected essentially his good faith interpretation of the negotiated agreement, as distinguished from a clear unilateral breach of the negotiated agreement.

The Assistant Secretary found also that he was precluded by Section 19(d) from considering the aspect of the unfair labor practice complaint concerning the alleged denial of access to certain information on the employee's employment record card. In this regard, the evidence established that the grievance which had been filed previously raised the same issue and the response to the grievance made no specific reference to this issue. Under these circumstances, the Assistant Secretary, noting that the Complainant did not choose to pursue its grievance appeal rights in this regard or seek a specific response from the Respondent, concluded that

Section 19(d) precluded the PATCO from raising this issue under the unfair labor practice procedures.

Accordingly, the Assistant Secretary dismissed the complaint in its entirety.

## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,  
MUSKEGON AIR TRAFFIC CONTROL TOWER

Respondent

and

Case No. 52-5566(CA)

PROFESSIONAL AIR TRAFFIC CONTROLLERS  
ORGANIZATION - MEBA, AFL-CIO

Complainant

## DECISION AND ORDER

On March 3, 1975, Administrative Law Judge John H. Fenton issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order. 1/

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

The Administrative Law Judge found, among other things, that Section 19(d) of Executive Order 11491, as amended, did not preclude further proceedings on the instant unfair labor practice complaint, notwithstanding the fact that the Complainant previously had filed a grievance under the negotiated grievance procedure addressed, in part, to the same issues as are involved in the instant complaint. In this regard, the complaint alleges that on November 19, 1973, in a meeting with the Chief of the Muskegon Air Traffic Control Tower, Mr. Alexander Kalvaitis (who was the subject of a proposed suspension) was "denied the right of Union representation in violation of Executive Order 11491,---". The record reveals that in the early stages of the meeting the Chief of the Tower attempted to limit the extent of the union representative's participation to that of a "listener." The grievance in this matter was filed on January 22, 1974, and alleged, in part, that the above described conduct was

1/ The Complainant filed untimely exceptions which were not considered.

violative of Article 6, Section 1 of the negotiated agreement 2/ and of the Executive Order. That portion of the grievance was denied as untimely filed. The Respondent contended that Section 19(d) of the Order precluded consideration of the instant unfair labor practice complaint because the filing of the grievance constituted a binding selection of a forum, even though the merits of this aspect of the grievance were not considered because the grievance in this respect had been untimely filed. However, the Administrative Law Judge concluded, and I concur, that as the untimely filed grievance did not in any real sense invoke the grievance procedure, Section 19(d) does not preclude consideration of the matter under the unfair labor practice procedures of the Executive Order. Nevertheless, contrary to the Administrative Law Judge, I find that the Respondent's conduct in this instance did not violate Section 19(a)(1) and (6) of the Order. Thus, as concluded by the Administrative Law Judge, the November 19, 1973, meeting in question did not constitute a "formal discussion" within the meaning of Section 10(e) of the Order at which the Complainant was entitled to be represented. Moreover, I find that, under the circumstances herein, the alleged limitations placed on Mr. Kalvaitis' representative, at the early stages of the meeting in question, were not in derogation of the Complainant's representative status. In this regard, it was noted that the evidence established that Kalvaitis' representative did, in fact, ultimately participate in a substantial manner in the discussion which took place at the meeting. Further, in my view, the record indicates that the Tower Chief's position concerning the role of union representative at the November 19, 1973, meeting reflected essentially his good faith interpretation of the term "accompanied by his Union representative" contained in Article 6, Section 1 of the parties' negotiated agreement, as distinguished from a clear, unilateral breach of the negotiated agreement. 3/ Under these circumstances, I find that the Respondent's conduct concerning the Complainant's representative status at the meeting in question was not violative of Section 19(a)(1) and (6) of the Order.

Furthermore, I find that I am precluded by Section 19(d) of the Order from considering whether the alleged denial of access to information contained on Mr. Kalvaitis' SF-7B employment record card constituted a violation of the Order. In this connection, it is clear that the grievance which had been filed herein raised the issue concerning the denial of access to certain information contained on Mr. Kalvaitis' SF-7B employment card and that the response to the grievance made no specific reference to the Respondent's failure to provide the SF-7B card. 4/ Under these circumstances, and noting that the Complainant did not choose to pursue its grievance appeal rights or seek a specific response from the Respondent

2/ Article 6, Section 1 of the negotiated agreement provides that in a meeting between an employee and supervisors or management officials concerning "discipline or potential discipline" the employee is entitled "to request to be accompanied by his Union representative---".

3/ Cf. General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices, A/SLMR No. 528.

4/ This aspect of the grievance was not denied by the Respondent as untimely.

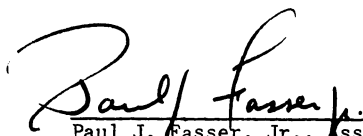
in this regard but, rather, invoked the unfair labor practice procedures, I find that Section 19(d) of the Order precludes the raising of this issue under the unfair labor practice procedures and that dismissal of this aspect of the complaint is warranted on this basis.

Accordingly, I shall order that the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 52-5566(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
July 29, 1975

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

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



.....  
: In the Matter of :  
: :  
: PROFESSIONAL AIR TRAFFIC CONTROLLERS :  
: ORGANIZATION-MEBA, AFL-CIO, :  
: :  
: Complainant :  
: :  
: and : Case No. 52-5566 (CA)  
: :  
: FEDERAL AVIATION ADMINISTRATION :  
: MUSKEGON AIR TRAFFIC CONTROL TOWER :  
: :  
: Respondent :  
: :  
.....

Mr. Robert E. Meyer  
Regional Vice President, PATCO  
3158 Des Plaines Avenue  
Des Plaines, Illinois 60018  
  
For the Complainant

Mr. Gerald P. Guziak  
Labor Relations Specialist, FAA  
2300 East Devon  
Des Plaines, Illinois 60018

Mr. Kenneth A. Burger  
Labor Relations Specialist, FAA  
2300 East Devon  
Des Plaines, Illinois 60018  
  
For the Respondent

Before: JOHN H. FENTON  
Administrative Law Judge

DECISION

Statement of the Case

This proceeding under Executive Order 11491 arose upon the filing of a complaint on July 27, 1974, by the Professional Air Traffic Controllers Organization-MEBA, AFL-CIO, against the Federal Aviation Administration, Muskegon Air Traffic Control Tower, Muskegon, Michigan. Notice of Hearing was issued on November 13, 1974, by the Assistant Regional Director, Chicago Region, Labor-Management Services Administration, alleging that Respondent violated Sections 19(a)(1) and (6) of the Order by refusing agents of PATCO, the exclusive bargaining representative, an appropriate opportunity to represent Mr. Alex Kalvaitis in discussions he had with the Chief of the Tower concerning a proposed 15-day disciplinary suspension. Respondent interposed three defenses: (1) that the Union was, in fact, afforded an opportunity to participate fully in such discussions; (2) that the Order does not in any event require that the Union be given such an opportunity; and (3) that Mr. Kalvaitis' belatedly filed grievance addressed in part to that subject constituted a choice of forum under Section 19(d) which precludes his filing of an unfair labor practice complaint addressed to the same subject matter.

The hearing was held on January 6, 1975, in Muskegon, Michigan. All parties were represented and were afforded full opportunity to be heard, to present evidence and to examine and cross-examine witnesses.

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

Findings

Mr. Kalvaitis is an air traffic control specialist at Muskegon County Airport in a unit represented by, and covered by a collective bargaining agreement with, PATCO. There is one echelon of supervision between him and Mr. Harald G. Bach, Chief of the Air Traffic Control Tower.

On October 2, 1973, Mr. Kalvaitis observed what he considered, or suspected to be an error, on the part of his supervisor, in permitting too little time between an arriving aircraft and a departing aircraft. The merits of this controversy are unimportant for our purposes; suffice it to say that Mr. Bach regarded Mr. Kalvaitis' report of the incident on October 3 as belated and violative of FAA regulations requiring that such incidents be immediately reported, and he sent Mr. Kalvaitis a letter under date of November 8, 1973, proposing a 15-day suspension for this and other reasons.

Mr. Kalvaitis requested and was granted a meeting with Mr. Bach on November 19, 1973, in order to discuss the proposed suspension. Because Mr. Kalvaitis was the Union President at the Tower, it was arranged that his alternate, Mr. Michael Mangino, would represent him at the meeting. Early in the discussion, which commenced with Mr. Kalvaitis and Mr. Bach doing the talking, Mr. Mangino attempted to take part. Mr. Bach told him "Mike, you are on the outside of this, you are listening." Mangino stated he was the Union representative, and was again told he was only a listener. Again he said he was the Union representative and once again Mr. Bach reiterated that he was a listener. Mangino said, "Okay", and remained quiet for several minutes. He then asked permission to speak, noting that he was an observer, and asked a series of questions. At a later point in the discussion, Mr. Bach had occasion to say: "I'm debating the pros and cons of discussing this with you, Mike, rather than with Kal. We're covering ground that's already been covered." In fact, Mr. Mangino took a very substantial part in the discussion, notwithstanding his belief that he had been relegated to the position of any observer, consigned to a passive role. While he might well have been intimidated early in the conversation, and thus have failed to raise, or inquire into, matters he otherwise would have explored, he testified that, when the discussion ended, he had nothing further to say.

Article 6 of the collective bargaining agreement (Joint Exhibit 2) recognizes an employee's right "to be accompanied by his Union representative" in discussions with supervisors concerning "discipline or potential discipline." Mr. Bach asserted that he was aware of this right, and stopped Mr. Mangino only because he at first interrupted at an

inappropriate time. Thus Mr. Bach viewed himself not as foreclosing or limiting Mr. Mangino's participation in the discussion, but only as exercising his prerogative as chairman of the meeting to ensure an orderly airing of the controversy. Nevertheless, Mr. Mangino, as the Union official designated by Mr. Kalvaitis as his representative, was the spokesman for Mr. Kalvaitis, entitled to direct their discussion with management. I find that Mr. Bach's words, whatever their purpose, had the effect of at least temporarily placing Union representative Mangino in the position of a silent observer, depriving him of his right to actively participate in the entire discussion as Mr. Kalvaitis' chosen representative. 1/

On November 30, 1973, another meeting occurred between Mr. Bach and Mr. Kalvaitis, the latter being represented on this occasion by Mr. Robert E. Meyer, Vice-President, Great Lakes Region, PATCO. The complaint with respect to this incident is addressed to the fact that Mr. Bach refused Mr. Meyer's request that he turn over the SF-7B card which recorded Mr. Kalvaitis' employment history. Mr. Bach defended his refusal to provide such information on the ground that the reasons for the proposed discipline were set forth in his letter November 8, that the card contained privileged information for the use of supervision and administrative staff only 2/, that Civil Service Regulations did not require that such information be divulged, and that Article 7, Section 9 of the contract required Union access to such official records only when a grievance was on file.

1/ It was as if Mr. Bach took literally the Article's language, according Mr. Kalvaitis the right to "be accompanied by" a Union representative. Respondent's brief likewise seems to suggest a distinction between the right to Union representa-  
tion grounded in Section 10(e) and the right to have a Union representative present conferred by the contract. I read Article 6 as granting an employee the right to be represented by the Union, not merely accompanied by a Union agent.

2/ An FAA, Great Lakes Region regulation issued March 29, 1973, concerning SF-7B, states at paragraph 5b that the form shall be filed in a manner which "will safeguard the confidential nature of the information recorded thereon . . . (and that) (a)ccess to these forms should be limited to supervisors and to administrative staff on a need-to-know basis." (Joint Exhibit No. 3)

These meetings resulted in a December 26, 1973, letter from Mr. Bach to Mr. Kalvaitis abandoning several of his grounds for discipline and reducing the proposed 15-day suspension to 5 days, to commence on January 9, 1974. Under the negotiated grievance procedure, Mr. Kalvaitis had 15 days in which to file a grievance from the day of the grievable event. On January 22, 1974, Mr. Kalvaitis filed a grievance which was addressed to the merits of the controversy as well as the claimed deprivation of representation and the denial of requested information. So much of the grievance as concerned the merits was accepted as timely and was rejected. That part relating to representation rights was rejected as untimely, inasmuch as the claimed denial of representation had occurred on November 19, more than 15 days before the grievance was filed. No explicit mention was made of the refusal to produce the SF-7B card upon request.

Conclusions

A threshold issue is presented by Respondent's motion to dismiss on the ground that the Complainant, having filed a grievance, albeit belatedly, has opted to be bound by the consequences of that route and is precluded under Section 19(d) from taking a second bite at the apple via the Order's complaint procedure. Implicit in its argument is the contention that, for Section 19(d) purposes, it matters not whether a grievance has been disposed of on the merits or is dismissed for want of timeliness or on some other procedural basis. The countervailing argument is, of course, that a grievance which is filed late does not invoke the grievance procedure, does not lead to a resolution of the controversy through the grievance machinery and hence does not constitute a first bite at the apple. Thus, Complainant asserts, an untimely step in that direction is not to be considered an irrevocable option under Section 19(d).

I know of no case under the Order which throws light on this issue. It is clear from the study preceding the amendment of the Order only that the election of the forum for redress was meant to be binding, not the reasons for it. Presumably the purpose of such a restriction is that which obtains in other areas of the law: to avoid conflicting

resolutions in different forums of the same controversy, as well as the waste of resources which attends such duplication. Neither of these purposes is subverted by a late-filed grievance. Thus no consideration by two forums could occur, and no cognizable waste of resources occurred. Here, filing of the grievance, as respects the issue of representation, did not trigger a disposition on the merits. In such circumstances I am not persuaded by the argument that the grievance machinery was in any real sense invoked. Were a party to withdraw a grievance before anyone acted upon it, and elect to take the unfair labor practice route, it would likewise not seem reasonable to deprive him of that option where no prejudice can be shown by the other party or burden upon the other forum. Thus, I conclude that Section 19(d) does not preclude action upon this complaint merely because there occurred an unsuccessful attempt to file a grievance addressed to the same subject matter. It is also to be noted that, even if the grievance had been timely filed and therefore actionable, it would not preclude processing of that part of this complaint which as I read it, is addressed to the Union's right to be represented at the meeting as opposed to the grievant's right to be represented by the Union.

The question whether Mr. Kalvaitis was entitled to representation at the November 19 meeting would, apart from contract considerations, be squarely covered by Federal Aviation Administration, National Aviation Facilities, Experimental Center, A/SLMR No. 438. There, (in Case No. 32-3297(CA)) no violations of Sections 19(a)(1) and (6) were found where the recipient of an official letter of reprimand was denied Union representation at a meeting concerning the reprimand with her fourth level supervisor. In concluding that the meeting was not a formal discussion within the meaning of Section 10(e), the Assistant Secretary noted that the subject matter of the meeting related only to the application of the Respondent's regulations to the individual employee, and that no grievance had been filed. On the facts presented here, the same finding would follow, *a fortiori*, but for the existence of Article 6 of the collective bargaining agreement. Having found that Tower Chief Bach inappropriately limited Union representative Mangino's role in the November 19 meeting by not permitting him to participate fully in the

discussion with management, it follows that the activity violated Article 6. Article 6 established the right to Union representation at meetings concerning proposed discipline as a term and condition of employment at the Muskegon Tower. Thus management's failure fully to recognize Mr. Mangino's status as Mr. Kalvaitis' representative constituted an unilateral change in an employment condition at the Tower, violative of Sections 19(a)(1) and (6). Furthermore, such conduct by its very nature has a restraining influence upon unit employees and a coercive effect upon their rights assured by the Order, in violation of Section 19(a)(1). <sup>3/</sup> I do not find, however, that the Union had any right to be represented at such discussions, as the contract created only a right running to the individual to designate a Union representative, and no such right flows from the Order because the discussions were not formal within the meaning of Section 10(e).

With respect to the question of Respondent's obligation to produce the SF-7B card requested by Union representative Meyer, Respondent points to no Civil Service Regulation prohibiting the production of such information. It introduced Subchapter 1 of Chapter 752 of the Federal Personnel Manual (Respondent's Exhibit No. 1) to establish that an Agency's obligation to assemble and to furnish an employee with all the material relied on to support a proposed adverse action does not apply to suspensions of 30 days or less. It also points to the failure of collective bargaining agreement to require such production before a grievance has been filed. Thus, it advances in justification of its refusal to produce only the absence of any requirement that such materials be produced and the limitation on distribution of the SF-7B which is set forth in the Agency's Great Lakes Region Order on the basis of "confidentiality".

The Assistant Secretary has referred to the Federal Labor Relations Council the question whether applicable laws and regulations, including policies set forth in the Federal Personnel Manual, constitute a defense to the refusal to produce relevant and necessary documents in a grievance

<sup>3/</sup> Long Beach Naval Shipyard, A/SLMR No. 154; U.S. Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42. Cf. NLRB v. J. Weingarten, Inc., 43 U.S. Law Week 4275.

proceeding. 4/ In doing so, he stated that, apart from such defense he would adopt the Administrative Law Judge's conclusion that a labor organization cannot properly discharge its responsibilities under Section 10(e) where it cannot obtain information which is relevant and necessary in connection with the processing of a grievance. There the Union sought documents which reflected an evaluation panel's assessment of the grievant and competing candidates for a promotion. Here the Union sought the employment record of Mr. Kalvaitis in order to more intelligently and effectively assist him in his discussions concerning proposed discipline. It is obvious that Mr. Kalvaitis' employment history, as recorded by his superiors, is relevant to the issue of the necessity for, as well as the severity of, any proposed discipline. The bargaining representative's capacity to represent him effectively depended largely upon the information with which it was armed. Without such information the Union was handicapped in deciding whether it should invoke the grievance procedure, counsel Mr. Kalvaitis to do so, or, for that matter, counsel him to accept some measure of discipline as reasonable and appropriate in the circumstances. To withhold such information is to require the bargaining representative to shoot in the dark, calling its shots on the basis of the complaining employee's version of events, hearsay, and the undocumented assertions of management's spokesman. Furthermore, in my view, a Union has the right, as a concomitant of its responsibility as bargaining representative of all unit employees, to such information as is relevant and necessary to the discharge of its obligation to sift out unmeritorious complaints and thus to harness its limited resources and energies to complaints on a scale corresponding to its perception of their relative worth and significance to its entire constituency. It is therefore my conclusion that the rationale for requiring disclosure of such information in connection with the processing of a grievance applies with equal force to the pre-grievance stages of a complaint, absent a persuasive showing of a need to preserve confidentiality, if only to a later, more formal step in the effort to resolve the controversy. Respondent has advanced no reasons for confidentiality. It has rested on the existence of an internal regional order which labels such material as confidential and limits its distribution to

4/ Department of Defense, State of New Jersey, A/SLMR No. 323.

supervisors and administrative staff prior to the filing of a grievance. That may be a sound practice in ordinary circumstances. It hardly constitutes good reason to withhold such matter from an individual, or the representative of an individual who is faced with a three week suspension without pay. 5/

I therefore conclude that Respondent's refusal to furnish the Union with the requested SF-7B on November 30, 1973, constituted a refusal to consult, confer or negotiate in violation of Section 19(a)(6) of the Order. I furthermore conclude that Respondent thereby interfered with, restrained and coerced unit employees in their right to have the exclusive representative act for and represent their interests in respect to proposed or potential discipline, in violation of Section 19(a)(1).

Recommendation

Having found that Respondent has engaged in conduct prohibited by Section 19(a)(1) and (6) of Executive Order

5/ Department of Health, Education and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411.

11491, as amended, I recommend that the Assistant Secretary adopt the following Order designed to effectuate the purposes of the Order. 6/

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Aviation Administration, Muskegon Air Traffic Control Tower shall:

- 1. Cease and desist from:
  - a. Refusing to consult, confer, or negotiate with Professional Air Traffic Controllers Organization-MEBA, AFL-CIO, the exclusive bargaining representative, by:

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6/ An explanation is required for my failure to accept the Union's request that the recommended remedy include a restoration of the status quo ante. Had imposition of the five day suspension been the final disposition here, it would be necessary to return the matter to its posture on November 19, 1973, and require Respondent to meet again with Mr. Kalvaitis and his designated representative, and to make available upon request the SF-7B card. Here, however, Mr. Kalvaitis received a "trial de novo" when he filed his grievance. The requested information was supplied to him and the Union was permitted to represent him, as Article 7 of the collective bargaining agreement required. Furthermore, the grievance procedure provided for complete reenactment of what had gone on before, namely an opportunity for oral presentation to the Facility Chief, to be followed, if necessary, by more formal steps culminating in arbitration. Thus, no remedy I can devise could add to the panoply of rights which were assured to Mr. Kalvaitis under Article 9. I therefore conclude that it would serve no useful purpose to add to the remedy outlined below a requirement that Respondent return to the stage as set in November 1973, discuss the proposed suspension with Mr. Kalvaitis and his representative, and make available the document upon request.

- 1. disregarding the collective bargaining agreement's provision granting employees faced with proposed or potential discipline the right, in discussions with management concerning such discipline, to be represented by that Union.
- 2. refusing to provide, upon request any documentary materials utilized in management's decision proposing disciplinary action against Alexander Kalvaitis, or any other bargaining unit employee, which are necessary for such labor organization to discharge its obligation as exclusive bargaining representative of all employees in the unit.
- b. Interfering with, restraining or coercing employees by disregarding the terms of the collective bargaining agreement which accord employees faced with proposed or potential discipline the right to be represented by PATCO in discussions with management concerning that subject, or by denying that Union's request for personnel records related to such discipline.
- 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 of the Executive Order:
  - a. Upon request, recognize Professional Air Traffic Controllers Organization-MEBA, AFL-CIO, as the representative of Alexander Kalvaitis, or any other employee in the bargaining unit, who is faced with proposed or potential discipline.



N O T I C E   T O   A L L   E M P L O Y E E S

P U R S U A N T   T O

A   D E C I S I O N   A N D   O R D E R   O F   T H E

A S S I S T A N T   S E C R E T A R Y   O F   L A B O R   F O R   L A B O R - M A N A G E M E N T   R E L A T I O N S

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L A B O R - M A N A G E M E N T   R E L A T I O N S   I N   T H E   F E D E R A L   S E R V I C E

We hereby notify our employees that:

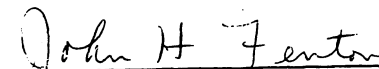
WE WILL NOT refuse to consult, confer, or negotiate with Professional Air Traffic Controllers Organization-MEBA, AFL-CIO, the exclusive bargaining representative by:

1. disregarding the collective bargaining agreement's provision granting employees faced with proposed or potential discipline the right, in discussions with management concerning such discipline, to be represented by that Union.
2. refusing to provide, upon request any documentary materials utilized in management's decision proposing disciplinary action against Alexander Kalvaitis, or any other bargaining unit employee, which are necessary for such labor organization to discharge its obligation as exclusive bargaining representative of all employees in the unit.

WE WILL NOT interfere with, restrain or coerce employees by disregarding the terms of the collective bargaining agreement which accord employees faced with proposed or potential discipline the right to be represented by Professional Air Traffic Controllers Organization-MEBA, AFL-CIO in discussions with management concerning that subject, or by denying that Union's request for personnel records related to such discipline.

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

- b. Upon request, permit Professional Air Traffic Controllers Organization-MEBA, AFL-CIO, access to the official personnel documents concerning Alexander Kalvaitis or any other employee in the bargaining unit who is faced with proposed or potential discipline.
- c. Post at its Muskegon, Michigan facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Chief, Air Traffic Control Tower, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Tower Chief shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.
- d. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing, within 20 days from the date of this Order as to what steps have been taken to comply therewith.

  
\_\_\_\_\_  
JOHN H. FENTON  
Administrative Law Judge

Dated: MAR 3 1975  
Washington, D.C.

July 29, 1975

UNITED 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

WE WILL, upon request, recognize Professional Air Traffic  
Controllers Organization-MEBA, AFL-CIO, as the representative  
of Alexander Kalvaitis, or any other employee in the bargain-  
ing unit, who is faced with proposed or potential discipline.

WE WILL permit Professional Air Traffic Controllers  
Organization-MEBA, AFL-CIO access to the official personnel  
documents concerning Alexander Kalvaitis or any other employee.  
in the bargaining unit who is faced with proposed or potential  
discipline.

DENVER AIRWAY FACILITIES HUB SECTOR  
FAA, ROCKY MOUNTAIN REGION, DOT  
AURORA, COLORADO  
A/SLMR No. 535

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature and Title)

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

If employees have any questions concerning this Notice or  
compliance with its provisions, they may communicate  
directly with the Assistant Regional Director for Labor-  
Management Services, United States Department of Labor,  
whose address is Room 848, Federal Office Building, 219 S.  
Dearborn Street, Chicago, Illinois, 60604.

This consolidated proceeding involved an RA petition filed by the  
Denver Airway Facilities Hub Sector, FAA, Rocky Mountain Sector, DOT,  
Aurora, Colorado (Activity) seeking an election in an existing unit of  
nonprofessional General Schedule and Wage Grade employees currently  
represented on an exclusive basis by the American Federation of Government  
Employees, Local 2665, AFL-CIO (AFGE). The Activity contended, in this  
regard, that it had a good faith doubt that the AFGE currently represented  
a majority of these employees. The AFGE asserted that the RA petition  
should be dismissed because it was filed untimely during the insulated  
90 day period provided for in Section 202.3(d) of the Assistant Secretary's  
Regulations following the dismissal of a decertification (DR) petition  
seeking an election in the same unit. Additionally, an unfair labor  
practice complaint was filed by the AFGE alleging essentially that the  
Activity violated Section 19(a)(1) and (6) of the Order by refusing to  
renegotiate, upon request, the expiring agreement between the AFGE and  
the Activity. The Activity contended that it was estopped from  
negotiating with the AFGE based on the pendency of its RA petition.

The Administrative Law Judge concluded that the RA petition was filed  
timely by the Activity as, in his view, the 90 day period provided for in  
Section 202.3(d) of the Regulations to consummate an agreement after dis-  
missal or withdrawal of a petition challenging the representation status  
of an incumbent exclusive representative does not apply to an RA petition  
which raises a good faith doubt as to majority status, and he further implied  
that an RA petition raising doubts as to continued majority status may be  
filed at any time beyond the certification year. Accordingly, and as he  
found the RA petition was filed in good faith, the Administrative Law Judge  
recommended that the unfair labor practice complaint be dismissed in its  
entirety and an election be held in the appropriate unit pursuant to the  
RA petition.

The Assistant Secretary disagreed with the rationale and conclusions  
of the Administrative Law Judge. Noting the distinctions between an RA  
petition filed in good faith based on changes in the character and scope  
of a unit and an RA petition which is based on a good faith doubt as to  
the continued majority status of an incumbent exclusive representative in  
an existing unit, he concluded that petitions of the latter type, such as  
the instant RA petition, are subject to the timeliness requirements of  
Section 202.3 of the Regulations, including Section 202.3(d) of the  
Regulations. He concluded, therefore, that the instant RA petition was  
filed untimely by the Activity, as it was filed within the insulated 90  
day period provided by Section 202.3(d) of the Regulations. Accordingly,  
he ordered that the RA petition be dismissed.

Although he had found that the RA petition was untimely filed, and that, in effect, there was no bar to the parties negotiating for a new agreement during the prescribed 90 day period after the dismissal of the DR petition, the Assistant Secretary noted that both the Assistant Secretary and the Federal Labor Relations Council (FLRC) have indicated that when an RA petition is filed in good faith, the petitioning agency should be permitted to remain neutral during the pendency of such petition and be given a reasonable opportunity to comply with the consequences which flow from the representation decision before incurring the risk of an unfair labor practice finding. Noting that the evidence was insufficient to establish that the Activity's RA petition in this matter was, in fact, not filed in good faith, the Assistant Secretary found that, during its pendency, the Activity was not obligated to meet and confer with the AFGE with respect to a new agreement, and he, therefore, concluded that the unfair labor practice complaint should be dismissed. The Assistant Secretary noted, however, that the consequence of his determination with respect to the timeliness of the RA petition is that the parties should now be afforded from the date of the decision the 90 day period provided for in Section 202.3(d) of the Regulations, free from any petition challenging the representation status of the AFGE, in which to negotiate in good faith for the purpose of consummating a new negotiated agreement.

A/SLMR No. 535

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DENVER AIRWAY FACILITIES HUB SECTOR  
FAA, ROCKY MOUNTAIN REGION, DOT  
AURORA, COLORADO

Activity-Petitioner 1/

and

Case No. 61-2350(RA)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2665, AFL-CIO

Labor Organization

DENVER AIRWAY FACILITIES HUB SECTOR  
FAA, ROCKY MOUNTAIN REGION, DOT  
AURORA, COLORADO

Respondent

and

Case No. 61-2367(CA)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2665, AFL-CIO

Complainant

DECISION AND ORDER

On April 24, 1975, Administrative Law Judge William Naimark issued his Report and Recommendation in the above-entitled consolidated proceeding, finding that the Activity had not engaged in the unfair labor practices alleged in the complaint in Case No. 61-2367(CA) and recommending that the complaint in that case be dismissed in its entirety. In Case No. 61-2350(RA) the Administrative Law Judge found that the Activity had a good faith doubt as to the continued majority status of the AFGE, the exclusively recognized representative, and he recommended that the Assistant Secretary direct an election in the exclusively recognized appropriate unit. Thereafter, the AFGE filed exceptions and a supporting

1/ The Denver Airway Facilities Hub Sector, FAA, Rocky Mountain Region, DOT, Aurora, Colorado, which is the Activity-Petitioner in Case No. 61-2350(RA) and the Respondent in Case No. 61-2367(CA), and the American Federation of Government Employees, Local 2665, AFL-CIO, which is the Labor Organization in Case No. 61-2350(RA) and the Complainant in Case No. 61-2367(CA) are hereinafter referred to as the Activity and the AFGE, respectively.

brief with respect to the Administrative Law Judge's Report and Recommendation.

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

In Case No. 61-2350(RA), the Activity filed an RA petition seeking an election in the existing unit of nonprofessional General Schedule and Wage Grade employees which currently is represented on an exclusive basis by the AFGE. The Activity contends that its RA petition is appropriate and an election should be conducted because it has a good faith doubt that the AFGE currently represents a majority of the employees in the exclusively recognized unit. The AFGE asserts, on the other hand, that the instant RA petition should be dismissed because it was filed untimely during the insulated 90 day period provided for in Section 202.3(d) of the Assistant Secretary's Regulations following the dismissal of a decertification (DR) petition seeking an election in the same unit.

The unfair labor practice complaint in Case No. 61-2367(CA) alleged essentially that the Activity violated Section 19(a)(1) and (6) of the Order by refusing to renegotiate, upon request, the expiring agreement between the AFGE and the Activity. In this connection, the Activity contended that it was estopped from negotiating with the AFGE based on the pendency of the RA petition which it had filed in Case No. 61-2350(RA).

The essential facts are not in dispute and I shall repeat them only to the extent deemed necessary.

On January 28, 1974, the AFGE requested negotiations with the Activity with respect to the parties' negotiated agreement which was due to expire on March 31, 1974. The following day the Activity agreed to negotiations, indicating, however, that it wanted to renegotiate, rather than amend, the parties' existing agreement, and in this connection it sought proposals from the AFGE. On January 30, 1974, Ronald Owens, an employee of the Activity, filed a DR petition seeking to decertify the AFGE as the exclusive bargaining representative. Having been notified of the filing of the DR petition, the Activity indicated on February 2, 1974, that it could not pursue negotiations until the issues raised by the filing of the DR petition had been resolved. Nevertheless, on March 4, 1974, the Activity received from the AFGE the latter's proposed changes in the parties' negotiated agreement. Thereafter, on May 14, 1974, the Assistant Secretary denied Owens' request for review seeking reversal of the Assistant Regional Director's decision to dismiss his DR petition on the ground that it had been filed untimely. On or about the time the denial of the request for review was received by the parties, the chief negotiator for the AFGE left the Denver area for four weeks of training. On June 17, 1974, the chief negotiator returned to his duty station and made arrangements to begin discussions on June 21, 1974, with the Activity

concerning the AFGE's agreement proposals. On June 19, 1974, an employee of the Activity submitted to the latter a petition signed by 34 of the 53 employees then in the exclusively recognized unit which asserted that the current exclusive representative no longer represented a majority of the employees. As a result of receiving this petition signed by its employees, the Activity filed an RA petition, claiming that it had a good faith doubt as to the continued majority status of the AFGE as the exclusive representative of its employees. Based on its asserted good faith doubt, as reflected by the filing of the RA petition, the Activity again refused to negotiate with the AFGE until the question concerning representation raised by its RA petition had been resolved. Subsequently, the AFGE filed the complaint herein based on the Activity's refusal to proceed with negotiations.

The Administrative Law Judge concluded that, under the foregoing circumstances, the subject RA petition was filed timely because, in his view, the 90 day period provided for in Section 202.3(d) of the Assistant Secretary's Regulations to consummate an agreement after dismissal or withdrawal of a petition challenging the representation status of the incumbent exclusive representative 2/ (the DR petition in the instant case) does not apply to an RA petition raising a good faith doubt as to majority status. Moreover, he implied that an RA petition raising doubts as to continued majority status may be filed at any time beyond the certification year. 3/

I disagree with the foregoing rationale of the Administrative Law Judge. Section 202.3(c) of the Assistant Secretary's Regulations provides for an "open period" prior to the termination of an existing negotiated agreement for the filing of petitions for exclusive recognition "or other

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2/ Section 202.3(d) of the Assistant Secretary's Regulations provides, "When there is an agreement signed and dated by the activity and the incumbent exclusive representative having a term not exceeding three (3) years from the date it was signed, and a petition has been filed challenging the representation status of the incumbent exclusive representative and the petition is subsequently withdrawn or dismissed less than sixty (60) days prior to the terminal date of that agreement, or any time thereafter, the activity and incumbent exclusive representative shall be afforded a ninety (90) day period from the date the withdrawal is approved or the petition is dismissed free from rival claim within which to consummate an agreement: Provided, however, That the provisions of this paragraph shall not be applicable when any other petition is pending which has been filed pursuant to paragraph (c) of this section."

3/ In discussing timeliness requirements as applied to RA petitions which question majority status, the Administrative Law Judge, on page 7 of his Report and Recommendation, inadvertently cited the holding in Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, A/SLMR No. 194, as being A/SLMR No. 119. This inadvertent error is hereby corrected.

election petition[s]." 4/ However, when such petitions have been resolved by withdrawal or dismissal less than 60 days prior to the terminal date of a negotiated agreement "or any time thereafter," as noted above, Section 202.3(d) of the Regulations provides the parties with an insulated 90 day period in which to consummate an agreement. Such a period is provided based on the rationale that during the pendency of a petition for an election (the DR in this case) the incumbent exclusive representative had not been afforded the prescribed insulated period set forth in Section 202.3(c) of the Regulations in which to consummate an agreement.

In prior decisions and in the recently issued Regulations, the Assistant Secretary has established a distinction between RA petitions which are based on a good faith doubt as to the continued majority status of an incumbent exclusive representative in the existing unit and RA petitions which question whether an exclusively recognized unit remains appropriate because of a substantial change in its character and scope. 5/ In this connection, an RA petition filed in good faith based on changes in the character and scope of a unit is considered to raise the "unusual circumstances" contemplated by Section 202.3(c)(3) of the Assistant Secretary's Regulations and, thus, is not subject to the other timeliness requirements set forth in Section 202.3 of the Regulations. However, an RA petition which is based on a good faith doubt as to the continued majority status of an incumbent exclusive representative in the existing unit, such as the instant RA petition, clearly is subject to the timeliness requirements of Section 202.3 of the Regulations as is any DR or RO petition which challenges the representation status of an incumbent

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4/ Section 202.3(c) of the Assistant Secretary's Regulations provides, "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows:

(1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed and dated by the activity and the incumbent exclusive representative; or

(2) Not more than ninety (90) days and not less than sixty (60) days prior to the expiration of the initial three (3) year period of an agreement having a term of more than three (3) years from the date it was signed and dated by the activity and the incumbent exclusive representative; or

(3) Any time when unusual circumstances exist which substantially affect the unit or the majority representation.

5/ See Headquarters, U.S. Army Training and Doctrine Command (TRADOC), Ft. Monroe, Virginia, A/SLMR No. 507; U.S. Department of Transportation, Federal Aviation Agency, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 482; Idaho Panhandle National Forests, U.S. Department of Agriculture, A/SLMR No. 394; and Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160. See also Section 202.1(c) of the Regulations, as amended on May 7, 1975.

exclusive representative. Thus, it follows that an RA petition based on a good faith doubt of majority status is subject to the requirements of Section 202.3(d) of the Regulations. Under these circumstances, I find that when the DR petition ultimately was dismissed on May 14, 1974, the AFGE was entitled to a 90 day period in which to negotiate a new agreement without the threat of a petition being filed challenging its majority status in the existing unit. Accordingly, I find that the instant RA petition filed by the Activity within the prescribed 90 day period was untimely. Therefore, I shall order that the petition filed in Case No. 61-2350(RA) be dismissed.


Although I have found that the instant RA petition was untimely filed, and that, in effect, there was no bar to the parties negotiating for a new agreement during the prescribed 90 day period after the dismissal of the DR petition, both the Assistant Secretary and the Federal Labor Relations Council (FLRC) have indicated that when an RA petition is filed in good faith, the petitioning agency should be permitted to remain neutral during the pendency of such petition and be given a reasonable opportunity to comply with the consequences which flow from any representation decision by the Assistant Secretary before incurring the risk of an unfair labor practice finding. 6/ Under these circumstances, and noting that the evidence was insufficient to establish that the Activity's RA petition in this matter was, in fact, not filed in good faith, I find, that during its pendency, the Activity was not obligated to meet and confer with the AFGE with respect to a new agreement. Accordingly, I conclude that the unfair labor practice complaint in Case No. 61-2367(CA) must be dismissed. It should be noted, however, that the consequence of my determination above with respect to the timeliness of the RA petition is that the parties should now be afforded from the date of this decision the 90 day period provided for in Section 202.3(d) of the Regulations, free from any new petition challenging the representation status of the AFGE, in which to negotiate in good faith for the purpose of consummating a new negotiated agreement.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 61-2350(RA) be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the complaint in Case No. 61-2367(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
July 29, 1975

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

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6/ See Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401 and Headquarters, United States Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 168, FLRC No. 72A-30.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



REPORT AND RECOMMENDATION

Statement of the Case

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 Denver Airway Facilities Hub Sector :  
 FAA, Rocky Mountain Region, DOT :  
 Aurora, Colorado :  
 Activity and Petitioner :  
 and :  
 American Federation of Government :  
 Employees, Local 2665, AFL-CIO :  
 Labor Organization :  
 and :  
 Denver Airway Facilities Hub Sector :  
 FAA, Rocky Mountain Region, DOT :  
 Aurora, Colorado :  
 Respondent :  
 and :  
 American Federation of Government :  
 Employees, Local 2665, AFL-CIO :  
 Complainant :  
 .....

CASE NOS.  
61-2350 (RA)  
61-2367 (CA)

Pursuant to a Notice of Consolidated Hearing on Representative's Status Petition and Complaint issued on October 22, 1974, by the Assistant Regional Director for Labor-Management Services Administration of the United States Department of Labor, Kansas City Region, a hearing in the above-captioned cases 1/ was held before the undersigned on January 14, 1975 at Denver, Colorado.

The proceedings herein were initiated under Executive Order 11491, as amended (herein called the Order) by the filing of a representative's status (RA) petition on June 21, 1974 by Denver Airway Facilities, Hub Sector, FAA, Rocky Mountain Region, DOT, Aurora, Colorado (herein called, at times the Activity or Respondent). A representation election is sought by the Activity which alleged it had a good faith doubt that the currently recognized exclusive bargaining representative represented a majority of the employees in an appropriate unit. Thereafter the Activity filed first, second, and third amended petitions on July 19, 25, and August 5, 1974 respectively.

A complaint was filed on July 19, 1974 by the "currently recognized" exclusive bargaining representative, American Federation of Government Employees, Local 2665, AFL-CIO (herein called, at times, the Union or the Complainant) against the Respondent Activity. The complaint alleged a violation of 19(a)(1) and (6) of the Order based on a refusal to negotiate with the Union. Complainant asserts it is the bargaining representative and that Respondent had no good faith doubt as to its majority status. The Respondent denies the alleged violation, asserting it had a good faith doubt that the Union was still the majority representative of its employees. 2/

1/ Both cases were consolidated for hearing by order dated October 22, 1974.

2/ The appropriateness of the unit is not in issue.

E. L. EMBREY  
Chief Union-Management Relation  
Office of Labor Relations, FAA  
Washington, D. C. 20591  
For the Respondent Activity-Petitioner

KENNETH BULL  
National Representative  
American Federation of Government  
Employees, Local 2665  
5001 S. Washington  
Englewood, Colorado 80110  
For Complainant-Union

BEFORE: WILLIAM NAIMARK  
Administrative Law Judge

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, the parties filed briefs which have been duly considered.

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

Findings of Fact

1. On October 21, 1969 the Union herein was granted voluntary recognition as the exclusive bargaining representative of the Activity's non-supervisory electronic technicians and wage grade employees assigned to the Airways Facilities Sector, Denver, Colorado. 3/

2. The Activity has continued to recognize the Union herein and both were parties to a contract, effective by its terms from March 31, 1972 until March 31, 1974, covering the employees in the aforementioned unit.

3. On January 28, 1974 4/ the Union filed a written statement with Respondent Activity which recited that it desired to renegotiate its contract with the Activity before renewal thereof.

4. By letter dated January 29, Respondent Activity replied that it was agreeable to renegotiations, and it requested that the Union submit proposals in sufficient time to permit the Activity to study them and submit counter proposals.

5. Ronald L. Owens, an employee of the Activity herein, filed a decertification petition on January 30 with the Department of Labor. This resulted in Respondent's writing a

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3/ In 1971, due to a reorganization, employees at other locations in Colorado, as Cheyenne, Laramie, and Akron, were added to the unit by agreement of the parties.

4/ Unless otherwise indicated, all dates hereinafter mentioned are in 1974.

letter to the Union dated February 1, stating that the pending representation matter precluded it from taking any further action toward negotiation until the matter was resolved.

6. A letter 5/ dated February 21 was sent from Dale Johnson, vice president of the local union herein, to James Bruce, assistant Sector manager of the Activity, reaffirming the desire to renegotiate the contract. Johnson stated the union would submit ground rules and its proposed agreement on March 3, and he suggested the parties meet on March 15.

7. Bruce replied to Johnson by letter 6/ dated February 22 reiterating that the Activity could not commence negotiations while the representative petition (DR) filed by Owens was pending before the Assistant Secretary.

8. The parties agreed in March to extend the current contract for 90 days, or until a decision was made on the DR petition, but the Activity adhered to its refusal to negotiate during the pendency of the decertification proceeding.

9. Thereafter the Assistant Regional Director, Labor-Management Services, DOL, Kansas City, Missouri dismissed the decertification petition on the ground that its was untimely filed under Section 202.3 of the Regulations.

10. On May 14, the Assistant Secretary for Labor-Management Relations, DOL, denied a request for review of the aforesaid dismissal of the decertification petition. He agreed with the determination made by the Assistant Regional Director that the petition was untimely filed. 7/

11. On June 19, Arlon J. Bold, an employee of the Activity, presented to James Bruce a statement 8/ signed by 34 of the 53 employees in the unit. The signers asserted that

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5/ Joint Exhibit 5

6/ Joint Exhibit 6

7/ A/S Exhibit 1H

8/ Joint Exhibit 14C

the currently recognized or certified exclusive representative no longer represented a majority of the employees in the unit.

12. Of the 35 employees who signed the statement presented to the Activity on June 19, fifteen signed it that same month (June), seventeen signed 4 1/2 months earlier at the end of January, and three signatures were undated.

13. Employees Enoch Wright, Elton Johnson, and Louis Phillipi testified it was their impression that they signed the aforesaid statement to get an election to determine if the union would continue to represent them. Employee Kent Bayne testified he was told by Bold they would see if an election could be held to determine who represented the workers.

14. Two days later, on June 21 Bruce filed, on behalf of the Activity, the representative status (RA) petition herein. Management refused to renegotiate the contract based on the pending RA petition despite repeated requests by the Union to do so. It continued to assert that a good faith doubt existed as to the Union's majority status.

15. Between May 17 and about June 19 Johnson was on detail at the Activity's training school in Oklahoma City. During this period Johnson wrote Bruce saying the union wanted to add additional items to the contract, but no specific demand was made to enter into negotiations.

16. Bruce testified that the Activity did not express any good faith doubt of the union's majority status prior to June 19, and it considered the Union as the bargaining representative. Further, that he had mental reservations regarding the Union's majority status since he learned after the DR was filed that 15-16 employees, out of a unit of approximately 54 employees, were on dues withholding.

17. In order to preserve neutrality, and to show good faith, Respondent has continued to extend the contract on a month-to-month basis until the resolution of these proceedings.

#### Conclusions

Complainant contends that the Activity had no good faith doubt that the union represented a majority of the employees. Thus, it asserts a refusal to negotiate with the union

constituted a violation by Respondent of 19(a)(1) and (6) of the Order.

In support of its contention Complainant advances several arguments. It asserts, firstly, that under Section 202.3(d) of the Regulations the Activity and the incumbent union (Complainant herein) were entitled to 90 days from the dismissal of the DR petition in which to negotiate a new agreement. The union maintains it was not given this opportunity. The filing of the RA petition by the Activity was, it is urged, in further derogation of the Activity's duty to bargain with the Union herein. Moreover, the Complainant maintains that the list of names submitted to management contained many of the employees who signed the decertification petition, and therefore it should not be relied upon by the Activity to establish good faith. It insists the DR proceeding is dead; that it should not be resurrected to allow the Activity to posit its good faith doubt of majority status based on a list bearing many of the signatures accompanying the DR petition. The Union argues that those who signed the DR petition did so to comply with the showing of interest requirement. Since an RA petition requires no interest showing, the activity could not rely on the signatures accompanying the DR petition to support a good faith doubt of the union's majority. Complainant asserts that the RA petition must set forth some independent statement supporting such doubt of majority status. Finally, the union argues that Respondent has no basis for a good faith doubt since, under Federal Aviation Administration, Great Lakes Region; A/SLMR No. 250 the union was still a viable representative; that dues were still checked off, and the union processed grievances as well as designated officers who were available for negotiation.

Section 202.3(d) of the Assistant Secretary's Rules and Regulations provides as follows:

"(d) When there is an agreement signed by the activity and the incumbent exclusive representative having a term not exceeding three (3) years from the date it was signed, and a petition has been filed challenging the representation status of the incumbent exclusive representative and the petition is subsequently withdrawn or dismissed less than sixty (60) days prior to the terminal date of that agreement, or any time



thereafter, the activity and incumbent exclusive representative shall be afforded a ninety (90) day period from the date the withdrawal is approved or the petition is dismissed free from rival claim with which to consummate an agreement:..."

It seems clear that the foregoing provision was intended to govern the timeliness of rival petitions filed to challenge the representative status of an incumbent union. The language of the regulation bespeaks of a 90-day period - free from rival claims - during which the activity and the incumbent exclusive representative may consummate an agreement. I do not construe this section as insulating the existence of a good faith doubt of majority status for 90 days after dismissal of the decertification petition. While Complainant avers that it was entitled to a period of 90 days from May 14 to negotiate a contract, I am constrained to reject this argument. Not only does 202.3(d) purport to outlaw only rival claims where the incumbent's representative status was unsuccessfully challenged, but an employer should be permitted to raise doubts, beyond the certification year, as to whether the union still represents a majority of its employees. Thus, as was stated in Federal Aviation Administration, Jacksonville Air Route Traffic Control Center, A/SLMR No. 119 the issue is not whether the parties were entitled to negotiate an agreement free from rival claims, but whether an Activity had reasonable cause to believe it was negotiating with a minority union.

The cases are legion in the private sector that a pending decertification petition, absent unfair labor practices by the employer, will entitle the latter to refuse to continue bargaining negotiations with the union. 209 NLRB No. 172. Newhouse Broadcasting Co. 197 NLRB No. 148; American Express Reservations, Inc. The question concerning representation, in those instances, the employer to remain neutral until such issue is resolved. The body of cases decided by the Assistant Secretary lends support to the conclusion that the federal sector will likewise excuse an activity from its obligation to bargain with an incumbent during a pending DR proceeding. Thus, in the instant case, Respondent Activity was obviously justified in suspending or discontinuing negotiations between January and May 14 - the date when the Assistant Secretary "affirmed" the dismissal of the decertification petition. In the face of a representation question, the

Activity may thus express its good faith doubt of majority status.

While Complainant does not necessarily disagree with the activity's refusal to negotiate during the pendency of the DR proceeding, it construes the filing of the RA petition by the activity as exhibiting a lack of good faith doubt as to the union's majority. The union quarrels with the activity's reliance upon the statement signed by 34 employees disavowing the union's representative status, which Bold presented to management on June 19, to establish a doubt of majority status.

Despite this contention, I am convinced the activity was within its rights in filing the RA petition after receiving the employees disaffirmance of union representation. Not only do the regulations establish an RA petition as the proper vehicle to question a union's majority, but I find nothing in the record which militates against the activity's acceptance of the statement submitted to it.

While 15 employees signed the disavowal 4 1/2 months prior to its submission to Respondent, I do not consider the signatures so stale as to preclude reliance upon by the Employer. In the private sector the National Labor Relations Board adopted a rule that application cards obtained more than one year prior to a bargaining request were too stale to be counted in determining majority. See Blade-Tribune Publishing Co. 161 NLRB 1512. Certainly, in the case at bar, the expressions of disaffirmance made 4 1/2 months earlier by some employees should not be deemed so unreliable as to unworthy of acceptance by management. Further, only one employee, Kent Bayne, testified he was told, when he signed the statement, that the employees would see if an election could be held to determine who represents the workers. Three other witnesses presented by Complainant testified it was their "impression" that they signed to get an election. Although the Board will often reject union application cards where the signers are told the purpose of the card is solely to obtain an election, such doctrine is inapplicable herein. Not only does the statement declare no such purpose - explicitly stating that the signers reject the Union as their representative - but the record does not support the conclusion that employees were advised that the sole aim in signing the statement was to obtain an election. In this posture, I cannot conclude that the statement should be invalidated. See Area Disposal, Inc., 200 NLRB No. 54.

The Union herein has been the collective bargaining representative of Respondent's employees in an appropriate unit since 1969. Moreover, the relationship between the parties continued undisturbed until the decertification petition was filed in January, 1974 - two months prior to the termination date of the contract. In order to justify its refusal to continue to negotiate with the Union, the Activity must establish a good faith doubt, on its part, that the Union still represents the majority of its employees. I believe Respondent had sufficient reason to question the Union's majority when it received, on June 19, the statement signed by 35 employees stating that the Union was no longer their bargaining representative. The fact that nearly half of the signers endorsed it some 4 months earlier, or that it may have been utilized in the filing of the DR petition, does not detract from its effectiveness as an indication that the employees no longer desire the Union to represent them. Such an avowal gives rise to a clear doubt on management's part that the Union is still the majority representative. Moreover, in the absence of some acts of interference on the part of the Activity, I am persuaded that such doubt was one of good faith; and that, in the face of such a rejection by the employees, the filing of the RA petition was not a tactical maneuver on the part of the employer designed to escape its obligation to bargain under the Order. 9/ Accordingly, I conclude Respondent did not refuse to negotiate in violation of 19(a)(1) or (6) thereof.

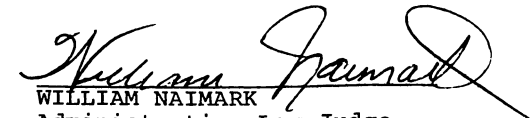
RECOMMENDATION

Having found that Respondent has not engaged in conduct violative of Sections 19(a)(1) and (6) of the Order, I recommend that the complaint herein be dismissed in its entirety.

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9/ Respondent's obligation to bargain continued between May 14 and June 19 when it received the statement of disavowal signed by the employees. However, the record reflects Complainant's representative, Johnson, was absent from Denver during this period; that he did not request Respondent to negotiate until after his return abroad June 17. Accordingly, I would not find a violation of the duty to bargain during the aforesaid period.

Having found, after evaluating the evidence submitted herein, that the Activity had a good faith doubt of the Union's majority status, I would conclude, and recommend, that it would effectuate the policies of the Order to accord the unit employees an election to determine whether they desire the Union to be their bargaining representative. Accordingly, I recommend the Assistant Secretary direct an election in the appropriate unit.

  
 WILLIAM NAIMARK  
 Administrative Law Judge

DATED: April 24, 1975  
 Washington, D. C.

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

INTERNAL REVENUE SERVICE  
 A/SLMR No. 536

This case involved an unfair labor practice complaint filed by the Internal Revenue Service (IRS) alleging that the Respondent, National Treasury Employees Union (NTEU), violated Section 19(b)(4) of the Order by picketing the Complainant's Service Center at Covington, Kentucky. The NTEU admitted that it had engaged in the picketing as alleged, but contended, among other things, that the picketing was informational in nature and as such was not proscribed by Section 19(b)(4) of the Executive Order.

Under the expedited procedures provided for in Section 203.7(b) of the Assistant Secretary's Regulations, a preliminary hearing was held, and on the basis of that hearing it was found that there was reasonable cause to believe that NTEU had and was violating Section 19(b)(4) of the Order, and the NTEU was ordered to cease and desist from such conduct pending disposition of the complaint. Subsequent thereto, a hearing was conducted by the Chief Administrative Law Judge pursuant to Section 203.7(b)(6) of the Regulations.

The Chief Administrative Law Judge concluded that the picketing engaged in by the NTEU was informational in character, but that the language of Section 19(b)(4) of the Order was clear and unambiguous and prohibited all picketing in a labor-management dispute.

The Assistant Secretary agreed with the Chief Administrative Law Judge's conclusion that all picketing in a labor-management dispute is violative of Section 19(b)(4) of the Order. Having found that the NTEU violated Section 19(b)(4) of the Order by its improper picketing of the IRS's installations, and that such conduct required the issuance of a remedial order, the Assistant Secretary issued such an order directed to the NTEU's officers, agents, and representatives and further ordered the posting of an appropriate notice to all members of the NTEU and to all employees of the Internal Revenue Service.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE

Complainant

and

NATIONAL TREASURY EMPLOYEES UNION

Respondent

and

Case No. 22-5976(CO)

ASSISTANT REGIONAL DIRECTOR  
 LABOR-MANAGEMENT SERVICES  
 ADMINISTRATION, UNITED STATES  
 DEPARTMENT OF LABOR

Petitioner

DECISION AND ORDER

On July 7, 1975, Chief Administrative Law Judge H. Stephan Gordon issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Chief Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant and the Respondent filed exceptions and supporting briefs with respect to the Chief Administrative Law Judge's Recommended Decision and Order, and the Complainant filed a motion to disregard the Respondent's exceptions. 1/

The Assistant Secretary has reviewed the rulings of the Chief Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Chief Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting 1/ The Complainant's motion to disregard the Respondent's exceptions is hereby denied. Moreover, it was noted that said motion was filed erroneously pursuant to Section 204.82 of the Regulations, instead of Section 203.19(a).

briefs filed by the Complainant and the Respondent, I hereby adopt the Chief Administrative Law Judge's findings, conclusions, and recommendations except as indicated herein.

The complaint, filed by the Internal Revenue Service (Complainant), alleged that the National Treasury Employees Union (Respondent) violated Section 19(b)(4) of Executive Order 11491, as amended, by illegally picketing the Complainant's Service Center at Covington, Kentucky.

Pursuant to Section 203.7(b)(1) of the Assistant Secretary's Regulations, a preliminary hearing was conducted before Administrative Law Judge John H. Fenton for the purpose of determining whether there existed reasonable cause to believe that a violation of Section 19(b)(4) of the Executive Order had, in fact, occurred. As a result of that hearing, Administrative Law Judge Fenton found reasonable cause to believe that the Respondent had and was violating Section 19(b)(4) of the Executive Order and he ordered the Respondent to cease and desist from such conduct pending disposition of the complaint. Pursuant to Section 203.7(b)(6) of the Regulations a hearing was then held on the complaint before the Chief Administrative Law Judge.

At the hearing, and in its exceptions, the Respondent admitted that its officers and agents had engaged in picketing, that it was responsible for such picketing and that a labor-management dispute existed between the Complainant and the Respondent. However the Respondent contends, among other things, that Section 19(b)(4) of the Executive Order 2/ does not prohibit picketing which is purely informational in character. The Complainant at the hearing, and in its exceptions, contends that the concept of informational picketing as defined in the private sector has no application in the Federal sector and particularly does not apply to the picketing engaged in by the Respondent in the instant case, and that all picketing, however designated, is explicitly prohibited by Section 19(b)(4) of the Order.

The Chief Administrative Law Judge found that the picketing conducted by the Respondent was "informational" in character but that it was violative of Section 19(b)(4) of the Order. In this regard he concluded, on the basis of the express wording of Section 19(b)(4) and his examination of the Study Committee Report and Recommendations of August 1969, that the language of Section 19(b)(4) is so clear and unambiguous that only a literal interpretation is justified, i.e., that all picketing in a labor-management dispute, including informational picketing, is prohibited by the Order.

I concur with the conclusion of the Chief Administrative Law Judge that Section 19(b)(4) of the Order prohibits all picketing in a labor-management dispute in the Federal sector.

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2/ Section 19(b)(4) provides, "(b) a labor organization shall not -- (4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it;"

## THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(b)(4) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take certain specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

### ORDER

Pursuant to Section 6(b) of the Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the National Treasury Employees Union, its officers, agents, and representatives shall:

1. Cease and desist from:

(a) Picketing the Internal Revenue Service, or any other agency of the Government of the United States, in a labor-management dispute, or from assisting or participating in any such picketing.

(b) Condoning any such activity by failure to take effective affirmative action to prevent or stop it.

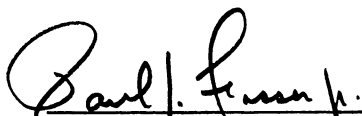
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at its national and local business offices, at its normal meeting places, and at all other places where notices to members and to employees of the Internal Revenue Service are customarily posted, including space on bulletin boards made available to the National Treasury Employees Union by agreement or otherwise by the Internal Revenue Service, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the President of the National Treasury Employees Union and shall be posted by the National Treasury Employees Union for a period of 60 consecutive days in conspicuous places, including all places where notices to members and to employees of the Internal Revenue Service are customarily posted. Reasonable steps shall be taken by the National Treasury Employees Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Submit signed copies of said notice within 14 days of the date of this Decision and Order to the Internal Revenue Service for posting in conspicuous places where it customarily posts information to its employees. The Internal Revenue Service shall maintain such notices for a period of 60 consecutive days from the date of posting.

(c) Pursuant to Section 203.27 of the Regulations notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.  
July 29, 1975



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

APPENDIX

NOTICE TO ALL MEMBERS  
and  
TO ALL EMPLOYEES  
OF THE INTERNAL REVENUE SERVICE  
PURSUANT TO  
A DECISION AND ORDER OF THE  
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS  
and in order to effectuate the policies of  
EXECUTIVE ORDER 11491, AS AMENDED  
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members and all  
employees of the Internal Revenue Service that:

WE WILL NOT picket the Internal Revenue Service, or any other agency of the Government of the United States, in a labor-management dispute.

WE WILL NOT assist or participate in picketing the Internal Revenue Service, or any other agency of the Government of the United States, in a labor-management dispute.

WE WILL NOT condone any of the above-mentioned activity and WE WILL take affirmative action to prevent or stop it in the event it reoccurs.

National Treasury Employees Union

Dated \_\_\_\_\_ By \_\_\_\_\_  
(President)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

.....  
In the Matter of :  
INTERNAL REVENUE SERVICE, :  
Complainant :  
and :  
NATIONAL TREASURY EMPLOYEES UNION, : Case No. 22-5976(CO)  
Respondent :  
and :  
ACTING ASSISTANT REGIONAL DIRECTOR :  
EUGENE M. LEVINE, LABOR-MANAGEMENT :  
SERVICES ADMINISTRATION, v.s. :  
DEPARTMENT OF LABOR, :  
Party :  
.....

ORDER

This matter comes before me upon a Notice of Preliminary Hearing issued by the Acting Assistant Regional Director on June 17, 1975, pursuant to the provisions of Executive Order 11491 and the implementing regulations found at 29 CFR 203.7 (b). The Complaint, filed by IRS on June 13, alleged a violation of Section 19(b)(4) of the Executive Order, which provides that a labor organization shall not "...picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it."

At the hearing conducted on June 18 the parties entered into a Stipulation received into evidence as Joint Exhibit 1. That Stipulation establishes the following.

(1) A labor-management dispute exists between IRS and NTEU, an impasse having been reached in negotiation of a collective bargaining agreement.

(2) Picketing occurred on May 30 at the IRS Service Center in Covington, Kentucky and on June 12 at the Center in Brookhaven, New York, in which officers and agents of NTEU participated, and NTEU plans to engage in further picketing at IRS National Headquarters during the week of June 23.

(3) The picket signs related to the labor-management dispute, and the picketing was for the purpose of informing the public and IRS employees of the NTEU's position regarding that dispute.

(4) The picketing was peaceful, had no "signal" effect on those wishing to enter the Centers and did not in any manner interfere with the operations of the Centers.

The Acting Assistant Regional Director has therefore carried the burden of establishing that there is reasonable cause to believe that a violation of Section 19(b)(4) is occurring, unless there is merit to NTEU's defense that that Section was intended to prohibit picketing which takes place in conjunction with other unlawful conduct, and not to ban picketing which is purely informational in purpose and effect.

This defense rests essentially on two propositions, given the rather difficult backdrop of an Executive Order which by its literal terms bans picketing without qualification, despite the fact that its provisions in many respects parallel those of the NLRA, under which law unions in the private sector may, in limited circumstances, engage in informational picketing.

The first proposition is that such picketing has long been recognized as a form of free speech protected by the U.S. Constitution, and that I am obliged to construe the language of the Order so as to avoid a collision with the Constitution. While I am aware that courts must construe a statute, or an Executive Order, if consistent with the will of Congress or the Executive, so as to comport with constitutional limitations, I am aware of no cases which commit such power to an administrative agency or judge. On the contrary, I think it is clear that an administrative body created to carry out the declared policy of the Congress or the Executive must assume the constitutionality of the law which it implements.

The second proposition advanced by NTEU is that I am bound to follow the law laid down in United Federation of Postal Clerks v. Blount 325 F. Supp. 879 (D.D.C. 1971). In relevant respect that three-judge District Court was faced with the question whether the language of certain statutes subjecting any federal employee who "participates in a strike" to loss of employment, fines and imprisonment, was overly broad and thus unconstitutional. After observing that the Government at oral argument had represented that it interpreted "participate" to mean "striking", or the refusal in concert with others to provide services to one's employer, the Court adopted that construction, noting that it "will exclude the

First Amendment problems raised by the plaintiff in that it removes from the strict reach of these statutes and other provisions such conduct as speech, ..... and informational picketing, even though these activities may take place in concert during a strike by others." Later the Court stated that such a construction "achieves the objective of Congress and, in defining the type of conduct which is beyond the reach of the statute, saves it from the risk of vagueness and overbreadth."

NTEU urges that this constitutes a holding that informational picketing is a form of free speech protected by the First Amendment. I do not agree that the Court squarely held that informational picketing by government unions is protected. Rather I read it only as a statement that the narrow construction offered by the Government and adopted by the Court served to avoid Constitutional problems. We are not told how the Court would have resolved those problems absent the narrow construction offered by the Government. Accordingly, I find no court authority for the proposition that picketing by government unions which is solely informational in character is beyond proscription.

It is therefore necessary for me to construe the language of Section 19(b)(4) within the four corners of the Executive Order. As already noted, that Section's language is a flat, unqualified prohibition of picketing. Furthermore, the Study Committee Report and Recommendations of August 1969, which led to issuance of the Order, suggested a change in the prior ban on "any strike... or related picketing engaged in as a substitute for any such strike" so as to "state clearly and simply its intended meaning, which is to prohibit the use of picketing directed at any employing agency by a labor organization in a labor-management dispute." These are rather plain words.

I am therefore constrained to find that there exists reasonable cause to believe that NTEU has picketed and currently plans to picket IRS, in connection with a labor-management dispute, in violation of Section 19(b)(4) of Executive Order 11491, and that there has been no satisfactory written offer of settlement by NTEU which provides for a cessation of such conduct.

In the circumstances, and by virtue of the authority vested in me by 29 CFR 203.7(b)(4) it is ORDERED that Respondent cease and desist, pending disposition of the complaint, from picketing IRS in a labor-management dispute, and that it shall immediately

take affirmative action to prevent and stop any such picketing of IRS by notifying all officers and agents of NTEU and its affiliates and chapters that any such picketing or plans for such picketing shall immediately cease.

SO ORDERED

*John H. Fenton*  
JOHN H. FENTON  
Administrative Law Judge

Dated: June 19, 1975  
Washington, D.C.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



RECOMMENDED DECISION AND ORDER

.....  
In the Matter of :

INTERNAL REVENUE SERVICE, :  
Complainant :

and :

NATIONAL TREASURY EMPLOYEES UNION, :  
Respondent :

and :

ASSISTANT REGIONAL DIRECTOR, :  
LABOR-MANAGEMENT SERVICES :  
ADMINISTRATION, :  
UNITED STATES DEPARTMENT OF LABOR, :  
Petitioner :

Case No. 22-5976(CO)

.....  
Robert Tobias  
General Counsel  
National Treasury Employees Union  
Suite 1101 K Street, N. W.  
Washington, D. C. 20006  
For the Respondent

G. Jerry Shaw  
Branch Chief  
Internal Revenue Service  
Room 4109, 1111 Constitution Ave., N. W.  
Washington, D. C. 20224  
For the Complainant

Howard K. Agran, Esq.  
Assistant Regional Director  
Louis Weiner, Esq.  
Regional Solicitor  
U. S. Department of Labor  
For the Petitioner

Before: H. STEPHAN GORDON  
Chief Judge

This matter comes before me upon a Notice of Expedited Hearing on Complaint issued on June 20, 1975 by Eugene M. Levine, Acting Assistant Regional Director, Philadelphia Region of the Labor-Management Services Administration. The Complaint, filed by the Internal Revenue Service (hereinafter referred to as the Complainant) on June 13, 1975, alleges that the National Treasury Employees Union (hereinafter referred to as the Respondent) illegally picketed Complainant's Service Center at Covington, Kentucky in violation of Section 19(b)(4) of Executive Order 11491, as amended (hereinafter referred to as the Executive Order).

Pursuant to the provisions of the Executive Order and the implementing regulations, 29 CFR 203.7(b)(1), the Assistant Regional Director issued a Notice of Preliminary Hearing on the Complaint on June 17, 1975. The preliminary hearing was conducted on June 18, 1975, before Administrative Law Judge John H. Fenton for the purpose of determining whether there existed reasonable cause to believe that a violation of Section 19(b)(4) of the Executive Order had in fact occurred. On the basis of that proceeding, Judge Fenton, on June 19, 1975, found that reasonable cause to believe that Respondent had and was violating Section 19(b)(4) of the Executive Order did in fact exist and ordered Respondent to cease and desist from such conduct pending disposition of the Complaint. It is this disposition of the Complaint which, pursuant to Section 203.7(b)(6), is presently before me.

At the expedited hearing conducted on June 23, 1975, all parties were represented by counsel and were given full opportunity to present, examine, and cross examine witnesses and to present evidence and arguments in support of their respective positions. At the hearing, the parties stipulated, and it was so ordered, that the entire record of the Preliminary Hearing before Judge Fenton shall become part of the record in the instant proceeding.

Subsequent to the hearing all parties submitted briefs which I found exceptionally well prepared, well reasoned, and helpful in my deliberations.

On the basis of the entire record, the briefs and my observation of the witnesses, I make the following Findings of Facts and Conclusions of Law:

Issues

1. What was the nature of the picketing?
2. If the picketing was informational in character, did Respondent's related conduct change the nature of the picketing?



3. Is informational picketing encompassed by the prohibitions of Section 19(b)(4) of the Executive Order?

Findings of Facts

The facts in this case are not in dispute and, indeed, have been stipulated by the parties in the Preliminary Hearing as well as in this hearing. On the basis of this stipulation, as well as on the basis of the entire record, I find that:

- (1) A labor-management dispute existed and continues to exist between Complainant and Respondent;
- (2) such labor-management dispute stems from an impasse having been reached in the course of negotiation of a collective bargaining agreement;
- (3) picketing in conjunction with such labor-management dispute occurred on May 30, 1975 at Complainant's Service Center in Covington, Kentucky and on June 12, 1975 at the Service Center in Brookhaven, New York;
- (4) officers and agents of Respondent participated in the picketing;
- (5) respondent assumes full responsibility for and in fact is responsible for such picketing;
- (6) the picketing was peaceful and did not interfere with Complainant's operation;
- (7) the picketing had no "signal" effect on either employees or members of the public who wished to enter the Centers;
- (8) the picket signs related to the labor-management dispute and were neither inflammatory nor derogatory in nature; and
- (9) the picketing was conducted for the purpose of informing the public and Complainant's employees of Respondent's position regarding the labor-management dispute-- that, in the parlance of labor-management relations, it did, in fact, constitute "informational picketing" as that term is ordinarily used in relevant decisions by the courts and the National Labor Relations Board.

With respect to my findings enumerated in paragraphs 6 through 9, above, I have fully considered the evidence and testimony offered by Complainant in this proceeding. Complainant, through the testimony of its witnesses, attempted

to prove that the informational character and purpose of the picketing was changed and whatever legal protection such picketing may enjoy was lost because: (1) all picketing in conjunction with a labor-management dispute is coercive in nature; (2) the picket signs allegedly disparaged certain of Complainant's officials; (3) some picketing occurred on Complainant's premises; and (4) the picketing was accompanied by other coercive actions, namely the filing of an unusually large number of grievances by Respondent's members.

In support of its first contention, Complainant introduced the testimony of Mr. Irving A. DesRoches, a labor-management relations specialist for Complainant who was also Complainant's chief negotiator during the collective bargaining sessions underlying this dispute. The witness, who has an extensive background in labor-management relations as a union official was qualified as an expert in the area of labor relations. The essence of Mr. DesRoches' testimony was that all picketing is coercive in nature; that its only purpose is to put pressure on an employer; that he has never encountered a situation involving true "informational picketing"; and that he would find it "extremely difficult to articulate" a distinction between purely "informational picketing" and any other type of picketing in a labor dispute. From a purely pragmatic point of view, Mr. DesRoches' characterization of picketing may be quite correct. However, and with due regard to the witness's considerable background and experience in the practical aspects of labor relations, I am bound by a considerable body of legal precedents wherein administrative bodies and courts of all levels have labored to delineate and elucidate these very distinctions and to define informational picketing. I therefore find that "informational picketing" is, indeed, a viable concept in the context of labor-management disputes, and that nothing in Mr. DesRoches' testimony affects or alters the parties' original stipulation that the picketing was "informational" as that term is used in labor-management relations.

I also disagree with Complainant's second contention that the language of the picket signs removed from the picketing its informational character. Counsel for Complainant himself points out in his very excellent brief that in Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et al. v. Austin, et al., 418 U.S. 264 (1974), the Supreme Court noted that "we see nothing in the Executive Order which indicates that it intended to restrict in any way the robust debate which has been protected under the NLRA." Despite counsel's characterization of the picket signs as "vicious", I find that the language on the picket signs which said that "Alexander ain't so great" and "IRS negotiators can stand pat, service center employees can't" falls well within accepted limits and

standards of language employed in a labor dispute. Accepting Complainant's explanation as correct that "Alexander" refers to Commissioner Donald C. Alexander, and even accepting the rather subtle inference that the word "pat" refers to Mr. Patrick J. Ruttle, Director of the Covington Service Center, I do not accept Complainant's characterization of such picket sign language as being "vicious", "spiteful" and "vituperative" nor its contention that such language is so disparaging of Complainant that a purpose other than informational should be ascribed to the picketing.

Regarding the contention that some picketing occurred on Complainant's premises, Mr. Patrick J. Ruttle testified that for a period of ten to fifteen minutes three picketers stationed themselves "inside the fence about six feet from the steps of the Service Center, the only entrance into the Center right there". Concededly these pickets did not block access to the Center nor did they in any way interfere or communicate verbally with employees or members of the public entering the Center. I find this incident too trivial and too isolated to warrant a finding that it changed the nature of the picketing.

With respect to the contention that the unusual number of grievances filed toward the termination of the contract was directly related to the picketing, and thus altered the informational character of the picketing, I find the link between these occurrences too tenuous and credit Respondent's testimony that it encouraged the filing of possible grievances during the last week of the contract, because it was concerned that the negotiated grievance procedure would terminate with the contract, leaving the resolution of any possible pending complaints or grievances by employees to non-contractual grievance devices. I find this conduct fully consonant with a union's duty to represent the interests of its members. Indeed, a failure to alert the employees it represented to the fact that the existing grievance machinery may well terminate with the contract, could have invited accusations that the Respondent was remiss in its obligation to its membership and to the employees it represents as the exclusive bargaining agent.

#### Conclusions of Law

On the basis of the above factual determinations, the only legal question before me is whether Section 19(b)(4) of the Executive Order 1/ prohibits picketing which is purely

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1/ Section 19(b)(4) provides: "(b) A labor organization shall not--(4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it;"

informational in the sense that its only purpose and effect is to advise the public and Complainant's employees of Respondent's position in the current labor-management dispute.

The question posed above is not only formidable but also novel. There are neither prior holdings nor dicta. It is true that a considerable body of law, both administrative and judicial, has addressed itself to this difficult and vexing question. Yet, these cases, which, incidentally, have been discussed and analyzed with great care and skill in the respective briefs of the parties to this proceeding, specifically address themselves to labor-management problems unique to the private sector and without a counterpart in the public sector. Thus, an analogy with the National Labor Relations Act leads us to permissible and prohibited picketing situations in the context of organizational picketing, Section 8(b)(7) of that Act 2/. Although Section 8(b)(7), which deals with organizational picketing, has no counterpart in the Executive Order or applicability in this case, it is of interest in that it demonstrates: (1) that picketing is not totally equatable to the free speech provisions of the First Amendment to The Constitution; and (2) that administrative bodies and the courts in construing the NLRA have carefully limited the prohibitions against informational picketing so as to safeguard the constitutionally protected areas of free speech.

That informational picketing is not an absolute right is amply demonstrated by the above cited provision in the NLRA which places very definite limitations on informational picketing. Thus, the NLRA permits certain forms of informational picketing as long as such picketing does not have an effect on deliveries or otherwise seriously disrupts the place of business being picketed. This limitation on the right to picket does not depend on the intent of the picketing union nor does it rest on any direct or implicit police power to keep the picketing within certain bounds. No matter how peaceful the picketing may be, no matter what the express intent of the picketing is, indeed no matter whether the picketing union specifically exhorts truck drivers or other deliverers of goods to cross such a picket line, the picketing becomes unlawful and enjoined if, in fact, it has the effect, intended or not, of interfering with deliveries to the picketed establishment.

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2/ Section 8(b)(7) provides: "(b) It shall be an unfair labor practice for a labor organization or its agents--(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently

While it can, of course be argued that even the most elementary constitutional freedoms are not unlimited, (we learn in grade school that freedom of speech does not permit us to shout "Fire" in a crowded theater), the above-described limitations go beyond the basic and necessary protections a society must afford to all its members. Indeed, these limitations are sufficiently sophisticated and essentially so bottomed on economic considerations, that they warrant an inference that neither the Congress nor the courts ever intended fully to equate picketing to First Amendment free speech. Yet, most assuredly, picketing generally, and informational picketing particularly, brings into play inherent problems affecting constitutional free speech. Where to draw the lines, where to place the limitations without violating constitutional principles remains a question not yet fully resolved.

In the area of labor-management relations in the public sector, this question has not gone unnoticed. However, neither precedent nor dictum exists to show us the way. I have carefully studied the cases cited by counsel for all parties in their learned briefs and must come to the reluctant conclusion that none of these cases are dispositive of the issue before me. These cases run the gamut from libel to the right to strike, but none deal with the question whether pure informational picketing is prohibited by the Executive Order; and, if so, whether such prohibition would render the Executive Order unconstitutional. To be sure, phrases can be plucked out of these decisions, inferences can be drawn, analogies can be made to support either proposition, but a careful reading of these cases convinces me that the courts have approached this volatile question gingerly at best, and in most cases have consciously avoided ruling on these questions for the express purpose of avoiding the constitutional problem. This, in itself, of course, fortifies Respondent's contention in this case that a serious constitutional question may exist if the Executive Order does indeed prohibit all picketing related to labor-management disputes, but unfortunately the cited cases, while posing the question obliquely, fail to provide the necessary answers.

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2/ (continued) certified as the representative of such employees:...Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

Respondent urges me to answer this constitutional problem in this proceeding. For one who has worked in labor law for a considerable number of years, the challenge is formidable; the temptation is great. Yet, I must regretfully decline. The maxim that administrative bodies must assume the constitutionality of the statutes they administer and that they do not possess the authority to declare such statutes unconstitutional is too well settled in law to warrant any detailed discussion. In fact all parties to this proceeding have expressly stated their agreement with this salutary legal principle. Therefore, regardless of any personal doubts or legal predilections, I am not empowered to nor do I reach the question of the Executive Order's constitutionality. In fairness to counsel for Respondent, it must be noted that his argument is more subtle and sophisticated. Indeed, as already noted, counsel for Respondent, fully agrees that I am not empowered to rule on the constitutionality of the Executive Order as such. What counsel does urge is that I am empowered and, indeed, mandated to apply the principle of constitutional applicability, i.e., to construe Section 19(b)(4) of the Executive Order in such manner as to avoid a conflict with the Constitution.

I agree with counsel for Respondent that administrative tribunals as well as other courts have the power and the obligation to construe any ambiguity in a law in such manner that it may comport with constitutional limitations. However, I also believe that the principle of constitutional applicability should only be invoked when the law itself is so ambiguous or unclear that it can be given different interpretations. To hold otherwise would, in my opinion, subvert a salutary legal principle to sophistry and subterfuge and could result in a usurpation of judicial functions not granted to administrative tribunals. Thus, by merely applying a label to the process, administrative agencies could not only rule on the constitutionality of the laws they administer, but actually change the clearly expressed legislative intent. Such a process whereby judges could interpret a law which is clear and unambiguous in language in ways different from its clearly intended meaning because, in the opinion of the deciding tribunal it clashes with constitutional principles, would make legislators out of judges and would inevitably fuse the legislative and judicial functions to the detriment of both.

The question is then posed whether Section 19(b)(4) of the Executive Order is so clear and unambiguous on its face that it must be read and applied literally, or whether there is sufficient ambiguity in its wording to warrant speculation, interpretation, and, indeed, the application of constitutional construction. After considerable deliberation and after many

readings of Section 19(b)(4), as well as the Study Committee Report and Recommendations of August 1969 which constitutes the only, albeit meager, legislative history regarding this section, I must come to the conclusion that the language employed is so clear and unambiguous that only a literal interpretation is justified.

The prohibition against picketing in a labor-management dispute is clearly and plainly stated. It is carefully separated from the other prohibitions contained in that section by the clear demarcation of semicolons. I know of no way how the framers of the Executive Order could have stated their intent more clearly. Therefore, despite the fact that the breadth of the prohibition raises in my mind serious constitutional problems, I must conclude that it is my obligation to apply the Executive Order literally to the facts of this case.

While I am not unmindful of the legal principle that where a statute is clear and unambiguous on its face, resort to legislative history is ordinarily not warranted, the gravity of the question posed as well as the fact that I specifically invited argument from all counsel on legislative history, I would like to address this area briefly.

The pertinent legislative history is contained in Section I of the Study Committee Report and Recommendations of August 1969, which led to the issuance of Executive Order 11491. The Study Committee noted that there had "been some difficulty in interpreting the 'related picketing' of the code section which prohibited a labor organization from

'Calling or engaging in any strike, work stoppage, slowdown, or related picketing engaged in as a substitute for any such strike, work stoppage or slowdown, against the Government of the United States.'

The Study Committee found the above cited language "unnecessarily obscure and confusing" and recommended that it be revised "to state clearly and simply its intended meaning, which is to prohibit the use of picketing directed at an employing agency by a labor organization in a labor-management dispute." This recommendation resulted in the simplified language of Section 19(b)(4) of Executive Order 11491 which states that:

"A labor organization shall not--(4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it;"

It would appear that under Executive Order 10988 the prohibition against picketing was clearly related to a strike situation. Thus the language of Executive Order 10988, as quoted above, appears to have prohibited picketing when it was related to a strike, work stoppage or slow down and/or when it was engaged in as a substitute for any such action. It is, however, not clear whether both elements, i.e., "related" to a strike, slow down, etc., and "as a substitute" for a strike, slow down, etc., would have been necessary to invoke the prohibition, or whether either of these elements would have made the conduct violative. The language is, indeed, confusing. I believe that it was this very ambiguity which the Study Committee addressed itself to when it stated that there had been some "difficulty in interpreting the 'related picketing' language". The clarification seems to have resulted in an outright prohibition against all picketing in the context of a labor-management dispute. It is true that subsequent language in the Study Report refers to "prohibited picketing", a phrase which would imply that not all picketing is made unlawful, and that, indeed, certain picketing is not prohibited. However, in view of the clear and unequivocal prohibition against all picketing in a labor-management dispute which emerged as a recommendation by the Study Committee and was subsequently incorporated into Executive Order 11491, I am persuaded that the qualification of "prohibited" picketing merely refers to the fact that the prohibition is limited to picketing in a labor-management dispute. While I find it somewhat difficult to conjure up situations where a labor organization would picket absent a labor-management dispute, I must reject Respondent counsel's contention, as expressed in his brief, that such a situation could never arise. I suppose labor organizations could picket for political or other purposes not related to a labor-management dispute--areas which, of course, could not be reached by the Executive Order.

Counsel for Respondent also argues persuasively that the expressed intent of the Study Committee was to clarify Executive Order 10988 and not necessarily to broaden it. The point is well taken, for, as counsel points out, when the Study Committee recommended substantive or procedural changes as distinct from clarifications, far more elaborate and detailed explanations accompanied such recommendations. While this matter remains by necessity somewhat obscure, a reading of the relevant language of the report in its full context as well as the unqualified language of the Study Committee's recommendation, convinces me that the Study Committee did indeed recommend a total ban on all picketing in a labor-management dispute. Since the proposal was incorporated in Executive Order 11491 verbatim, I must also conclude that the Executive Order is equally broad in its prohibition.

It is also true, as counsel argues, that the Study Committee did not write its Report in a vacuum; that it was fully cognizant of the fact that the Executive Order was closely patterned after the National Labor Relations Act; and that it was familiar with Board and court precedents which had spoken to the question of informational picketing. However, the very fact that I must assume such expertise on the part of the Study Committee convinces me that the breadth of language expressed in Section 19(b)(4) was deliberate. If the Study Committee in its desire to clarify the prohibition against picketing would have wished to carve out certain protected areas, it would have been a relatively simple matter to do so specifically. I cannot assume that the Study Committee on the one hand stated a clear intent to clarify the prohibition while on the other it would either deliberately or by oversight create additional confusion.

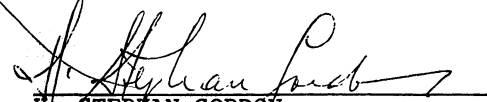
Therefore, on the basis of the above, I must reiterate that, regardless of the inherent and substantial constitutional question which Respondent may raise in another forum, I am constrained to hold that the prohibitions of Section 19(b)(4) must be applied literally to the facts of the instant case.

I therefore find that the Assistant Regional Director has fully met the required burden of proof and that Respondent, by picketing Complainant's installations in connection with a labor-management dispute has violated Section 19(b)(4) of Executive Order 11491.

#### Recommended Order

It is recommended that Respondent be directed by the Assistant Secretary to cease and desist from the above-described unlawful conduct and that it shall take immediate affirmative action to stop and prevent any such picketing of Complainant at either its headquarters or any other installation. Specifically, Respondent is ordered to notify its officers and agents, as well as its membership, that its picketing of Complainant's installations in the course of its current labor-management dispute has been found to be illegal. Respondent is further ordered to issue a directive to its officers, agents and members to cease such illegal conduct and to refrain from any similar conduct in the future. The above referred to notices and directives shall be in the form of letters, notices on bulletin boards, or other effective means of communication. Evidence of compliance with the order shall be submitted by Respondent to the Assistant Secretary within ten (10) days following the date of the order.

In view of the fact that this is a test case of first impression which raises serious and complex problems, the resolution of which is not free of doubt, and also in recognition of the fact that only through the process of elucidating litigation in such test cases can such basic and far reaching questions affecting federal labor-management relations be developed and resolved effectively, I specifically recommend that the Assistant Secretary invoke no further sanctions against Respondent.

  
H. STEPHAN GORDON  
Chief Administrative Law Judge

Dated: July 7, 1975  
Washington, D. C.

July 30, 1975

A/SLMR No. 537

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

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

DEPARTMENT OF THE AIR FORCE,  
4392d AEROSPACE SUPPORT GROUP,  
VANDENBERG AIR FORCE BASE, CALIFORNIA  
A/SLMR No. 537

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DEPARTMENT OF THE AIR FORCE,  
4392d AEROSPACE SUPPORT GROUP,  
VANDENBERG AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. 72-4658

MARIE BROGAN

Complainant

DEPARTMENT OF THE AIR FORCE,  
4392d AEROSPACE SUPPORT GROUP,  
VANDENBERG AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. 72-4745

LOCAL 1001,  
NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On March 18, 1975, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints, and recommending that the complaints be dismissed in their entirety. Thereafter the Complainant labor organization filed exceptions and a supporting brief in behalf of itself and Complainant Brogan with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject cases, including the Complainant labor organization's exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

I concur with the conclusion of the Administrative Law Judge that, under the particular circumstances herein, certain statements made by the

This proceeding arose upon a filing of separate unfair labor practice complaints by an individual employee who was a local union president, and Local 1001, National Federation of Federal Employees (NFFE). One complaint alleged, in part, that the Respondent violated Section 19(a)(1) and (6) of the Order by statements made by the Chief of Base Procurement on September 26, 1973, at a meeting held to discuss the employees' equal employment opportunity complaint, that some action should be taken by an arbitrator to stop the local union president from filing charges. A second complaint alleged violations of Section 19(a)(1), (2) and (4) of the Order by detailing and then permanently reassigning the union president to another position because of her filing complaints against the Respondent, which reassignment was allegedly to a position with no possibility of promotion and which was vulnerable to a reduction-in-force.

The Administrative Law Judge found the statements made by the Chief of Base Procurement at the meeting of September 26, 1973, with the employee and other management officials were not violative of the Order. The Administrative Law Judge also found that work performance, not union animus, was the motivating factor in the union president's job reassignment. In reaching this conclusion, he noted the dissatisfaction of management with the union president's work performance; the un rebutted testimony of the union president's supervisors as to her job inefficiency and tardiness, as well as her frequent absences from the office which, contrary to instructions, were not reported to her supervisors; and that her supervisory appraisals indicated that her work was suffering as far back as 1972 from neglect and inattention. The Administrative Law Judge also noted that, contrary to the union president's contention that her reassignment was motivated by union animus, the record indicated that the reassignment would allow the employee to have more time to apply to her union activities. Moreover, he found that the record was barren with respect to showing that the reassignment was made to a job with no chances for promotion, or for which the union president was not equipped by training to handle. Under all of the circumstances, the Administrative Law Judge found no violations of the Executive Order and recommended that the complaint be dismissed.

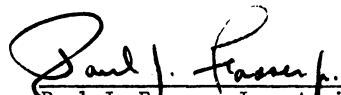
Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the case, including the Complainant labor organization's exceptions and supporting brief, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaints be dismissed.

Respondent's Chief of Base Procurement on September 26, 1973, at a meeting held to consider an equal employment opportunity complaint by the Complainant, Marie Brogan, were not violative of Section 19(a)(1) and (6) of the Order. Further, I agree with the Administrative Law Judge's findings that the detailing in February 1974, and the permanent reassignment on April 14, 1974, of Brogan to another work position were also not violative of Section 19(a)(1), (2) and (4) of the Order. In this connection, it was noted that the undisputed evidence reflects that Brogan's work performance was substandard and that this was the factor which was determinative in making the reassignment. In this regard, the evidence established that all of Brogan's recent supervisors were unhappy with her performance and so testified without contradiction. Thus, it is uncontradicted that Brogan was not preparing contracts on time; that she was allowing large time lags to occur in her work which resulted in orders being improperly handled; that she was tardy for work on numerous occasions; and that, contrary to requests of her superiors, she would not inform them when leaving her office to attend to union activities or other matters. The evidence indicates further that, although Brogan alleged that her reassignment was to a "dead end job" which would be vulnerable to a reduction-in-force and which also required her to perform unpleasant tasks for which she was technically unqualified, in fact, her background in the contract procurement field provided her with the expertise necessary to perform the job, many of her tasks could be performed without technical expertise, and she was able to call upon other employees in regard to technical matters in the event that such was necessary. Further, there is no evidence supporting Brogan's contention that her reassignment to the new position would prevent her from being considered for normal promotion and in-grade advances or make her more susceptible to a reduction-in-force action. Nor did the evidence establish that anti-union considerations were a motivating factor in Brogan's reassignment. Rather, the uncontradicted evidence indicates that the Respondent, in effecting the transfer of Brogan, was motivated, in part, by the view that because of the nature of the new position, Brogan would be afforded the opportunity to devote more time to union representational duties during her working day without disruption of other employees' job performance as the job was less demanding than the one she formerly held. 1/

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 72-4658 and 72-4745 be, and they hereby are, dismissed.

Dated, Washington, D.C.  
July 30, 1975

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

1/ In this connection, it was noted that, at a meeting held to discuss Brogan's reassignment, a representative of the Complainant acknowledged that in her new position Brogan would have more time and opportunity to devote to her union representational functions.

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



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In the Matter of :  
DEPARTMENT OF THE AIR FORCE : CASE NOS.  
4329 AEROSPACE SUPPORT GROUP :  
VANDENBERG AIR FORCE BASE, CALIFORNIA : 72-4658  
Respondent : 72-4745  
and :  
MARIE BROGAN :  
Complainant :  
and :  
DEPARTMENT OF THE AIR FORCE :  
4329 AEROSPACE SUPPORT GROUP :  
VANDENBERG AIR FORCE BASE, CALIFORNIA :  
Respondent :  
and :  
LOCAL 1001, NATIONAL FEDERATION :  
OF FEDERAL EMPLOYEES :  
Complainant :  
.....

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4329 Aerospace Support Group  
Vandenberg Air Force Base  
California 93437  
For the Respondent

IRVING GELLER, Esquire  
National Federation of Federal Employees  
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Washington, D. C. 20006  
For the Complainants

BEFORE: WILLIAM NAIMARK  
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on October 11, 1974 by the Assistant Regional Director for Labor-Management Services Administration of the United States Department of Labor, San Francisco Region, a hearing was held in this matter before the undersigned on November 12 and 13, 1974 at Vandenberg Air Force Base, California.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order) by the filing of a complaint in Case No. 72-4658 on February 19, 1974 by Marie Brogan against Department of the Air Force, Vandenberg Air Force Base, California (herein called Respondent) alleging violations of Section 19(a)(1), (2) and (4) of the Order. An amended complaint in Case No. 72-4658 alleged violations of 19(a)(1) and (6) based on (a) certain statements made by Colonel Calvert, Chief of Base Procurement, on September 26, 1973 that some action should be taken by an arbitrator who could stop Marie Brogan from filing charges which go back to 1968; (b) a statement by Colonel Calvert on October 30, 1973 before an examiner from the Appellate and Review Office in San Antonio, Texas that there was an overlapped period in which Calvert was briefed by Colonel Evans on Marie Brogan's union activities and substandard performance. 1/

A complaint was filed in Case No. 72-4745 on May 16, 1974 by Local 1001, National Federation of Federal Employees, (herein called Complainant Union) against Respondent alleging violations of Section 19(a)(1), (2) and (4) of the Order. 2/ This complaint alleged that Respondent detailed, and then permanently reassigned, Marie Brogan to another position because of her filing complaints against Respondent; that such reassignment was to a position with no possibility of promotion and which was vulnerable to a reduction in force.

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1/ No evidence was adduced to support this second allegation and no findings are made in regard thereto.

2/ Case Nos. 72-4658 and 4745 were consolidated by an Order issued on October 11, 1974.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, the parties filed briefs which have been duly considered by the undersigned. In his brief Complainants' counsel contends that, although 19(a)(2) and (4) allegations were deleted in Case No. 72-4658, a finding should be made in support thereof since (a) the complaint was amended amid confusion, (b) the deletions were at the recommendation of the Area LMSA compliance officer, and (c) the facts are set forth in the complaint. 3/ At the hearing said counsel contended that, with respect to Case No. 72-4658, Respondent violated 19(a)(6) of the Order by reassigning Marie Brogan to another job without consulting or meeting with the union in that regard. 4/

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

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3/ Apart from the fact that I could find no merit to alleged violations by Respondent of 19(a)(2) and (4), I do not feel obliged to go behind the actions taken in respect to the amended complaint. Further, no motion was made by Complainant at the hearing in 72-4658 to amend the complaint and reallege violations of said sections.

4/ Although 19(a)(6) is alleged in the complaint in 72-4658, there were no facts recited therein to support such allegation. Further, the thrust of said complaint were statements made by Colonel Calvert alleged to be interference and restraint of employees' rights under the Order. The contention that Respondent refused to consult and confer was not the subject of investigation, nor was it litigated at the hearing. Although it appears, *infra*, that Respondent did discuss the impact of the reassignment with union officials, I do not consider the 19(a)(6) issue is properly before me for determination.



Findings of Fact

1. At all times material herein Complainant Union has been the exclusive bargaining representative of Respondent's non-professional employees at Vandenberg Air Force Base, California. Complainant's collective bargaining agreement with Respondent had expired, and the parties are, and have been, engaged in negotiations leading to a new contract.

2. Marie Brogan, an employee of Respondent, has been president of the Complainant Union for approximately five years. As a representative of the union she has been very active on behalf of fellow employees, filing numerous EEO and Department of Labor complaints, handling compensation and disability cases, and appearing before the Civil Service Commission in adverse action appeal matters. Moreover, Brogan has processed grievances under prior contracts with Respondent, and has been engaged on behalf of the Union in negotiations with management for a new collective bargaining agreement.

3. On September 26, 1973 a meeting was held in base Commander Colonel Hoffman's office to discuss and consider an EEO complaint filed by Brogan in which she was alleged to be a victim of sex discrimination. This meeting was attended by Brogan, Lt. Colonel James W. Calvert, base procurement chief, Sylvester Cole, an EEO counsellor, Colonel Hoffman, Lois Johns, an EEO counsellor-trainee, and Mr. Lowsley. 5/

(a) At the aforesaid meeting Calvert asked his EEO counsellor if there were not some way to stop Marie Brogan from filing all the charges and what recourse management had if the charges had no merit. He also stated it was a waste of time considering these charges since it tied up employees and kept them from their jobs. Calvert also suggested, or raised the query, as to whether an arbitrator couldn't be brought in to handle these complaints against

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5/ The parties stipulated that none of the employees present were members of the bargaining unit represented by Complainant Union.

Respondent. 6/

(b) Lois Johns testified that Calvert also said, at the meeting on September 26, that he had a file on Brogan with many things in it going back to 1968; that Brogan asked if he had a file on anyone else and Calvert stated he did not. Sylvester Cole testified Calvert stated at the meeting he had a file on Brogan which contained a stack of papers; that he read at all and it was a waste of time. Marie Brogan avers that after Calvert queried whether some action could be taken to stop her from filing charges, she asked how he knew so much about her activities. Whereupon, according to Brogan, the colonel replied he'd been through a whole drawer of them going back to 1968. Upon being asked by Brogan how many others he kept records on going back to 1968, Calvert remarked he only had records for this employee.

While the three versions differ as to the aforesaid statement by Calvert 7/, I accord greater weight to Brogan's narrative in this respect due to her precise and detailed testimony. Accepting her testimony regarding this particular statement by Calvert, I find that the colonel stated he had a whole drawer of charges going back to 1968 which he had been through, and that he had no such records of charges or complaints filed by any other employee.

4. Marie Brogan has been employed in Respondent's procurement unit for twenty years. In February or March 1973 she was assigned as a procurement agent, 1102, GS-9. Prior thereto Brogan was a buyer of electronics equipment and a contract administrator in the procurement division. As a procurement agent, Brogan wrote service contracts, prepared invitations for bids (IFB) which were sent out to several bidders, abstracted the bids and sent low ones through channels for approval, took contractors out on tours to see particular sites, and distributed copies of contracts. She was responsible for thirty-three contracts in this position. In the performance of her job in procurement Brogan had a working knowledge

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6/ These findings are based on the combined and credited testimonies of Johns, Cole, and Brogan. Calvert admitted asking at the meeting whether an arbitrator could be used to take case of these charges or complaints, but be denied the other statements, supra, attributed to him.

7/ Calvert's denial that he made a statement to the [continued on next page]

of, among other subjects, minimum wage law, Davis-Bacon Act, overtime laws, Air Force rules, and Department of Labor regulations.

5. In the services procurement branch the regular services buyers were Brogan and Sgt. Barnes. Working part-time in performing such duties was Mary L. Allen, a construction buyer who was assigned to that branch. Since July, 1971 Virgil F. Prem was the deputy chief of procurement, and Harold Mattison acted as chief of services buying branch from October 1, 1972 until he left VAF on September 2, 1973. Mattison, a GS-11 was the direct supervisor of Brogan during such period, and after his departure he was replaced temporarily on September 5, 1973 by Captain Kenneth L. Gerken who supervised Brogan until he left VAF on January 5, 1974. Prior to coming with the service section, Gerken worked in procurement for about a year as branch chief responsible for contract administration. In order to fill Mattison's position, Respondent first sought a replacement air force wide, and finally went DOD wide when not satisfied with possible successors from which to choose.

6. Marie Brogan testified, and I find, that while working as a service buyer in procurement, and for about 5 years, she spent between 25% to 65% or 70% of her day on union matters, and that, on some occasions, she devoted as much as 90% of her daily time to union activities. Brogan also stated that when she spent 80% - 90% of her time on union business she could sometimes perform her regular work.

7. In respect to Brogan's work as a contract administrator, an appraisal 8/ dated February 28, 1972 was made by Virgil Prem as Deputy Chief of Procurement. His rating of Brogan included the following determinations: (a) "Her knowledge of procedures and negotiation process is outstanding. Needs to be more consistent in work quality...; (b) Has the ability to schedule time to meet deadlines but work with no deadline is often not accomplished in a timely manner; (c) Written communication is outstanding and to the

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7/ - continued

effect he had such records of Brogan's activities is not credited.

8/ Complainant's Exhibit 7.

point; (d) Oral communication is adequate. Needs to keep to the point and exclude extraneous details; (e) Works well with others but needs to become more tolerant of others...; (f) Has potential to be outstanding supervisor if she learns to orally communicate and consider the advice of others."

8. Mattison testified that while Brogan's performance as a service buyer was adequate during the first few months, the quality of her work deteriorated thereafter and became a problem around February or March, 1973. Colonel Evans had inquired of him as to the status of the food services contracts, which had been assigned to Brogan. Mattison told Evans that Brogan was capable of doing the job, but did not seem to want to do it; that other employees had to undertake Marie's work when she was absent, and she was belligerent when he discussed it with her. The supervisor also advised Evans that Brogan was gone for hours on union business.

Mattison further testified that if her work was adequate, he could have managed his branch notwithstanding Brogan's absences. She did not perform her work when present on the job, and therefore, the real problem was not her being away so much of the time. However, Mattison stated that there were occasions when Brogan's extended absences or being on the telephone for hours did affect the work she was expected to handle. He requested that she inform him when she needed time for union affairs, but Brogan left the job frequently without letting him know. In addition, Brogan was tardy on a daily basis.

9. A letter 9/ from Mattison to Brogan, dated July 16, 1973, in respect to the latter's work performance, was given to her by the supervisor. It notified Brogan that her job performance for the month of June, 1973 and the first half of July, 1973, were less than satisfactory. Specifically, it averred that (a) while the purchase request and specifications for a food service contract was given to her on May 7, 1973, no solicitation was prepared to send prospective bidders, which should have been done by July 1, 1973 - and no synopsis of a prepared procurement plan, as

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9/ Respondent's Exhibit 7.

well no Procurement Plan, were prepared; (b) a mistake in a bid on a custodial contract was received on June 25, 1973 and was not processed expeditiously, resulting in Mattison's preparing the file and forwarding it on July 13, since Brogan did not do so; (c) several small contracts, as refuse collection for cambria AFS, were not ready for award by July 1, 1973. The letter also recited that Brogan exhibited a lack of organization and concern, allowing documents to pile up so that a search was required to locate same, and that she was tardy in four successive days, July 9 through 11 as specified. It further stated that the supervisor would assist Brogan in organizing or supervising her work; that her work would be carefully observed, and failure to show improvement within 60-90 days could lead to personnel action against her; however, that since Brogan had the necessary job knowledge and capability, Mattison did not expect such action to be necessary.

10. Brogan, while not disputing the specific items set forth in Mattison's letter, testified that there was a big backlog at the end of the fiscal year; that Mattison told her to let Mary Allen, the construction buyer, process all of her construction contracts and let their contracts go till after the beginning of the new fiscal year; that she called the contractor to proceed with the services required. She further declared that she trained Sgt. Barnes as well as Allen; that her work was changed during her absences so that inapplicable clauses were added, information inserted, and pages renumbered out of sequence - all requiring revision by her upon returning to work.

11. Prem testified that Brogan did not produce as a procurement agent; that a great time lag existed between the time when purchase requests were received and action taken thereon by said employee, and, on one occasion Brogan did not write the purchase order until 53 days after its receipt; and she spent much time talking to others in the office or on the phone.

12. In July 1973, according to Prem, personnel performance standards, which were prepared for other branches previously, were developed for positions in the procurement branch. Between September 1973 and February 1974 suspense controls were instituted in the service buying section to control input and output. There had not been any controls imposed in respect to purchase requests, and tabs were put on all employees in the section.

13. Robert B. Gottfredson, chief of employment and career development, testified, and I find, that Brogan was on the list of eligibles for a GS-11 while in procurement, but not among the highest thereon. She was one of eight rated as highly qualified when Mattison was selected as supervisor in October 1972. When Mattison left, Brogan was rated as qualified but not among the best qualified employees in that branch.

14. Captain Gerken, who replaced Mattison, testified that Brogan's work was sub-standard; that she was absent frequently without permission, presumably on union business. He stated, however, that neither the workload nor her absences for union activities had a bearing on the quality of her work; that she did not schedule her work properly; that her work was not proficient, requiring him or others to redo it on occasion. Gerken spoke to Prem and Colonel Calvert who asked how Brogan was performing, and he informed them she was not doing well and did not meet her suspenses, i.e., getting specification for the user, preparing a package, and getting wage determinations from the DOL - all well in advance of the package going out into the mail for bid.

During the first two weeks of October 1973 Gerken prepared a letter 10/ addressed to Brogan, which was a proposal to separate her from the federal service for poor performance. The letter set forth numerous alleged instances of poor performance and mistakes by Brogan in handling purchase orders and contracts, as well as her failure to take action in specific matters. It was never given to Brogan since the ultimate decision by Respondent was to reassign her in lieu of separation.

15. In and about September or October 1973, as a result of complaints by supervisors in procurement to Allen Cullman, civilian personnel officer, meetings were held to discuss Brogan's work performance. Cullman testified that it was felt the union business attended to by Brogan interfered with her work; that while she had a good knowledge of procurement tasks, she couldn't meet deadlines due to union business conducted by her. At these meetings consideration was given to reassigning Brogan to a place where her absences to attend

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10/ Respondent's Exhibit 8.

to union affairs would not be critical upon organizational performance. Since there were so few employees in service buying, her absences affected the productivity of the unit. At subsequent meetings in January or February 1974, Cullman proposed the reassignment to Colonel Carter, and management representatives discussed whether it was proper to reassign Brogan in view of her position with the union and what effect it might have upon labor-management relations at the base.

16. Colonel Carter, who approved the reassignment of Brogan testified he received complaints from Colonel Calvert and Captain Gerkin re Brogan's poor job performance in September and October 1973. 11/ They advised him she could not accomplish her assignment and tasks in procurement due to her involvement in so many union matters. Moreover, since there were only two regulars as service buyers plus an added person to assist, 50% of the staff was absent when she left the job. Her supervisors stated they had no control over the time Brogan spent on her regular duties and on other matters. Carter averred he spoke to the unions president on several occasions with respect to this matter, and also tried to establish a reasonable time to be allotted to each endeavor. No definitive arrangement was ever reached in respect thereto.

Carter testified he discussed the reassignment with other management officials; that no mention was made of an intention to retaliate against her for filing charges or engaging in union business; that the decision was due to the fact that the quality of work performed by procurement was suffering as a result of Brogan's performance on the job and being away therefrom so often; and that the reassignment was not effected downgrade Brogan.

17. Brogan was detailed on February 11, 1974, and reassigned on April 14, 1974, to the civil engineering squadron (Engineering and Construction Branch) as a Service

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11/ To the extent that Brogan failed to deny the specific instances of her neglect or poor performance, as testified to by Mattison, Gerken, and Prem, her supervisors - their testimonies are credited in that regard.

Contract Specialist. A meeting was held to discuss the detail several days thereafter, and was attended by Marie Brogan, Homer R. Hosington, NFFE representative, Colonel Carter and Commander Jonathan J. Lustig, Civil Engineering Branch. In addition to resisting the detail, Brogan had three objections: (a) the recital in a letter to Lustig, written prior thereto, of Brogan's poor performance and the displeasure of management; (b) the Civil Service Administration numerical designation of her functional area; (c) possible jeopardy of her future grade since she was being transferred to a job performed by someone else as a GS-7. The parties worked out certain corrections and changed some details to make it more agreeable to Brogan. Carter agreed to delete the reference in a letter 12/ to Brogan dated February 5, 1974, regarding her poor performance, and Hosington concurred that she would have more time and opportunity in her new job to work with the union.

18. Colonel Carter testified the detail of Brogan was to a position which could take advantage of her procurement experience and still put her closer to the union representatives. Since Brogan would be spending much time in contract negotiations, management wanted to schedule her work around the union activities. It did not want to let an overbalance of union duties interfere with a sensitive job requiring continuity of performance.

19. As a service contract specialist Brogan reports to the chief of construction management section, Mr. McComb. It is a new civilian position, having been an existent military job directed to civilian as part of an Air Force conversion project. Brogan represents the civil engineer as a central control point for monitoring contract performance - base custodial and other assigned contracts. The position description calls for monitoring a \$400,000 custodial contract. As a reassignment the position was exempt from competitive provisions of the merit promotion plan, and no advertisement therefore was necessary. As service contract specialist Brogan was responsible for insuring contractor compliance, which requires a knowledge of contracts and the negotiations involved. As contract inspector Brogan deals with contract changes and requests, and acts in liaison with the customers.

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12/ Respondent's Exhibit 10.

20. After her reassignment as a service contract specialist, Brogan was appointed as technical representative of the contracting office (TRCO) in respect to several individual contracts. <sup>13/</sup> The TRCO is responsible for monitoring the contractor's performance and inspecting the services reordered. He attends meetings when required, keep records of services received, notes deficiencies, and signs certificates of contract performance. He is required, under regulation 70-9 in evidence, <sup>14/</sup> to possess a high degree of technical knowledge of the service being procured.

21. Several of the contracts to which Brogan was assigned as TRCO required, *inter alia*, that she perform such tasks as (a) approving samples of all chemicals to be used; (b) inspect each exhaust system for satisfactory work; (c) insure that grease traps are properly cleaned and waste disposed of; (d) ensure that chemical toilets are maintained and serviced; (e) ensure that savaged pumped from the chemical toilets is properly disposed of; (f) ensure that pumping equipment and trucks are in good condition.

22. Although Brogan testified, and I find, that she was not familiar with the technical aspect of certain tasks, as heretofore specified, the record indicates the job could be performed without such technical knowledge. Further, Brogan may, if she needs assistance, call upon employees who are members of trades in regard to technical matters.

Conclusions

A. Colonel Calvert's Statements  
As Alleged Interference Under 19(a)(1)

Complainant Brogan contends that the statements made by Colonel Calvert on September 26, 1973, in the presence of other employees, regarding the union president, constituted interference and restraint in violation of the

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<sup>13/</sup> Complainant's Exhibits 8(a) thru (c)

<sup>14/</sup> Complainant's Exhibit 10.

Order. She insists that the remarks were part of a design and program to frustrate Brogan's activism on behalf of the union herein, and that, as uttered, they convey an implied threat to accomplish such aim.

After reviewing carefully the statements made by Calvert at the meeting on September 26, concerning charges and complaints filed by Marie Brogan, I am not persuaded that they were violative of 19(a)(1). It is noted that Calvert had just recently assumed his position as chief of base procurement, and he had been confronted with the numerous charges and complaints filed by Brogan, as union representative, against management. His queries, rhetorical in form, as to (a) what could be done to stop Brogan from filing charges and (b) whether an arbitrator could not be brought in to handle them, were not, in my opinion, a threat, express or implied, directed toward that employee. Calvert's words evinced an understandable concern, and they bespoke of a desire to eliminate these adversary matters which consumed so much time, as well as diverted employees from their duties and work performances. Neither was Calvert's question, as to what recourse management had against Brogan if the charges proved groundless, reflective of an intention to punish her for engaging in union activities. It is seemingly referable to an inquiry concerning management's rights in this regard, and I find nothing coercive in an employer's attempt to protect itself from a flow of charges which may be found to be without merit. In any event, within the framework of a new officer becoming acquainted with the numerous grievances and complaints filed against the base, I do not consider his comments in this regard indicative of an intent to either frustrate or interfere with the rights of Brogan, or other employees, guaranteed by the Order.

In respect to Calvert's statement that he had a drawer or file of Brogan's charges and complaints going back to 1968, I do not conclude it carries the implication that management was either monitoring Brogan's union activities or engaging in espionage thereof. Brogan's testimony reveals that Calvert's remark was in reply to her inquiry as to how he knew so much of her activities since she hardly spoke to him since his arrival. In this posture, Calvert's retort was a legitimate explanation of his familiarity with her numerous activities resulting in the filing of charges and complaints.

Moreover, his representation, in answer to Brogan's further query, that there was no file or drawer on any other employee does not alter my conclusion. Since, for the most part, Brogan filed all grievances and complaints on behalf of other employees and the union, it is understandable that management would not have other files or records of such filings. Thus, Calvert's comment in this regard does not warrant the conclusion that Respondent was "keeping tabs" on Brogan's union activities. It might well be expected that management would keep a file on charges or complaints filed by other individuals if numerous enough to require this procedure. In any event, the statements re the retention of a file or drawer of charges initiated by Brogan solely does not, in my opinion, reflect an effort, on management's part, to interfere with her actions in this regard. Rather, do they reveal a legitimate right of Respondent to maintain files or records of charges and complaints processed, albeit by Brogan or other employees. In light of this concern, I find no restraining force in Calvert's statements, and would conclude they are not violative of the Order.

B. Reassignment of Brogan As  
Allegedly Discriminatory Under The Order

The basic contention by Complainant Union herein is that Marie Brogan was detailed out of the procurement unit, and then reassigned permanently, to civil engineering because of her active participation as union president. It is alleged that Brogan's constant attendance to grievances and complaints on behalf of her fellow employees, motivated the detail on February 11, 1974 and the permanent reassignment, effective on April 14, 1974.

Under Section 19(a)(2) of the Order, as patterned after 8(a)(3) of the National Labor Relations Act, an employer may not discriminate against an employee's conditions of employment to discourage membership in a labor organization. The cases in the private sector are legion that a discharge of an employee, or other change of an employee's status, by an employer because of union activities will necessarily discourage such union membership and is hence an unfair labor practice. It is also established in that sector that even where the employer is only partly motivated

by an employee's union activity, the latter's discharge is violative of the National Labor Relations Act. NLRB v. Great Eastern Color Lithograph 309 F 2d 352. On the other-hand, it is also settled that the protection afforded employees, in the private sector, to engage in such activities may become unprotected in certain circumstances. Thus, an employee may not disregard his job in favor of union affairs and neglect his duties. His union activities do not insulate him from appropriate discipline when the employee fails to perform his work properly. Northside Electric Company, 151 NLRB 34.

It is clear from the record that Brogan's work performance was a factor which ultimately led to her reassignment. Commencing in February or March, 1973, complaints were made regarding her handling of food services contracts, and finally in July 16, 1973 Brogan was notified that her performance was unsatisfactory. Specifically, after a purchase request and specifications for "food service" contract was given her, she failed to prepare solicitations and send same to bidders, and she neglected to prepare a procurement plan; failed to correct a mistaken bid on a custodial contract; failed to prepare refuse collection contracts for Cambria AFS and others for award; neglected to write a purchase order until 53 days after its receipt, and allowed a large time lag to occur between the date when other purchase orders were received and action taken on them by her; failed to meet her suspenses; was tardy on four successive days and other occasions; and did not schedule her work properly.

The appraisal of Brogan executed by Prem in 1970 does not negate the conclusion that her work was suffering from neglect and inattention. While Prem remarked in the appraisal that Brogan had outstanding knowledge of procedures and negotiation process as a contract administrator, he also adverted to her inability to accomplish work in a timely fashion and of her need to be more consistent in quality. In any event, all her supervisors were dissatisfied with Brogan's performance as a service buyer in 1973, and the dissatisfaction resulted in complaints to Colonel Evans and Colonel Carter as well as a proposal by her supervisor, Captain Gerken, that she be terminated from the service.

Complainant contends, in support of its alleged discrimination directed toward Brogan, that when Mattison left in October 1972 Respondent left the position vacant for a time and then filled it with a military person to further harass Brogan. It was further suggested that Brogan would have been a logical successor to Mattison. There is no evidence, despite management's seeking a replacement for Mattison outside the Air Force, that its action was designed to obstruct Brogan's career on her employment. Further, at this time, as appears from testimony of Gottfredson who was chief of career development, Brogan was rated as qualified, but not among the best qualified, in procurement.

In respect to the causes for reassigning Brogan to the civil engineering squadron, I am persuaded that her frequent absences from procurement to attend to union business was, in part, a reason for the transfer. While Mattison testified he would have managed if Brogan's work was adequate, he admitted that her continual and extended absences (which were not attributable to any endeavor other than union business) did affect the work assigned her. Further, Cullman, who proposed the reassignment, testified that management felt it was the union business to which she attended which interfered with Brogan's work. Both Calvert and Gerken advised Colonel Carter that the employee could not accomplish her tasks due to her extensive involvement in union business, and Carter testified he sought a position for Brogan which would allow her to spend more time on union activities but not require continuity of performance as was needed in procurement.

The record supports the conclusion that management was aware of Brogan's intensive actions on behalf of fellow employees in both filing grievances and complaints on their behalf. Her supervisors knew Brogan was involved in contract negotiations with management leading to a new labor agreement, and the evidence adduced herein establishes that Brogan's frequent absences from work - as well as lengthy phone calls - were for the purpose of transacting union business. Therefore, the critical issue is whether Brogan's activities of this nature protected her from the transfer out of procurement. Since it thus appears that her absences for union affairs were in part, at least, responsible for the transfer of Brogan, it is vital to consider these

activities and the amount of time spent thereon. 15/

In respect to Brogan's attendance to union affairs, as a union representative, the record reflects she devoted an unusual amount of time thereto. Her testimony reveals that between 25% to 90% of her day was spent on such activities, and that, on occasion, 90% of her daily time was so occupied. By her own admission Brogan could not always perform her work tasks when attending to union affairs 90% of the day. It also appears that, as testified to by her supervisor, Mattison, she often left the job without notifying him. Further, Brogan spent hours on the telephone attending to union business during her workday. Both of Brogan's supervisors, Mattison and Gerkin, also testified that she was warned about these excessive absences and their effect upon her job performance.

While I recognize that union activities of an employee must be accorded protection under the Order, this right to engage therein must at times be balanced against the right of an employer to insist upon performance by an employee of his assigned tasks in a timely and proper fashion. In the case at bar, I am convinced that Brogan's absences from duty, and her phone conversations, consumed an inordinate amount of time and thus prevented her from devoting sufficient number of hours to her job. The amount of time spent by Brogan on union business, without approval or sanction by management, was excessive and would necessarily reduce the effectiveness of the unit in which she work. In this instance, in view of the fact that only 2 regulars worked as service buyers, it could have a 50% effect upon productivity. See Northside Electric Co., supra.

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15/ Inasmuch as I have found that this was a reason for Brogan's transfer, it is only essential to determine whether her absences for union activities protected her from the change in her position. If protected, a violation has occurred; if unprotected, Respondent's action exculpates it from liability and it would reassign her at will. Thus, I find it unnecessary to consider Brogan's aptitude to perform the work of a contract specialist, and particularly as a TRCO since such evidence does not meet the aforesaid issue.

Record facts do not disclose an anti-union animus on the part of management in regard to Brogan's role as union president. She had been permitted considerable latitude in the performance of union duties while procurement, and the record is barren of any attempts or threats by Respondent to undertake retaliatory action toward this employee. In truth, the reassignment was made with the understanding - as expressed by Colonel Carter - that Brogan would have more time to devote to union business during her working day.

In sum, I am persuaded that Respondent was faced with taking some action toward Brogan based, in part, on her constant absences from work and inattention to duty. Whether or not such conduct on Brogan's part was directly responsible for her poor performance may be a subject of argument. Suffice it to say that such excessive absences and time spent on phone calls, albeit devoted to union business, does not insulate her from action taken by the employer to correct her abuses. Notwithstanding the zealous efforts devoted to union affairs by an employee, the latter must obey rules and requirements pertaining to employment. Failing to do so will subject such employee its discipline or other action by the employer. See *NLRB vs. Huber & Huber Motor Express* 36 LRRM 2241. Accordingly, and since Respondent took action toward Brogan which I deem not discriminatory under the Order, I conclude it has not violated Section 19(a)(2) thereof.

RECOMMENDATION

Having found that Respondent has not engaged in conduct violative of Sections 19(a)(1), (2), (4), and (6) of the Order, I recommend that the complaint herein be dismissed in its entirety.

  
 WILLIAM NAIMARK  
 Administrative Law Judge

MAR 18 1975

DATED:  
 Washington, D.C.

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

DEPARTMENT OF THE TREASURY,  
 BUREAU OF ALCOHOL, TOBACCO  
 AND FIREARMS,  
 WASHINGTON, D. C.  
 A/SLMR No. 538

This case involves a petition for clarification of unit filed by the National Treasury Employees Union seeking to clarify the description of its existing unit by including among the unit exclusions the category "confidential employees", and to clarify the status of employees designated as Clerk to the Area Supervisor. In disagreement with the Petitioner who contended that the Clerk to the Area Supervisor in each of the 45 Area Offices of the Activity's Bureau of Regulatory Enforcement should be included in the existing unit, the Activity contended that they are confidential employees and should be excluded from the unit.

The Assistant Secretary found that employees designated as Clerk to the Area Supervisor are confidential employees inasmuch as they act in a confidential capacity to an official who, in his capacity as head of an Area Office, is involved in effectuating management policies in the field of labor relations. He noted that an incumbent in this position, as the only clerical and administrative employee in an Area Office, types and processes paperwork involving disciplinary actions, reductions-in-force, and matters relating to the Area Supervisor's responsibility for labor relations.

Accordingly, the Assistant Secretary ordered that the description of the unit be clarified to include among the unit exclusions the category "confidential employees", and excluded the Clerk to the Area Supervisor in each of the 45 Area Offices from the unit.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO  
AND FIREARMS,  
WASHINGTON, D. C.

Activity

and

Case No. 22-5630(CU/AC)

NATIONAL TREASURY EMPLOYEES UNION

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition 1/ 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 briefs filed by the parties, the Assistant Secretary finds:

The Petitioner, National Treasury Employees Union, hereinafter called NTEU, seeks clarification of an existing exclusively recognized unit. Specifically, it seeks to clarify the description of the existing unit by including among the unit exclusions the category "confidential employees" and by clarifying the status of employees designated as Clerk to the Area Supervisor. In this latter regard, the NTEU contends that employees designated as Clerk to the Area Supervisor should be included in the existing unit. On the other hand, the Activity takes the position that these employees perform confidential labor-management duties which require their exclusion from the unit.

The Activity, headquartered in Washington, D. C., is engaged in criminal and regulatory enforcement of Federal laws pertaining to firearms, distilled spirits, the liquor industry, and the wagering industry.

1/ In its petition herein, the Petitioner sought, among other things, to amend the Certification of Representative, issued on April 23, 1973, to reflect the change in the name of the certified representative from the Petitioner's former name, the National Association of Internal Revenue Employees, to the National Treasury Employees Union. On February 21, 1975, the Area Director issued an appropriate amendment of certification in this regard.

Its enforcement program is carried out in seven Regional Offices. Located in each Regional Office is an Office of Regulatory Enforcement which is subdivided further into Area Offices located throughout the Region. Nationwide, there are 45 Area Offices, each headed by an Area Supervisor.

The record reveals that the employee complement of an Area Office for Regulatory Enforcement consists of a Clerk to the Area Supervisor and eight or more Inspectors. 2/ The record reveals that, under the terms of the parties' current negotiated agreement, most Area Supervisors are first-line supervisors having authority to adjust grievances at the first step of the negotiated grievance procedure. 3/ In Area Offices which have an Officer In Charge, the Area Supervisor is the second level supervisor and, as noted above, is authorized to adjust grievances at the second step (initial formal stage) in the administration of the grievance procedure. Further, each Area Supervisor, in his capacity as head of the Area Office, has overall personnel responsibilities pertaining to that office.

The record reveals that the Clerk to the Area Supervisor is the only clerical and administrative employee in each of the 45 Area Offices for Regulatory Enforcement. In addition to performing normal typing and filing duties and having the overall responsibility for maintaining Area Office files, the evidence establishes that an incumbent in this position is involved in handling records relating to personnel and labor relations in the particular Area Office. In this regard, the record reveals that the incumbent types and processes paperwork involving disciplinary actions, reductions-in-force, and matters relating to the Area Supervisor's responsibility for labor relations.

Under these circumstances, I find that Clerks to the Area Supervisors are confidential employees inasmuch as they act in a confidential capacity to an official who, in his capacity as head of the Area Office, is involved in effectuating management policies in the field of labor relations. 4/ Accordingly, I shall exclude the Clerk to the Area Supervisor in each of the 45 Area Offices for Regulatory Enforcement from the existing exclusively recognized unit.

2/ An Area Office servicing a geographic area where distilleries are located also has a Plant Officer and an Officer In Charge. The Officer In Charge is responsible to the Area Supervisor and supervises Inspectors who are assigned to distilleries.

3/ Article 34, Section 7, of the agreement designates to the first-line supervisor the authority to adjust grievances at the first step of the grievance procedure, and authorizes a second level supervisor to adjust grievances at the second step (initial formal stage) of the grievance procedure.

4/ Cf. Department of Transportation, Federal Aviation Administration, Flight Inspection District Office, Battle Creek, Michigan, A/SLMR No. 313, and cases cited at footnote 10.

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the National Treasury Employees Union on April 23, 1973, be, and it hereby is, clarified to read as follows:

All General Schedule and Wage Grade employees employed by the Regional Offices of the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, located throughout the country, excluding employees engaged in criminal enforcement, professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined by Executive Order 11491, as amended.

IT IS FURTHER ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the National Treasury Employees Union on April 23, 1973, be, and it hereby is, clarified by excluding from the above-designated unit employees designated as Clerk to the Area Supervisor in each of the 45 Area Offices for Regulatory Enforcement.

Dated, Washington, D. C.  
July 30, 1975

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

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

DEPARTMENT OF DEFENSE,  
STATE OF NEW JERSEY  
A/SLMR No. 539

On November 16, 1973, the Assistant Secretary issued an Order Referring Major Policy Issue To The Federal Labor Relations Council in A/SLMR No. 323 in which he concluded that a refusal to permit the National Army and Air Technicians Association, I.U.E., AFL-CIO, (Complainant), in connection with the processing of an employee's grievance, access to documents which reflected an evaluation panel's assessment of "Best Qualified" candidates would constitute a violation of Section 19(a)(1) and (6). However, it was noted that the Respondent's defense in the matter -- i.e., that the Federal Personnel Manual prohibits the disclosure of such information -- raised a major policy issue which required referral to the Federal Labor Relations Council.

On May 22, 1975, the Federal Labor Relations Council issued its Decision finding that:

. . . applicable laws and regulations, including policies set forth in the Federal Personnel Manual, do not specifically preclude the Respondent from disclosing to the grievant (or his representative), in the context of a grievance proceeding, certain relevant and necessary information used by the evaluation panel in assessing the qualifications of the six "Best Qualified" candidates for appointment. Thus, the agency can make such relevant information available to the grievant (or his representative) without any violation of law, rules, or Commission directive provided the manner in which the information is made available protects the privacy of the employees involved by maintaining the confidentiality of the records containing such relevant information.

In the Council's view, disclosure to the grievant of such relevant materials (after measures are taken to protect the privacy of the employees involved by procedures such as those described in the appendix) effectuates the purposes of the Order. That is, disclosure of the materials may enable the grievant to decide whether or not to proceed with his grievance, while the requisite anonymity protects the privacy of the Federal employee, as required by law and regulation.

Based on the rationale contained in the Council's Decision, as well as in A/SLMR No. 323, the Assistant Secretary found that the Respondent's refusal to permit the Complainant, in connection with the processing of an employee's grievance, access to documents which reflected the evaluation panel's assessment of "Best Qualified" candidates violated Section 19(a)(1) and (6) of the Order. Under these circumstances, the Assistant Secretary ordered that the Respondent cease and desist from conduct found violative of the Order and that it take affirmative actions consistent with his decision.

A/SLMR No. 539

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,  
STATE OF NEW JERSEY

Respondent

and

NATIONAL ARMY AND AIR TECHNICIANS  
ASSOCIATION, I.U.E., AFL-CIO

Case No. 32-2833(CA)  
A/SLMR No. 323  
FLRC No. 73A-59

Complainant

SUPPLEMENTAL DECISION AND ORDER

On November 16, 1973, I issued an Order Referring Major Policy Issue To The Federal Labor Relations Council. <sup>1/</sup> In connection with that determination, it was concluded that the Respondent's conduct in refusing to permit the Complainant, in connection with the processing of an employee's grievance, access to documents which reflected an evaluation panel's assessment of "Best Qualified" candidates, would constitute a violation of Section 19(a)(1) and (6) of the Order. However, it was noted that the Respondent's defense in this matter -- i.e., that the Federal Personnel Manual prohibited the disclosure of the information sought by the Complainant -- raised a major policy issue which required referral to the Federal Labor Relations Council. Accordingly, the following major policy issue was referred to the Council for decision: "<sup>1/</sup>Whether applicable laws and regulations, including policies set forth in the Federal Personnel Manual, preclude the Respondent from disclosing to the Complainant, in the context of a grievance proceeding, certain relevant and necessary documents used by the evaluation panel in assessing the qualifications of the six 'Best Qualified' candidates for appointment, including the grievant."

On May 22, 1975, the Federal Labor Relations Council issued its Decision On Referral Of A Major Policy Issue From Assistant Secretary wherein it found, in pertinent part, that:

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<sup>1/</sup> A/SLMR No. 323

. . . applicable laws and regulations, including policies set forth in the Federal Personnel Manual, do not specifically preclude the Respondent from disclosing to the grievant (or his representative), in the context of a grievance proceeding, certain relevant and necessary information used by the evaluation panel in assessing the qualifications of the six "Best Qualified" candidates for appointment. Thus, the agency can make such relevant information available to the grievant (or his representative) without any violation of law, rules, or Commission directive provided the manner in which the information is made available protects the privacy of the employees involved by maintaining the confidentiality of the records containing such relevant information.

In the Council's view, disclosure to the grievant of such relevant materials (after measures are taken to protect the privacy of the employees involved by procedures such as those described in the appendix) effectuates the purposes of the Order. That is, disclosure of the materials may enable the grievant to decide whether or not to proceed with his grievance, while the requisite anonymity protects the privacy of the Federal employee, as required by law and regulation.

Based on the Council's holding in the instant case, as well as the rationale contained in A/SLMR No. 323, I find that the Respondent's refusal to permit the Complainant, in connection with the processing of an employee's grievance, access to documents which reflected the evaluation panel's assessment of "Best Qualified" candidates violated Section 19(a)(1) and (6) of the Order.

#### ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Defense, State of New Jersey shall:

1. Cease and desist from:

(a) Refusing to permit the National Army and Air Technicians Association, I.U.E., AFL-CIO, access to the documents which reflect the

evaluation panel's assessment of Vincent Tallone and the other applicants who were placed in the "Best Qualified" candidate category pursuant to Vacancy Announcement No. 72-5.

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

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

(a) Upon request, and after appropriate measures are taken to protect the privacy of the employees involved, permit the National Army and Air Technicians Association, I.U.E., AFL-CIO, access to:

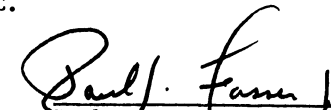
(1) the documents which reflect the evaluation panel's assessment of Vincent Tallone and the other applicants who were placed in the "Best Qualified" candidate category pursuant to Vacancy Announcement No. 72-5.

(2) whatever information the evaluation panel used in assessing the qualifications of the six applicants who were placed in the "Best Qualified" candidate category pursuant to Vacancy Announcement No. 72-5.

(b) Post at its New Jersey facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Department of Defense, State of New Jersey and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of the order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.  
July 30, 1975

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

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

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

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to permit the National Army and Air Technicians Association, I.U.E., AFL-CIO, access to the documents which reflect the evaluation panel's assessment of Vincent Tallone and the other applicants who were placed in the "Best Qualified" candidate category pursuant to Vacancy Announcement No. 72-5.

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, and after appropriate measures are taken to protect the privacy of the employees involved, permit the National Army and Air Technicians Association, I.U.E., AFL-CIO, access to:

- (1) the documents which reflect the evaluation panel's assessment of Vincent Tallone and the other applicants who were placed in the "Best Qualified" candidate category pursuant to Vacancy Announcement No. 72-5.
- (2) whatever information the evaluation panel used in assessing the qualifications of the six applicants who were placed in the "Best Qualified" candidate category pursuant to Vacancy Announcement No. 72-5.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

is 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.

employees have any question concerning this Notice or compliance with any its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515, 1515 Broadway, New York, New York 10036.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SAN ANTONIO AIR LOGISTICS CENTER,  
 SAN ANTONIO AIR MATERIEL AREA (AFLC),  
 KELLY AIR FORCE BASE, TEXAS  
 A/SLMR No. 540

SAN ANTONIO AIR LOGISTICS CENTER,  
 SAN ANTONIO AIR MATERIEL AREA (AFLC),  
 KELLY AIR FORCE BASE, TEXAS

Respondent

and

Case No. 63-5064(CA)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, LOCAL UNION 1617, AFL-CIO

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local Union 1617, AFL-CIO, (AFGE) alleging that the San Antonio Air Logistics Center, San Antonio Air Materiel Area (AFLC), Kelly Air Force Base, Texas (Respondent), violated Section 19(a)(1) and (6) of the Order by virtue of its actions in unilaterally changing, without notice to the AFGE, a practice and/or condition of employment, i.e., the utilization of official time by employee representatives.

On April 22, 1975, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The parties were involved in negotiations for an agreement with respect to a unit of General Schedule (GS) employees represented exclusively by the AFGE. The record reflects that the Complainant's President was shown, during the course of a meeting on April 3, 1975, with management representatives, a copy of an undated letter (apparently a draft of the letter issued April 4, 1974) and his comments were requested. Upon learning that this was not his personal copy, he withheld comment until such time as he could obtain a copy and could study its contents. He was assured that he would receive a copy and the meeting ended. On April 4, 1974, the Respondent sent a letter to its supervisors, which was shown to the AFGE President by another employee's supervisor, in which it was stated that official time for employee representatives could not be granted for more than eight hours per pay period without permission being obtained from the branch chief, or higher authority. Prior to April 4, 1974, employees' immediate supervisors granted official time which, the record reflected, had been generally unlimited.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, including the Respondent's exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge. Thus, under the circumstances herein, I find that no impasse had been reached by the parties on a negotiable issue in the course of their bargaining for a negotiated agreement, and that, therefore, the Respondent's unilateral change of a term and condition of employment was violative of Section 19(a)(1) and (6) of the Order.

The Assistant Secretary agreed with the Administrative Law Judge that it is well established that if the parties reach an impasse following good faith negotiations, an employer may unilaterally impose changes in working conditions which do not exceed the offers or proposals made in the prior negotiations. In the instant case, however, the Assistant Secretary found that the parties had not reached an impasse on a negotiable issue and that the Respondent's unilateral change in a term and condition of employment was violative of Section 19(a)(1) and (6) of the Order.

ORDER

Accordingly, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, and issued an appropriate remedial order.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the San Antonio Air Logistics Center, San Antonio Air Materiel Area (AFLC), Kelly Air Force Base, Texas, shall:

1. Cease and desist from:

(a) Changing the policy or regulations governing use of official working time by employee representatives, or any other condition of employment which is the subject of collective bargaining negotiations during the course of such negotiations, unless an impasse has been reached in such negotiations and appropriate notice of any proposed change is given to the American Federation of Government Employees, Local Union 1617, AFL-CIO, or any other exclusive representative.

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

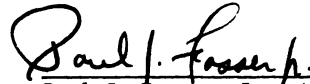
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Revoke any unilaterally established change in policy or regulations governing use of official working time by employee representatives which is the subject of collective bargaining negotiations unless an impasse has been reached in such negotiations and appropriate notice of any proposed change is given to the American Federation of Government Employees, Local Union 1617, AFL-CIO, or any other exclusive representative.

(b) Post at its facility at Kelly Air Force Base, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, San Antonio Air Logistics Center, San Antonio Air Materiel Area (AFLC), Kelly Air Force Base, Texas, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.  
July 30, 1975

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

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the policy or regulations governing use of official working time by employee representatives, or any other condition of employment which is the subject of collective bargaining negotiations during the course of such negotiations, unless an impasse has been reached in such negotiations and appropriate notice of any proposed change is given to the American Federation of Government Employees, Local Union 1617, AFL-CIO, or any other exclusive representative.

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

WE WILL revoke any unilaterally established change in policy or regulations governing use of official working time by employee representatives which is the subject of collective bargaining negotiations unless an impasse has been reached in such negotiations and appropriate notice of any proposed change is given to the American Federation of Government Employees, Local Union 1617, AFL-CIO, or any other exclusive representative.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

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

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



..... :  
In the Matter of :  
SAN ANTONIO AIR LOGISTICS CENTER :  
SAN ANTONIO AIR MATERIEL AREA (AFLC) :  
KELLY AIR FORCE BASE, TEXAS :  
Respondent :  
and :  
AMERICAN FEDERATION OF GOVERNMENT :  
EMPLOYEES, LOCAL UNION 1617, AFL-CIO :  
Complainant :  
..... :

Case No. 63-5064 (CA)

Major John T. Dorman  
San Antonio Air Logistics Center  
Kelly Air Force Base, Texas 78241  
For the Respondent

Mr. Glen J. Peterson  
National Representative  
American Federation of Government Employees  
Local Union 1617, AFL-CIO  
Post Office Box BB  
Boerne, Texas 78006  
For the Complainant

Before: BURTON S. STERNBURG  
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a complaint filed on August 9, 1974, under Executive Order 11491, as amended, by American Federation of Government Employees, Local 1617, AFL-CIO, (hereinafter called the Union or Complainant) against the San Antonio Air Logistics Center, San Antonio Air Materiel Area (AFLC),

Kelly Air Force Base, Texas, (hereinafter called the Agency or Respondent), a Notice of Hearing on Complaint was issued by the Regional Director for the Kansas City, Missouri, Region on December 12, 1974.

The complaint alleges, in substance, that the Agency violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in unilaterally changing a practice and/or condition of employment with respect to the utilization of official time for processing grievances.

A hearing was held in the captioned matter on February 25, 1975, in San Antonio, Texas. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

The Union is the exclusive bargaining representative in four separate bargaining units at Kelly Air Force Base. On the date involved herein (April 4, 1974), the Union and the Respondent were engaged in separate negotiations for contracts covering two of the units, the GS unit and the Police unit. Subsequent to April 4, 1974, the parties reached agreement on a contract for the Police unit. No collective bargaining agreement, however, was reached, as of the date of the hearing, covering the general schedule employees comprising the GS unit, the unit involved in the instant complaint. Although a number of proposed contractual provisions for the GS unit had been unsuccessfully discussed prior to April 4, 1974, many other such subjects or provisions, due to lack of sufficient negotiating time, had yet to be reached in the negotiations. Accordingly, as of April 4, 1974, no impasse existed with respect to the complete contract negotiations and/or respective proposals for the GS unit.

Among the proposals discussed prior to April 4, 1974, without agreement having been reached thereon, were those of the Respondent concerning limitations on the activities of both unit employees and stewards in the area of grievance representation. Thus, the Respondent, being concerned over the unlimited official working hours being utilized by various employees in representing other employees in the area of grievances or complaints, attempted, and/or proposed, to put



some sort of restriction on the amount of official time allotted for the processing or presentation of grievances. Respondent's proposals, which were stated in percentages, ran from four to eight hours per representative per two week pay period. The Union, on the other hand, declined to incorporate any such restriction, opting instead for "reasonable time" in accordance with the provisions of A. F. Regulation 40-771, generally applicable to all Air Force installations, including Kelly Air Force Base.

Prior to April 4, 1974, GS unit employees were generally allowed unlimited representation time with respect to the handling or processing of grievances and/or complaints. Thus, according to the record, the employee designated as the representative merely approached his immediate supervisor, stated the grievance or complaint involved, and was then customarily granted an administrative permit allowing him to perform the appropriate representation activities on official time without restriction. The aforementioned ease in obtaining the administrative permits resulted in some individual employees spending a great deal of their official working time on grievances, since, by virtue of their demonstrated expertise or success, they were continually being selected by their fellow employees as their respective representatives. The record further reveals that prior to April 4, 1974, the Respondent was successful in its attempt to restrict the hours spent per employee on "representation" in the Nurses and Wage Grade units by incorporating time limitations on such activities in the collective bargaining contracts covering such units. Subsequent to April 4, 1974, as noted above, the Respondent reached agreement with the Union on a contract covering the Police unit which contained similar "representation" restrictions.

On April 3, 1974, Robert Vachon, President of Local 1617, met in the civilian personnel office with Colonel Stevens, Director of Personnel, and Charles Roberts, Civilian Personnel Officer. During the course of discussion on another unrelated matter, Colonel Stevens handed Mr. Vachon a tissue copy of an undated letter and solicited Mr. Vachon's comments thereon. Mr. Vachon started to read the letter and then asked if it was his copy. Upon receiving a negative reply and being informed that he would receive a copy, Mr. Vachon stated that he had been caught cold and that he would withhold comment until such time as

he could study the letter. After Mr. Vachon was reassured that he would be "getting a copy", the meeting ended without further discussion. 1/

On April 4, 1974, Mr. Vachon became involved in a dispute with supervisor Don Lee with respect to employee Manual Martinez representing another employee in a complaint or grievance. During the discussion of the matter, Mr. Lee informed Mr. Vachon that he, Lee, was going to restrict the use of employee Martinez' time in representing employees "in accordance with the policy". Mr. Lee then proceeded to hand Mr. Vachon a copy of a letter dated April 4, 1974, to all supervisors from Colonel Robert Stevens. The letter which was identical to the undated tissue paper draft shown to Mr. Vachon a day earlier read in pertinent part as follows:

1. To assure that employees devote most of their clock time to the performance of "job description" duties, supervisors must exercise increased control in this area by:
  - a. Accumulating and retaining all administrative permits issued to employee representatives during each pay period and calculating the amount of official time utilized by each during that pay period for the performance of representational duties, and
  - b. Assuring that any period of official time in excess of eight hours per pay period is approved in advance by the branch chief or higher authority.

Discussion and Conclusions

It is well settled, both under the Executive Order applicable to public employees and the National Labor Relations Act applicable to employer-employee relations in the private sector, that a unilateral change in a condition of employment without prior consultation or good faith bargaining is violative of Sections 19(a)(1) and (6) of the Executive Order and Sections 8(a)(1) and (5) of the National Labor Relations Act, respectively.

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1/ The foregoing description of the August 3, 1974, meeting is based upon the credited testimony of Mr. Vachon, whose testimony in this regard is substantially corroborated by Mr. Roberts.

It is further well established that, with the exception of negotiations for a complete collective bargaining contract, employers, following good faith consultation and/or negotiations, leading to impasse, may unilaterally impose changes in working conditions which do not exceed the offers or proposals made in the prior consultation or negotiations.

Lastly, it is well settled that in the field of management prerogative, i. e., the rights reserved under Section 12(b) of the Order, and employer may make unilateral changes provided that prior to the institution of such changes it gives adequate notice and upon request bargains and/or consults with the union concerning the impact on unit employees.

In the instant case the parties were still engaged in unfinished negotiations for a collective bargaining contract covering the GS unit at the time the Respondent elected to unilaterally change or restrict the "reasonable time" allotted under the Air Force Regulations for grievances or complaint representation to no more than eight hours per pay period without further consultation with higher management authority.

In defending its action with respect to the unilateral change, Respondent relies on two bases, i. e., management prerogative and impasse. With respect to impasse, Respondent cites various Circuit Court decisions under the National Labor Relations Act wherein unilateral changes were condoned. However, inasmuch as the Circuit Court cases relied upon by Respondent deal with changes after impasse in complete contract negotiations or impasse on particular subjects apart from contract negotiations I find such decisions to be inapplicable. If the principles developed under the National Labor Relations Act are to be applied, however, the Supreme Court's decision in N. L. R. B. v Katz 369 U. S. 736, would appear to be controlling. In Katz, supra, the Supreme Court found that in the absence of impasse on the entire collective bargaining contract under negotiation, unilateral changes in any condition of employment involved in the negotiations constitutes a violation of the duty to bargain in good faith imposed by Section 8(a)(5) of the National Labor Relations Act. Applying the Katz decision to the instant facts, it is clear that inasmuch as the unilateral change herein preceded impasse on the entire collective bargaining contract a violation of the duty to bargain within the meaning of Section 19(a)(6) is established. 2/

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2/ While decisions of both the Courts and the National Labor Relations Board in the private sector are not controlling, the Assistant Secretary has in the past looked to such decisions for guidance.

Moreover, and even assuming impasse justifying a unilateral change or that the change involved a management right reserved under Section 12(b) of the Order, the record is barren of any evidence indicating that adequate prior notice of the impending change was given to the Union. In the absence of such notice the Union could not, of course, make the requisite request for bargaining with respect to impact and/or implementation until the change became a fait accompli. In these circumstances I find that a violation of Sections 19(a)(6) is established. 3/

As to the Respondent's alternative defense, i. e., management prerogative, I find that under all the circumstances present herein, the Respondent is estopped from relying on same. Thus, I note that "reasonable time" for representation was a condition of employment established not by the Respondent but rather by the Air Force itself. While Respondent may bargain under the umbrella of the Regulation, it can not take it upon itself to unilaterally alter such condition of employment without further consultation with the Union. 4/ Additionally, it would appear that the Respondent waived any management prerogative that may have existed by virtue of its action in injecting the matter of "representation on working time" into the collective bargaining negotiations in an attempt to secure a contractual provision concerning same. Once surrendering its so-called management prerogative, particularly in the circumstances present herein, Respondent is obligated to treat the subject matter involved as any other condition of employment, and await a good faith impasse on the complete contract before effecting any unilateral changes thereon. To hold otherwise, would give the Respondent a distinct advantage in collective bargaining negotiations, since a union would always be operating under the cloud or threat of withdrawal should it reject a management proposal during collective bargaining negotiations on a non-mandatory subject. Such cloud would definitely be a detriment to concessions and an impediment to negotiations.

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

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4/ C. F. Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas. A/SLMR No. 322.

I further conclude that by this same conduct, Respondent violated Section 19(a)(1) of the Executive Order in that such conduct inherently interferes with restrains and coerces unit employees in their right to have their exclusive representative act for and represent their interests, in matters concerning grievances, personnel policies and practices as assured by Section 10(e) of the Order. 5/

Recommendations

Having found that Respondent has engaged in certain conduct which is violative of Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes and policies of the Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the San Antonio Air Logistics Center, San Antonio Air Materiel Area (AFLC), Kelly Air Force Base, Texas, shall:

1. Cease and desist from:

(a) Unilaterally changing the policy or regulation governing use of official working time by employee representatives or any other condition of employment which is the subject of collective bargaining negotiations until such time as a total impasse is reached on such negotiations and appropriate notice of any proposed change is given to American Federation of Government Employees, Local Union 1617, AFL-CIO, or any other exclusive representative.

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


5/ Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange A/SLMR No. 454.

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

(a) Revoke any unilaterally established change in policy or regulation governing use of official working time by employee representatives until such time as a total impasse is reached in collective bargaining negotiations for a contract covering the GS unit and appropriate notice of any proposed change is given to American Federation of Government Employees, Local Union 1617, AFL-CIO, or any other exclusive representative.

(b) Post at its Kelly Air Force Base, San Antonio, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor-Management Relations. Upon receipt of such forms, they shall be signed by Colonel Robert E. Stevens, USAF, Chief of Personnel, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Colonel Roberts shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

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

  
BURTON S. STERNBURG  
Administrative Law Judge

Dated: April 22, 1975  
Washington, DC

NOTICE TO ALL EMPLOYEES

APPENDIX

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:

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

WE WILL NOT unilaterally change the policy or regulations governing use of official working time by employee representatives or any other condition of employment which is the subject of collective bargaining negotiations until such time as a total impasse is reached on such negotiations and appropriate notice of any proposed change is given to American Federation of Government Employees, Local Union 1617, AFL-CIO, or any other exclusive representative.

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

WE WILL revoke any unilaterally established change in policy or regulation governing use of official working time by employee representatives until such time as a total impasse is reached in collective bargaining negotiations for a contract covering the GS unit and appropriate notice of any proposed change is given to American Federation of Government Employees, Local Union 1617, or any other exclusive representative.

\_\_\_\_\_  
(Agency or Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

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

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

FEDERAL ENERGY ADMINISTRATION,  
 REGION IV, ATLANTA, GEORGIA  
 A/SLMR No. 541

This proceeding involved an unfair labor practice complaint, filed by the National Treasury Employees Union, alleging that the Respondent violated Section 19(a)(1) of the Order by interfering with, restraining and coercing an employee in the exercise of his union activities, including his circulating of a representation petition as well as his obtaining signatures to support such petition. It alleged further that certain statements made to the employee by a management representative were coercive in nature and also violative of 19(a)(1).

The Administrative Law Judge found that the rule posted by the Respondent which limited employee solicitation on behalf of a union to nonworking time and in nonworking areas was improper as such solicitation was permissible on agency property provided it occurs during nonworking time. The Administrative Law Judge also found that a statement made to the employee at a meeting of July 30, 1974, constituted, in effect, an unwarranted limitation of the employee's rights and was invalid as it required that employee solicitation not be conducted on the Respondent's premises at any time. Accordingly, the Administrative Law Judge concluded that the Respondent's conduct violated Section 19(a)(1) of the Order.

The Administrative Law Judge also found that the questions asked of the employee by the Regional Administrator and another supervisor at a meeting of July 30, 1974, as to how many and which employees signed the representation petition was improper interrogation, and an unwarranted intrusion into the union activities of fellow employees, and therefore violative of Section 19(a)(1) of the Order.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the matter, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and issued an appropriate remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL ENERGY ADMINISTRATION,  
 REGION IV, ATLANTA, GEORGIA

Respondent

and

Case No. 40-5760(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On May 9, 1975, Administrative Law Judge William Naimark issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendation. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation and the Complainant filed a response to the exceptions and supporting brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent and the response to the exceptions and supporting brief filed by the Complainant, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

I concur with the conclusion of the Administrative Law Judge that the Respondent's interrogation of employee Skip Frey on July 30, 1974, <sup>1/</sup> concerning the names and number of those employees who had signed the

<sup>1/</sup> On pages 4,5,7 and 10 of his Report and Recommendation the Administrative Law Judge inadvertently referred to the date of the meeting between management and employee Frey as June 30, 1974, instead of July 30, 1974. These inadvertent errors are hereby corrected.

representation petition being circulated in behalf of the Complainant, constituted improper interference with employee rights assured by the Order. Further, I agree with the Administrative Law Judge's finding that the statements made by the Respondent's representatives at the July 30, 1974, meeting concerning limitations on where Frey could solicit signatures for the petition, as well as the documentary evidence of the Respondent's policy with respect to when and where solicitation on behalf of a union was permissible, as reflected in operational memo #58, 2/ improperly interfered with employee rights assured by the Order, in that both the oral and written statements would restrict the places where employees could solicit on behalf of a union during their nonwork time. In this regard, it was held in Charleston Naval Shipyard, A/SLMR No. 1, that, in the absence of any evidence of special circumstances, the limiting or banning of employee solicitation during nonwork time constituted improper conduct in violation of Section 19(a)(1) of the Order. Thus, in effect, the Assistant Secretary has found invalid, absent unusual circumstances, the prohibition by agency management of employee solicitation in their work areas during nonwork time.

Based on the foregoing, therefore, I find that the Respondent, by its interrogation of employee Skip Frey on July 30, 1975, by its oral expression of policy with respect to employee solicitation on that date, and by its written policy on employee solicitation as expressed in its operational memo #58, improperly interfered with, restrained, or coerced employees in the exercise of rights assured by the Executive Order and, thereby, violated Section 19(a)(1) of the Order.

ORDER

Pursuant to Section 6(b) of the Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Energy Administration, Region IV, Atlanta, Georgia, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their membership in, or activities on behalf of, the National Treasury Employees Union, or any other labor organization.

(b) Promulgating, maintaining or enforcing any directive, regulation or rule which prohibits or prevents employees from soliciting any other employees at their workplace during nonwork time on behalf of the National Treasury Employees Union, or any other labor organization, providing there is no interference with the work of the agency.

2/ Operational memo #58 was placed in evidence by the Respondent for the purpose of showing that the previous oral expression of its employee solicitation policy was "moot."


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

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

(a) Post at its facility at the Federal Energy Administration, Atlanta, Georgia, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Administrator of the Federal Energy Administration, Region IV, Atlanta, Georgia, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D. C.  
July 31, 1975

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



NOTICE TO ALL EMPLOYEES

PURSUANT TO  
A DECISION AND ORDER OF THE  
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS  
and in order to effectuate the policies of  
EXECUTIVE ORDER 11491, AS AMENDED  
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interrogate our employees concerning their membership in, or activities on behalf of, the National Treasury Employees Union, or any other labor organization.

WE WILL NOT promulgate, maintain or enforce any directive, regulation or rule which prohibits or prevents our employees from soliciting any other employees at their workplace during nonwork time on behalf of the National Treasury Employees Union, or any other labor organization, providing there is no interference with the work of the agency.

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

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

.....  
In the Matter of :  
FEDERAL ENERGY ADMINISTRATION :  
REGION IV :  
Respondent 1/ : CASE NO. 40-5760 (CA)  
and :  
NATIONAL TREASURY EMPLOYEES UNION :  
Complainant :  
.....

GERALD J. RACHELSON  
Program Manager, Employee-Labor Relations  
Federal Energy Administration  
Room 2409, Federal Building  
12th and Pennsylvania Avenue, N.W.  
Washington, D. C.  
For the Respondent

THOMAS N. LOFARO  
National Field Representative  
National Treasury Employees Union  
1730 K Street, N. W.  
Washington, D. C. 20006  
For the Complainant

BEFORE: WILLIAM NAIMARK  
Administrative Law Judge

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

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on December 19, 1974 by the Assistant Regional Director for Labor-Management Services Administration of the U.S. Department of Labor, Atlanta Region, a hearing in the above captioned case was held before the undersigned on February 11, 1975 at Atlanta, Georgia.

The proceeding herein was initiated under Executive Order 11491, as amended, (herein called the Order) by the filing of a complaint on October 9, 1974 by National Treasury Employees Union (herein called the Complainant) against Federal Energy Administration, (herein called the Respondent). It was alleged in said complaint that Respondent on July 30, 1974 violated Section 19(a)(1) of the Order by interfering, restraining and coercing employee Skip Frey's union activities, including his circulating a petition as well as his obtaining signatures to said petition for the exclusive recognition of Complainant as the employees' bargaining representative. Further, it was averred that certain statements made to Frey by Kenneth L. DuPuy, a Regional Administrator for Federal Energy Administration, on the aforesaid date, were coercive in nature and also violative of 19(a)(1).

Respondent filed a Motion to Dismiss 2/ the complaint in which it denied the commission of any unfair labor practices. It contended therein that any possible violation was de minimis, and that Respondent cured any infractions by issuing several memos advising employees of their rights under the Order.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, the parties filed briefs which have been duly considered.

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2/ This motion was denied by the Assistant Regional Director on December 19, 1974.

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

Findings of Fact

1. At all times material herein Elias (Skip) Frey was employed as a Federal Energy Administrator attached to the Louisville, Kentucky office, and during the summer of 1974 Frey was on a detail to, and working out of, the Atlanta, Georgia office of the Federal Energy Administration.

2. During the summer of 1974 Complainant conducted an organizational campaign among the FEA employees at Atlanta, Georgia. 3/ In connection with Complainant's efforts to represent the employees, Thomas LoFaro, National Field Representative of the Union, asked Frey, on or about July 25, 1974, to circulate a petition 4/ designating Complainant as their exclusive bargaining representative.

3. In accordance with LoFaro's request, Frey circulated a petition on July 25, to select Complainant as the bargaining representative, and he solicited signatures from fellow employees at work stations during working hours, at restaurants in the area, and during lunch hours on the Respondent's property.

4. On July 25, Guy Strong, an employee of Respondent, approached Frey and said he had told Texas Allen, Deputy Regional administrator, that Frey had circulated a petition. Strong remarked he probably got Frey in trouble by informing management of the matter.

5. Several days later, on July 30, Jim Esterday, Acting Director of Compliance and Enforcement for Respondent notified Frey to report to the office of Allen. After Frey reported to Allen's office, all three men went to the office of Kenneth DuPuy, Regional Administrator, where a meeting was held which lasted about one-half hour.

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3/ Complainant had not been previously designated or certified as the exclusive representative of Respondent's employees.

4/ All dates hereinafter mentioned are in 1974 unless otherwise indicated.



6. In respect to the meeting on June 30, Frey testified it occurred about 7:45 a.m. and lasted about 30 minutes. According to his version, Frey was asked if he knew why he was there and Frey replied it was because he passed out a petition. Whereupon Frey, attempting to defend himself, stated he was finished with the petition, had sent it back after getting signatures and he had only been to one union meeting.

Frey further testified DuPuy said they knew Frey was a union organizer; that he should have come to management first and told them he was passing out a petition and DuPuy would have made a room available across the street or somewhere else; that Frey could have held a meeting and done what Frey did if not on government property or working time. Further testimony by this employee reveals DuPuy said that due to the confidential nature of the work, the investigators weren't eligible for union membership. Moreover, if they had any problem 5/ DuPuy would take care of them; that Frey and the employees get into situations with unions and they create problems. Finally, DuPuy asked Frey how many signatures he obtained, to which he replied that 28 signed. Allen then asked who signed, and Frey answered he didn't know the individuals.

Respondent's version of this meeting was presented by Esterday who testified that the meeting occurred substantially as Frey had related. However, their testimonies vary in several respects. According to Esterday's testimony Frey was asked when and where he distributed the petition; and DuPuy told the employee he couldn't do so at work stations. The Regional Administrator of Respondent expressed concern that this activity not be done while people were at work or at work stations, and he raised a doubt whether it could be done on government property. Esterday testified DuPuy offered to arrange for a meeting place across the street at the Hyatt House, or a conference room on the 5th floor, if it were proper to conduct this activity on the premises. When Frey told DuPuy how he became involved, DuPuy allegedly said that the employee didn't need to tell him where Frey stood or why he circulated the petition, that he knew where Frey stood.

5/ Frey suggests this was referable to financial problems, since they were having troubles with finances at the time.

Further, Esterday did not recall that Frey was asked how many signed the petition. He remembered Frey being asked if he were aware that they must submit to the activity a list of people 6/. While he was, in fact, solicited for the United Fund during working hours, Esterday avers that management did not allow any solicitations on government time or property.

Based on the explicitness and directness of his testimony, coupled with Esterday's remark that the comments at the meeting were "pretty much" as described by Frey, I credit the latter's version of the meeting. 7/ Accordingly, I find, inter alia, that at the meeting on June 30 managements representatives told Frey (a) he should have come to them first and informed the employer he was passing out a petition, so that management could provide a room or space for him; (b) he could not circulate the petition (organizational) during working time or on government property - that they didn't care what he did if not on government property or government time. Further, I find that Respondent's representatives asked Frey, at the meeting, to supply the names of those who signed the petition as well as the number of those who signed it.

7. Respondent prepared and posted separate memorandae on July 23, August 23, and October 7, relative to the rights of employees during a union organization campaign. 8/ In substance, these postings advised employees that two unions were seeking to represent the FEA employees; that the latter had the rights to form, join or assist a union freely without penalty or reprisal, or to refrain from such activity; that "employees may engage in union activity, including solicitations and signing of petitions, only during non-working time, including lunch and break periods, and in non-working areas." 9/ (emphasis supplied); that all managerial and supervisory personnel were

6/ This is apparently referable to a showing of interest acquired by a union when filing a petition.

7/ Several other statements, which Frey testified were made by DuPuy, remain undenied.

8/ Respondent's Exhibits 3, 4, and 5.

9/ Operational memo #58, dated August 23. (Respondent's Exhibit 5)

admonished to remain neutral on union issues, and not to question employees on union matters.

Conclusions

In seeking a dismissal of the complaint herein, Respondent makes several contentions: (a) a written offer of settlement was made by Respondent, following the filing of the unfair labor practice charge, which the union refused to accept. Under Section 203.7(a) of the Regulations the complaint herein should have been dismissed, but the Assistant Secretary's Internal Manual prohibited accepting an offer of settlement unless embodied in the settlement agreement with an accompanying notice. Hence, it is urged the refusal to dismiss was arbitrary and capricious since the Assistant Secretary arbitrarily nullified its own regulations to Respondent's detriment; (b) assuming arguendo that interrogation by Respondent occurred, it was outside the scope of the complaint; (c) no violation of 19(a)(1) exists since management merely advised Frey he couldn't solicit during working time - which is within its rights under the Order - and any interrogation was designed to ascertain when and where solicitation occurred. Further, Respondent maintains it harbored no anti-union animus, and was only desirous of assisting Frey in conducting his activities in a proper place; and that any reference to the employee's union affiliation was for identification purposes and not intended to be derogatory in nature; (d) any violation, if it occurred, was de minimis; and the memos published by management, which advised employees of their rights under the Order, cured any conduct which may have constituted an infringement thereof.

Assistant Director's Refusal  
To Dismiss The Complaint  
After Respondent's Offer of Settlement

Respondent contends that these proceedings are improperly brought to hearing. It argues that since a satisfactory written offer of settlement was made to Complainant, the complaint should have been dismissed under Section 203.7(a) of the Assistant Secretary's Rules and Regulations. Apart from the fact that the applicable regulation is permissive rather than mandatory in respect to a dismissal of the complaint, I consider a determination of this issue to be an administrative one. It is neither my function to pass upon the merits or the

effect of an offer of settlement 10/, nor to substitute my judgment for that of the Assistant Regional Director in determining whether a proffered settlement warrants dismissal of a complaint. Accordingly, I reject the employer's contention in respect to this issue and will deny the motion to dismiss on this regard. 11/

Restrictions Imposed By Respondent  
Against Solicitation By Frey  
On Behalf of Complainant

The employer asserts that it did not interfere with the rights of Frey, or the Union, to engage in organizational activities. In confronting Frey on June 30, management insists it was only concerned with preventing solicitation by him of employees at work, and that such limitation was permissible under the Order. Such a restriction was allegedly in conformance with the employer's operational memo #58, dated August 23 which was addressed to all employees and posted by the activity.

Although refined in recent years, the principles in respect to union solicitation by employees have become well entrenched in the private sector as laid down by the National Labor Relations Board. Thus, employees have the right to solicit union membership on 'company' premises during their nonworking time unless unusual circumstances necessitate some restriction of that right to maintain production and discipline. Republic Aviation Corp. v. NLRB 324 U.S. 793, Stoddard-Quirk Mfg. Co. 138 NLRB 615. In this regard, the Supreme Court adopted the view of the Board that "working time is for work", thus entitling an employer to prohibit solicitation during working time.

10/ See U.S. Dept. of Air Force, Norton Air Force Base, A/SLMR No. 261.

11/ In view of my conclusions in respect to the remaining issues, as hereinafter set forth, Respondent's motion to dismiss the complaint for (a) lack of merit, (b) not embracing the evidence adduced, and (c) mootness, is also denied.

Recent decisional law in the private sector enunciated the doctrine that a rule which prohibits solicitation during "working hours" is invalid. A clear distinction was drawn between prohibiting solicitation during "working time" and "working hours", the latter term connoting a period of time from "clocking in" until "clocking out". A rule prohibiting solicitation during "working hours" was deemed invalid as encompassing hours other than work time. Essex International, Inc. 211 NLRB No. 112. Likewise, no solicitation rules which are enforced to preclude employees from distributing union literature in non-working areas are invalid. In such instances the rule is too broad since a balancing of interests requires that a limited intrusion upon an employer's property right is warranted. Patio Foods 165 NLRB No. 446. See Stoddard-Quirk Mfg. Co., supra.

Applying these principle to the case at bar, I am persuaded that the no-solicitation rule of Respondent, as expressed and published in operational memo #58, was an illegal rule. While it properly restricted union solicitation to work time, the prohibition of such activity at work areas is too broad under the cited cases. Decisional law in the private sector recognize that such solicitation may take place on company property provided it occurs during non-working time.

Moreover, in the application of Respondent's non-solicitation rule - as evidenced in the meeting on June 30 - the statements by management to Frey were an infringement upon employees' rights to engage in union solicitation. It has been heretofore found that DuPuy told Frey he didn't care what the latter did if not done on government property or working time. The limitation imposed by DuPuy upon Frey's solicitation was clearly invalid since it required that such activity not be conducted on the employer's premises. However, the prohibition with respect to solicitation by employees must be confined to outlawing such actions only during working time.

Prohibiting this activity in non-working areas flouts the rights accorded employees as set forth in private sector cases, and I see no reason shy a different rule should apply in the public sector with regard thereto. Support for this view is seen in Charleston Naval Shipyard, A/SLMR No. 1 where the promulgation and maintenance of a rule which prohibited employees from soliciting on behalf of a union during non-working time, or distributing literature in non-work areas

during non-work time, was held violative of 19(a)(1) of the Order. Accordingly, I conclude Respondent, by orally advising Frey that he could not obtain signatures on the union organizational petition on government property, interfered with employees' rights under the Order. Such interference constitutes a violation of Section 19(a)(1) there of. 12/

Interrogation By  
Respondent of Skip Frey

Recent decision by the Assistant Secretary have adopted the doctrine - now well established in the private sector - that interrogation by an employer of an employee re his union activities constitutes interference with rights guaranteed employees to join and assist labor organizations. Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 477; Vandenberg Air Force Base, California, A/SLMR No. 383.

Questions posed of Frey by management's representatives DuPuy and Allen as to how many, and which, employees signed the petition, fall within the framework of prohibitive inquiries. Such interrogation, designed to elicit information concerning the individual who designated the Complainant as their bargaining representative, is an unwarranted intrusion into the union activities of fellow employees. Conducted at a time when solicitation was illegally restricted, it must necessarily have a restraining and coercive effect upon an employee. Further, a union and its agents should be able to conduct an organizational campaign undisturbed by queries regarding those individuals who have affiliated with it. Inquiries of this nature, as made by Respondent's officials, constitute a direct interference with rights assured under

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12/ Respondent urges that, if a violation occurred, a remedy is inappropriate in view of the memos published by it affirming employees' rights. This argument is rejected since respondent's conduct, arising during union organization, constituted more than a "technical" violation. See Vandenberg Air Force Base, 439 2d Aerospace, A/SLMR No. 435.

the Order and are violative of Section 19(a)(1) thereof. 13/

RECOMMENDATIONS

Having found that Respondent has engaged in conduct which is in violation of Section 19(a)(1) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Energy Administration, Region IV, shall:

1. Cease and desist from

(a) Interrogating as to the membership in, or activities on behalf of the National Treasury Employees Union, or any other labor organization, of any of its employees.

(b) Promulgating, maintaining or enforcing any directive, regulation or rule which prohibits or prevents any of its employees from orally soliciting on its premises any other employees on behalf of National Treasury Employees Union, or any other labor organization, and/or from obtaining signatures on its premises of the employees on union authorization cards

13/ Complainant insists that DuPuy's statements that (a) Frey should have come to him before passing out a petition; (b) unions create problems and management could take care of problems arising, were also violative of the Order. In regard to (a) DuPuy was bespeaking of arranging a place for the union to solicit, and as to (b), Frey concedes this remark pertained to financial difficulties. While such comments might suggest employees should deal with Respondent in respect to particular matters, I am not persuaded that management sought thereby to thwart union representation. I conclude these remarks, in the context stated during the meeting of June 30, did not [continued on next page]


or petitions on behalf of National Treasury Employees Union, or any other labor organization, during non-working time.

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

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

(a) Post at its facility at the Federal Energy Administration, Atlanta, Georgia, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Administrator and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

  
WILLIAM NAIMARK  
Administrative Law Judge

DATED: May 9, 1975  
Washington, D. C.

13/ - continued

constitute interference, restraint or coercion and were not violative of the Order.

## N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interrogate as to the membership in, or activities on behalf of, the National Treasury Employees Union, or any other labor organization, of any of our employees.

WE WILL NOT establish, maintain or apply any directive, rule, or regulation which prohibits or prevents any employee from orally soliciting on its premises any other employees and/or obtaining signatures on its premises of other employees on union authorization cards or petitions, on behalf of the National Treasury Union or any other labor organizations, during 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 Executive Order 11491, as amended.

\_\_\_\_\_  
(Agency or Activity)

Dated: \_\_\_\_\_ By \_\_\_\_\_  
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

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

ARMY AND AIR FORCE EXCHANGE SERVICE,  
SOUTH TEXAS AREA EXCHANGE,  
LACKLAND AIR FORCE BASE, TEXAS  
A/SLMR No. 542

This proceeding arose upon the filing of an unfair labor practice complaint by the American Federation of Government Employees, Local 3202, AFL-CIO (Complainant) which alleged that the Respondent violated Section 19(a)(1), (5) and (6) of the Order when, after a reorganization, it ceased recognizing the Complainant as the exclusive representative of certain maintenance employees located at the Fort Sam Houston Exchange.

Prior to January 1974 the Fort Sam Houston Exchange was an autonomous exchange responsible directly to the Alamo Exchange Region within the Army and Air Force Exchange Service. Effective January 26, 1974, a reorganization was instituted whereby the Fort Sam Houston Exchange was added to the South Texas Area Exchange (STAE), a new managerial entity which centralized various administrative functions such as accounting, personnel, contract administration and certain management operations for all exchanges within its jurisdiction, including the Fort Sam Houston Exchange. Subsequent to the reorganization, the STAE terminated dues deductions for five maintenance employees remaining at the Fort Sam Houston Exchange on the grounds that while these five maintenance employees retained the Fort Sam Houston Exchange as their duty station, they had been "transferred" to the STAE. Thus, the Respondent maintained that as a result of a bona fide reorganization, which included the maintenance employees remaining at the Fort Sam Houston Exchange, the Respondent had the right to withdraw recognition from the Complainant with regard to those maintenance employees.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the reorganization herein amounted to no more than an administrative transfer as to those maintenance employees remaining at the Fort Sam Houston Exchange and that such maintenance employees continued to remain in the exclusively recognized unit represented by the Complainant at the Fort Sam Houston Exchange. In this regard, the Assistant Secretary noted that while subsequent to the reorganization bookkeeping matters relative to these employees were reassigned to the STAE and they were covered on different payrolls, these maintenance employees reported to work at the same place, received assignments from and were responsible to the same immediate supervisor, and performed the same duties and maintained the same work contacts with other employees who undisputedly remained in the Fort Sam Houston Exchange unit.

Moreover, and noting the fact that both the Fort Sam Houston Exchange and the STAE were administrative components of the Army and Air Force Exchange Service, the Assistant Secretary found the Fort Sam Houston Exchange and the STAE were co-employers vis-a-vis the existing unit at the Fort Sam Houston Exchange represented by the Complainant, and as co-employers, the Fort Sam Houston Exchange and the STAE were responsible for maintaining the present terms and conditions of employment for all employees in the unit including those contained in any existing negotiated agreement.

By withdrawing recognition with regard to the maintenance employees at the Fort Sam Houston Exchange, where as a co-employer it had the obligation to continue such recognition, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (5) of the Order. Under the circumstances of this case, the Assistant Secretary found the Respondent's conduct was not violative of Section 19(a)(6) of the Order.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions consistent with his decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE  
SOUTH TEXAS AREA EXCHANGE,  
LACKLAND AIR FORCE BASE, TEXAS

Respondent

and

Case No. 63-5019(CA)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 3202, AFL-CIO

Complainant

DECISION AND ORDER

On March 13, 1975, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

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

The instant complaint alleged that the Respondent violated Section 19(a)(1), (5) and (6) of the Order when, after a reorganization, it ceased recognizing the Complainant as the exclusive representative of certain maintenance employees located at the Fort Sam Houston Exchange. 1/

1/ The Complainant was certified on September 3, 1971, as the exclusive representative of all regular full-time and regular part-time hourly paid employees and certain temporary personnel employed by the Fort Sam Houston Exchange. The record revealed that the parties' most recent negotiated agreement was executed in April 1972 and remained effective through April 1975.

The essential facts are not in dispute and I shall repeat them only to the extent deemed necessary.

At all times material herein, the Alamo Exchange Region was one of five exchange regions in the Army and Air Force Exchange Service. Prior to January 1974, the Fort Sam Houston Exchange was an autonomous exchange responsible directly to the Alamo Exchange Region. Effective January 26, 1974, a reorganization was instituted whereby the Fort Sam Houston Exchange, along with Randolph Air Force Base, was added to the South Texas Area Exchange (hereinafter called STAE), headquartered at Lackland Air Force Base, a distance of some 13 miles from the Fort Sam Houston Exchange. Operating as a new managerial level, the STAE centralized various administrative "overhead" functions for all exchanges within its jurisdiction, including the Fort Sam Houston Exchange, such as accounting, personnel, contract administration and certain management operations. As a result of the reorganization, numerous employees working in "overhead" operations were transferred to other exchanges, and some managerial employees were subject to reduction-in-force procedures.

In early April 1974, the Complainant received notice that, as a result of the reorganization, four of the Fort Sam Houston Exchange maintenance employees were being transferred to the STAE and the remaining four maintenance employees, one maintenance secretary, and the section supervisor would remain at the Fort Sam Houston Exchange. The Complainant agreed that maintenance employees physically transferred to the STAE would no longer be a part of its bargaining unit and, in this regard, four maintenance employees were transferred physically from the Fort Sam Houston Exchange to the STAE and the Activity ceased deducting union dues from their pay. However, on or about April 19, 1974, the Complainant was informed that dues deductions also had been terminated for the five maintenance section employees remaining at the Fort Sam Houston Exchange. This action was justified by the Respondent on the grounds that while some maintenance employees retained the Fort Sam Houston Exchange as their assigned duty station, the entire maintenance crew had been "transferred" to the STAE. 2/

The Complainant took the position that the reorganization herein did not remove the maintenance employees remaining at the Fort Sam Houston Exchange from the certified exclusively recognized unit. Moreover, the Complainant maintained that, even if a "legitimate" reorganization occurred, an activity cannot withdraw recognition without first filing a representation petition with the Assistant Secretary and receiving a favorable decision. Under these circumstances, the Complainant contended that the Respondent violated Section 19(a)(1), (5) and (6) of the Order

2/ Unknown to the Complainant until shortly before the hearing in the case, after a brief hiatus in April 1974, dues deductions were resumed for the maintenance employees at the Fort Sam Houston Exchange but the money was retained in escrow pending resolution of the dispute.

when, without prior consultation, it withdrew recognition from the Complainant, discontinued union dues deductions, and later withheld the transmittal of dues payments to the Complainant after the dues deductions were reinstated. On the other hand, the Respondent maintained that, as a result of a bona fide reorganization which included the maintenance employees remaining at the Fort Sam Houston Exchange, the Respondent had the right to withdraw recognition from the Complainant with regard to those maintenance employees. 3/

In agreement with the Administrative Law Judge, I find that the reorganization herein amounted to no more than an administrative transfer as to those maintenance employees remaining at the Fort Sam Houston Exchange. Thus, while subsequent to the reorganization, bookkeeping matters relative to these employees were reassigned from the Fort Sam Houston Exchange Personnel Office to the STAE, and they were covered on different payrolls, it appears that these maintenance employees, as before, were located at the Fort Sam Houston Exchange, reported to work at the same place, received assignments from and were responsible to the same immediate supervisor, and performed the same duties and maintained the same work contacts with other employees who undisputedly remained in the Fort Sam Houston Exchange unit.

However, contrary to the Administrative Law Judge, I find that while the facts herein are distinguishable from those in A/SLMR No. 360, the essential issue herein parallels the issue raised in that case. Thus, the reorganization in the Aberdeen case involved two separate employing agencies within the Department of Defense and the instant case involves two administrative components of the Army and Air Force Exchange Service. In this latter regard, it was noted that, prior to the reorganization, the Fort Sam Houston Exchange was responsible directly to the Alamo Exchange Region within the Army and Air Force Exchange Service. After the reorganization, the Fort Sam Houston Exchange remained responsible indirectly to the Alamo Exchange Region but became directly responsible to the STAE, with the latter assuming responsibility for various overhead functions previously performed at the Fort Sam Houston Exchange. While the employer, as set forth in the parties' most recent negotiated agreement, is the Army and Air Force Exchange Service, Fort Sam Houston Exchange, the new entity-STAE-assumed control of various administrative functions for all unit employees at the Fort Sam Houston Exchange, including those maintenance employees remaining at the Fort Sam Houston Exchange. In my view, under these circumstances, as in Aberdeen where it was found that the exclusively recognized unit had remained intact following a reorganization and administrative transfer by a parent organization, any additional

3/ Additionally, the Respondent asserted that the issue herein closely parallels the issue before the Federal Labor Relations Council (Council) in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, and requested that a decision in this matter be delayed pending the Council's determination in Aberdeen.

component organization which has been added as an employing entity vis-a-vis the existing exclusively recognized unit, should be considered as a co-employer with common responsibility for maintaining the present terms and conditions of employment for all employees in the unit, including those contained in any existing negotiated agreement. While it is recognized that an agency must be permitted to conduct periodic reorganizations designed to accomplish its mission more efficiently, in my judgment, a balance must be struck in such situations to assure that such reorganizations do not unnecessarily destroy existing constructive and cooperative relationships between labor organizations and agency management or unnecessarily impede the opportunity of employees to participate in the formulation and implementation of personnel policies and matters affecting the conditions of their employment. Permitting an agency to destroy existing bargaining relationships with respect to an entire unit or a portion of a unit, based on the type of administrative reorganizations as was involved in the instant case, clearly would not further the foregoing goals, nor would the resulting unit fragmentation herein have the desired effect of promoting effective dealings and efficiency of agency operations. 4/

Under these circumstances, I find that the Fort Sam Houston Exchange and the STAE are co-employers vis-a-vis the existing unit at the Fort Sam Houston Exchange represented by the Complainant and, as such, the Respondent and the Fort Sam Houston Exchange are responsible for maintaining the present terms and conditions of employment for all employees in the unit, including those contained in any existing negotiated agreement. 5/ An integral part of the obligation to accord appropriate recognition to a labor organization qualified for such recognition is the obligation to continue to accord such recognition as long as the labor organization involved remains qualified under the provisions of the Order. In view of the above finding that the maintenance employees at the Fort Sam Houston Exchange continue to remain in the exclusively recognized unit, the Respondent, as co-employer of these employees, was obligated to continue to accord recognition to the Complainant, including the obligation to continue to honor any existing negotiated agreement between the Complainant and the Fort Sam Houston Exchange, as it pertains to the maintenance employees working at the Fort Sam Houston Exchange.

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4/ Noting that the instant reorganization took place within a single agency as distinguished from a reorganization across agency lines, as occurred in A/SLMR No. 360, I find no useful purpose in delaying the issuance of this decision until such time as the Council has ruled in the Aberdeen case.

5/ It is, of course, the responsibility of management to decide how it will fulfill its management role with respect to dealing with any exclusive bargaining representative. Thus, in this instance, it will be incumbent upon the co-employers to take the necessary steps to designate an appropriate management representative or representatives to deal with the Complainant concerning appropriate matters related to the bargaining unit.

Accordingly, and noting also that the Respondent did not file a representation petition seeking a determination concerning the unit represented by the Complainant, I find that the Respondent's conduct herein constituted an improper partial withdrawal of recognition with respect to a labor organization qualified for such recognition and, thereby, constituted a violation of Section 19(a)(5) of the Order. Also, I find that, by such conduct, the Respondent interfered with, restrained or coerced employees in the exercise of their rights assured by the Order in violation of Section 19(a)(1) of the Order.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(6) and (1) of the Order by its failure "to provide the Union with appropriate notice of its intention to withdraw recognition from the Union and affording it an opportunity to meet and confer with regard thereto . . . ." It has been determined previously, under similar circumstances, that matters related to an improper refusal to accord appropriate recognition are inseparable from the theory of violation discussed above with respect to the 19(a)(1) and (5) allegations and that Section 19(a)(6) is not applicable in such a situation. 6/ Accordingly, while, under the circumstances of this case and for the reasons outlined above, the Respondent's conduct herein was considered violative of Section 19(a)(1) and (5) of the Order, I find that its conduct was not violative of Section 19(a)(6). Under these circumstances, I shall order that the Section 19(a)(6) allegation be dismissed.

#### CONCLUSION

By failing to continue to accord appropriate recognition to a labor organization qualified for such recognition and also failing to continue to honor an existing negotiated agreement, the Respondent violated Section 19(a)(5) of Executive Order 11491, as amended. By such conduct 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 (5) of Executive Order 11491, as

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6/ See United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, A/SLMR No. 106 and Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360. It should be noted additionally that, under the circumstances of this case, the Respondent's conduct in partially withdrawing recognition from the Complainant was viewed as improper irrespective of whether it had afforded the Complainant with appropriate notice of its intention in this regard.



amended, I shall order the Respondent to cease and desist therefrom and take certain affirmative actions, as set forth below, designed to effectuate the purposes and policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders 7/ that the Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, shall:

1. Cease and desist from:

(a) Refusing to accord appropriate recognition to the American Federation of Government Employees, Local 3202, AFL-CIO, and refusing to honor any existing negotiated agreement with the American Federation of Government Employees, Local 3202, AFL-CIO, as it pertains to the maintenance employees at the Fort Sam Houston Exchange.

(b) Interfering with, restraining, or coercing unit employees at the Fort Sam Houston Exchange by refusing to accord appropriate recognition to their exclusive bargaining representative, American Federation of Government Employees, Local 3202, AFL-CIO, and by refusing to honor any existing negotiated agreement with that labor organization.

(c) In any like or related manner interfering with, restraining, or coercing its employees represented by the American Federation of Government Employees, Local 3202, AFL-CIO, in the exercise of rights assured by Executive Order 11491, as amended.

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

(a) Upon request, accord appropriate recognition to the American Federation of Government Employees, Local 3202, AFL-CIO, for unit employees, including maintenance employees reporting to work at the Fort Sam Houston Exchange, Fort Sam Houston, Texas, in the following certified unit:

All regular full-time and regular part-time hourly pay plan and commission paid civilian employees, all off-duty military personnel employed in either

7/ In its exceptions the Respondent maintained that shortly after the hearing in this matter all dues money held in escrow was refunded to the employees involved and that remedial provisions regarding the payment of this dues money to the Complainant were no longer applicable. In my view, such matters may best be raised in the compliance phase of this matter. Therefore, I adopt, as modified herein, the Administrative Law Judge's recommendations regarding the return to the Complainant of unit employees dues.

of the foregoing categories, and all temporary employees in the above categories who are employed continuously for a period of more than 180 days, employed by the Fort Sam Houston Exchange which includes Camp Bullis, Canyon Lake, Port O'Connor, and Fort Sam Houston; excluding all temporary full-time and temporary part-time employees employed in a period of 180 days or less, on call, casual, management officials, managerial trainees (who perform supervisory duties), professionals, personnel workers in other than a purely clerical capacity, watchmen, supervisors and guards as defined in EO 11491.

(b) Honor all terms of any existing negotiated agreement with the American Federation of Government Employees, Local 3202, AFL-CIO.

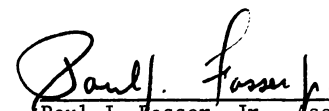
(c) Remit to the American Federation of Government Employees, Local 3202, AFL-CIO, all money deducted from unit employees' pay which was withheld from the American Federation of Government Employees, Local 3202, AFL-CIO, but is retained in escrow.

(d) Post at its facility at the Fort Sam Houston Exchange, Fort Sam Houston, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the General Manager, South Texas Area Exchange, Lackland Air Force Base, Texas, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The General Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint insofar as it alleges as violation of Section 19(a)(6) and additional violations of Section 19(a)(1) of Executive Order 11491, as amended, be, and it hereby is, dismissed.

Dated, Washington, D. C.  
July 31, 1975

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

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to accord appropriate recognition to the American Federation of Government Employees, Local 3202, AFL-CIO, or refuse to honor any existing negotiated agreement with the American Federation of Government Employees, Local 3202, AFL-CIO, as it pertains to maintenance employees at the Fort Sam Houston Exchange.

WE WILL NOT interfere with, restrain, or coerce unit employees at the Fort Sam Houston Exchange by refusing to accord appropriate recognition to their exclusive bargaining representative, American Federation of Government Employees, Local 3202, AFL-CIO, and by refusing to honor any existing negotiated agreement with that labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees represented by the American Federation of Government Employees, Local 3202, AFL-CIO, in the exercise of rights assured by Executive Order 11491, as amended.

WE WILL, upon request, accord appropriate recognition to the American Federation of Government Employees, Local 3202, AFL-CIO, as the exclusive collective bargaining representative for our employees, including maintenance employees reporting to work at the Fort Sam Houston Exchange, Fort Sam Houston, Texas, in the following certified unit:

All regular full-time and regular part-time hourly pay plan and commission paid civilian employees, all off-duty military personnel employed in either of the foregoing categories, and all temporary employees in the above categories who are employed continuously for a period of more than 180 days,

employed by the Fort Sam Houston Exchange which includes Camp Bullis, Canyon Lake, Port O'Connor, and Fort Sam Houston; excluding all temporary full-time and temporary part-time employees employed in a period of 180 days or less, on call, casual, management officials, managerial trainees (who perform supervisory duties), professionals, personnel workers in other than a purely clerical capacity, watchmen, and supervisors and guards as defined in EO 11491.

WE WILL honor all terms of any existing negotiated agreement with the American Federation of Government Employees, Local 3202, AFL-CIO.

WE WILL remit to the American Federation of Government Employees, Local 3202, AFL-CIO, all money deducted from unit employees' pay which was withheld from the American Federation of Government Employees, Local 3202, AFL-CIO, but is retained in escrow.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

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

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



..... :  
 In the Matter of :  
 :  
 Army and Air Force Exchange Service, :  
 South Texas Area Exchange, :  
 Lackland Air Force Base, Texas : CASE NO.  
 Respondent : 63-5019 (CA)  
 and :  
 :  
 American Federation of Government :  
 Employees, AFL-CIO, Local 3202 :  
 Complainant :  
 .....

ROBERT E. EDWARDS  
 Assistant General Counsel  
 Labor Relations Law Branch  
 Army and Air Force Exchange Service  
 Dallas, Texas 75222  
 For the Respondent

GLEN J. PETERSON  
 National Representative  
 American Federation of Government  
 Employees, AFL-CIO  
 Post Office Box BB  
 Boerne, Texas 78006

BEFORE: SALVATORE J. ARRIGO  
 Administrative Law Judge

DECISION

Preliminary Statement

This proceeding heard in San Antonio, Texas, on October 1, 1974, arises under Executive Order 11491, as amended (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereafter called the Assistant

Secretary), a Notice of Hearing on Complaint issued on August 16, 1974, with reference to alleged violations of Sections 19(a)(1), (5) and (6) of the Order as set forth in a complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3202 (hereafter called the Union or Complainant) against Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas (hereafter called the Activity or Respondent). In its complaint the Union alleged that the Activity violated the Order when, after a reorganization, it discontinued recognizing the Union as the exclusive collective bargaining representative for certain maintenance employees.

At the hearing the parties were represented by counsel and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Oral argument was waived and briefs were filed by both parties.

Upon the entire record in this matter, from my reading of the briefs and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

At all times since certified by the Assistant Secretary on September 3, 1971, the Union has been the exclusive collective bargaining representative of all regular full-time and regular part-time hourly paid employees and certain temporary personnel employed by the Fort Sam Houston Exchange (Fort Sam Exchange) which included Fort Sam Houston (Fort Sam), Camp Bullis, Canyon Lake and Port O'Connor. 1/ The Fort Sam Exchange and the Union are parties to a collective bargaining agreement signed in April 1972 and effective to April 1975. The agreement provides, inter alia, that a unit employee may voluntarily authorize Union dues deduction from his pay, said money to be remitted by the Activity to the Union on a bi-weekly basis.

Prior to January 1974, Fort Sam Exchange was an autonomous exchange responsible directly to the Alamo Exchange

1/ As of April 1974, the unit encompassed 300 to 400 employees.

Region. 2/ As an autonomous exchange it performed its own accounting and personnel functions, contract administration and retail and service operations, all with separate managers responsible to a general manager for the entire exchange. Effective January 26, 1974, a reorganization was instituted whereby Fort Sam Exchange along with Randolph AFB was added to the South Texas Area Exchange (hereafter referred to as STAB), 3/ headquartered at Lackland AFB, a distance of some 13 miles from Fort Sam 4/. The reorganization realized certain economies of operation in that the various administrative "overhead" functions such as accounting, personnel, contract administration and certain management operations were phased out and were henceforth performed centrally at STAE for all exchanges included within its jurisdiction. As a result of the reorganization numerous employees working in "overhead" operations were transferred to other exchanges in equivalent positions. Some managerial employees were subject to reduction in force procedures.

Sometime in March 1974, the Union was notified by the Activity that the reorganization would result in a portion of the Fort Sam Exchange maintenance section (unit employees) being physically transferred to Lackland AFB. In early April the Union received notice that four of the Fort Sam Exchange maintenance employees were being transferred but the remaining four maintenance employees, one maintenance secretary and the section supervisor would remain at Fort Sam with no further changes envisioned. The Union had agreed that upon physical transfer from Fort Sam to Lackland AFB the employees would no longer be part of the Fort Sam Exchange unit and discontinuance of union dues deductions would be appropriate.

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2/ The Alamo Exchange Region is one of 5 exchange regions in the Army and Air Force Exchange Service (AAFES) which report to AAFES headquarters located in Dallas, Texas. The Alamo Exchange Region consists of six area exchanges including the South Texas Area Exchange.

3/ STAE was activated on July 27, 1973, and consisted of Kelly AFB Exchange, Brooks AFB Exchange, Laughlin AFB Exchange, Lackland AFB Exchange and Laredo AFB Exchange.

4/ The transcript (Tr. p. 91) indicates that the distance from Fort Sam to Lackland AFB is approximately [continued on next page]

Accordingly, when the relocation was accomplished the Activity ceased deducting union dues from their employees' pay.

On or About April 19, 1974, the Union received from the Activity a register showing those employees from whose pay union dues had been deducted by the Activity for the prior two week work period. The register revealed that no union dues had been deducted for the five maintenance section employees remaining at Fort Sam. The Union's President, Mrs. Flo Valentine, contacted Douglas Warren, STAE Personnel Manager at Lackland AFB, and was informed that the reorganization resulted in the entire maintenance crew being "transferred" to Lackland AFB. It was the Activity's position that although some employees kept Fort Sam as their assigned duty station, effective April 6, 1974, they were all paid from Lackland AFB, and the reorganization removed all maintenance employees from the collective bargaining unit. The Union objected and the complaint herein was subsequently filed. 5/ Unknown to the Union until shortly before the hearing, while dues were not deducted from Fort Sam maintenance employees' pay for a period in April 1974, the Activity thereafter deducted union dues from these employees but retained the money in escrow pending resolution of the dispute.

The evidence discloses that at all times before and after the reorganization the maintenance employees who were not physically transferred to Lackland AFB but were administratively "transferred" to STAE reported to and received assignments from the same immediate supervisor, at the same building at Fort Sam. Further, after the reorganization these employees performed the same duties of general maintenance repair and renovation at the same locations to approximately the same degree 6/ as before the reorganization. Since they performed

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4/ - continued

30 miles. However, map measurements, of which I take official notice, reveal that the distance is approximately 13 miles.

5/ At the time of the hearing herein no representation petition had been filed by either party with regard to the matters giving rise to the complaint.

6/ Thus, the Fort Sam Exchange maintenance supervisor testified, without contradiction, that both before and after [continued on next page]

the same functions as prior to the reorganization, maintenance employees' contacts with other unit employees remained the same throughout. 7/

Some procedural changes resulted from the reorganization of the maintenance section. Thus, the maintenance section supervisor's immediate superior, Mr. Gray, the Equipment and Facilities Manager at the Fort Sam Exchange was RIF'd after which the maintenance supervisor was responsible to Joseph Godwin, the Equipment and Facilities Manager for STAE at Lackland AFB. Although work orders continued to be sent to the maintenance section at Fort Sam from the Fort Sam Exchange General Manager and various operations managers (food, retail and service operations), after the reorganization work order valued over \$250 and orders for work to be performed at the Alamo Exchange Regional Office were required to be approved first by STAE. Prior to the reorganization all work orders regardless of value required the approval of Gray.

The reorganization resulted in little change in maintenance section supervisor James Shreck's relationship to maintenance employees. While Shreck no longer approves annual or sick leave requests, he still participates in the performance evaluation of those maintenance employees who report to work at Fort Sam and are under his direction and control.

Positions of the Parties

The Union contends that with regard to the maintenance employees who continued to report to work at Fort Sam no reorganization occurred which would have the effect of removing these employees from the certified collective bargaining

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6/ - continued

the reorganization the maintenance employees stationed at Fort Sam spent 55 percent of their time working at Fort Sam and the remaining 45 percent of their time at other locations such as Camp Bullis, Canyon Lake, Randolph AFB, and the Alamo Exchange Regional Office located at Fort Sam.

7/ Other unit employees at the Fort Sam Exchange (food service workers) were similarly reorganized and placed administratively within STAE - [continued on next page]

unit. The Union further contends that even if a legitimate reorganization took place, an Activity cannot withdraw recognition from a union without first filing a representation petition with the Assistant Secretary and receiving a favorable decision. The Union also takes the position that the Activity violated Sections 19(a)(1), (5) and (6) when it, without prior consultation, withdrew recognition from the Union, discontinued union dues deductions and later withheld dues from the Union after dues deductions were reinstated.

The Activity contends that the reorganization was bonafide and accordingly no violation of the Order occurred when it withdrew recognition from the Union as the collective bargaining representative of those maintenance employees who continued to report to Fort Sam.

Discussion and Conclusions

I find that the reorganization herein was not of such a nature as to privilege the Activity to withdraw recognition from the Union with regard to the maintenance employees who remained at Fort Sam. As to these employees, the reorganization virtually amounted to no more than a paper transfer whereby they were thereafter carried on a different payroll and bookkeeping matters relative to them were re-assigned from Fort Sam Exchange personnel to STAE personnel at Lackland AFB. As stated above, before and after the reorganization the employees in question reported to work at the same place, received assignments from and were responsible to the same immediate supervisor, performed the same duties and maintained the same work contacts with employees who remained undisputedly in the Fort Sam Exchange unit. While

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7/ - continued

jurisdiction. However, according to Respondent's Personnel Manager, since these employees continued to be "assigned" to the Fort Sam Exchange as contrasted with the maintenance employees who were "assigned" to STAE, the Activity continued to recognize the Union as the collective bargaining representative for food service employees even though STAE performs the "overhead" administrative functions for that group.

Fort Sam maintenance employees may theoretically be given assignments anywhere within STAE 8/ in practice they have been assigned duties at the same geographical locations with approximately the same frequency as before they were administratively reassigned. In these circumstances I find that the community of interest the Fort Sam Exchange maintenance employees shared with other unit employees was undisturbed by the reorganization and their nominal transfer to STAE. Therefore, at all times relevant hereto they remained in the certified collective bargaining agreement in effect herein. 9/ Accordingly, I find and conclude that:

1. By failing to continue to accord appropriate recognition to the Union and also failing to continue to honor the negotiated agreement Respondent has violated Sections 19(a)(5) and 19(a)(1) of the Order. 10/
2. By withholding from the Union dues deducted from unit employees' pay Respondent has violated Section 19(a)(1) of the Order.
3. By failing to provide the Union with appropriate notice of its intention to withdraw recognition from the Union and affording it an opportunity to meet and confer with regard thereto Respondent has violated Sections 19(a)(6) and (1) of the Order. 11/

8/ Indeed, Personnel Manager Warren acknowledged that other Fort Sam Exchange unit employees could also receive temporary duty assignments to other STAE locations.

9/ See Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360; Department of the Army, Strategic Communications Command, Fort Huachuca, Arizona, A/SLMR No. 351; and Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 106.

10/ See Defense Supply Agency, Aberdeen Proving Ground, supra.

11/ The Activity admits that it failed to give the Union advance notice of its intention to withdraw recognition and [continued on next page]

In its brief, the Activity suggests that the issues herein "closely parallel" those undertaken for review by the Federal Labor Relations Council in the Aberdeen Proving Ground case (supra) 12/ in that the Council stated it would consider among other issues the principle of "co-employers" as established by the Assistant Secretary and the effect of Civil Service Commission regulations concerning dues withholding in the circumstances of that case. Accordingly, the Activity requests that a decision in the case herein be delayed until such time as the Council has ruled on the Aberdeen Proving Ground case.

I find the facts of Aberdeen to be substantially different from the case herein. In Aberdeen a reorganization involving two different employers took place. In the case herein, the employer as set forth in the collective bargaining agreement herein is the Army and Air Force Exchange Service (AAFES), Fort Sam Houston Exchange Service, Fort Sam Houston, Texas. AAFES is a non-appropriated fund activity of the Department of Defense. Organizationally the Alamo Exchange Region at all times has been subordinate to AAFES and prior to the reorganization the Fort Sam Exchange was directly responsible to the Alamo Exchange Regional Office as was STAE. After the reorganization the Fort Sam Exchange became directly responsible to STAE but nevertheless remained indirectly subordinate to the Alamo Exchange Region. There still remains an AAFES, an Alamo Exchange Region and a Fort Sam Houston Exchange. Accordingly, in my opinion the reorganization did not result in a new or different employer. Rather the same employer continued in existence but a different system of management was inaugurated which took the form of a consolidation of administrative functions and a simple revision of managerial hierarchy which had little impact upon those employees who were not

11/ - continued

terminate dues deduction. An activity owes a duty to an exclusive collective bargaining representative to deal fairly and openly with it and provide it with ample notice and an opportunity to meet and confer when it contemplates taking an action which goes to the very heart of the union's representational status. See Federal Railroad Administration, A/SLMR No. 418.

12/ Petition for review accepted by Federal Labor Relations Council on May 3, 1974, FLRC No. 74A-22 (Case Report No. 53)

relocated. 13/ In these circumstances no useful purpose would be served by delaying the issuance of this decision. 14/

#### Remedy

Respondent has deducted union dues from unit employees and failed to forward such money to the Union. In order to make whole the Union, Respondent must now remit to the Union all accumulated sums due and owing. The general principle is now well settled in the private sector under the National Labor Relations Act that in fulfilling the obligation to pay monies which a party would have received but for a violation of the Act, it is just and proper to require the payment of interest on such monies for the period involved. 15/

Under Section 6(b) of the Order 16/ the Assistant Secretary has broad authority to fashion appropriate remedies for violations of the Order. In my opinion the reasoning

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13/ Indeed such was inherently recognized by the Activity in that it continued to recognize the Union as the collective bargaining representative of other unit employees who remained at the Fort Sam location.

14/ In view of the disposition herein I find it unnecessary to address the Union's contention that an activity violates the Order if it withdraws recognition from a union without first filing a representation petition with the Assistant Secretary and receiving a favorable decision.

15/ Isis Plumbing and Heating Co., 138 NLRB 716; NLRB v. Sheridan Creations, 384 F.2d 696 (1967); cf. Creutz Plating Corp., 172 NLRB 1; and Paramount Plastic Fabricators Inc., 190 NLRB 170.

16/ Section 6(b) of the Order provides:

"(b) In any matters arising under paragraph (a) of this section, the Assistant Secretary may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order."

supporting the payment of interest in the private sector is equally applicable to the Federal sector. Such payment is not a penalty but rather to compensate for the loss of the use of the money wrongfully withheld. Accordingly, I recommend that the dues withheld by Respondent herein be remitted to the Union with interest thereon at the rate of 6 percent per annum, computed in the manner described in Isis Plumbing and Heating Co., 138 NLRB 716.

#### Recommendations

Having found that Respondent has engaged in conduct prohibited by Sections 19(a)(1), (5) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order.

#### Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, shall:

1. Cease and desist from:

(a) Refusing to accord appropriate recognition to American Federation of Government Employees, AFL-CIO, Local 3202, and refusing to honor the existing negotiated agreement with American Federation of Government Employees, AFL-CIO, Local 3202, as it pertains to maintenance employees at the Fort Sam Houston Exchange.

(b) Withdrawing recognition from American Federation of Government Employees, AFL-CIO, Local 3202, with regard to its right to represent all employees exclusively represented by that labor organization without providing that labor organization with appropriate notice of its intention to withdraw recognition from that labor organization and affording it an opportunity to meet and confer with regard thereto to the extent consonant with law and regulations.

(c) Interfering with, restraining or coercing unit employees at the Fort Sam Houston Exchange by refusing to accord appropriate recognition to their exclusive bargaining representative, American Federation of Government Employees, AFL-CIO, Local 3202; by refusing to honor the existing negotiated agreement with that labor organization; by withholding from that labor organization union dues deducted from unit employees' pay; and by failing to provide that labor organization with appropriate notice of any intention to withdraw recognition from it and affording it an opportunity to meet and confer with regard thereto.

(d) In any like or related manner interfering with, restraining, or coercing its employees represented by American Federation of Government Employees, AFL-CIO, Local 3202, in the exercise of rights assured by Executive Order 11491, as amended.

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

(a) Upon request, accord appropriate recognition to American Federation of Government Employees, AFL-CIO, Local 3202, for its employees, including maintenance employees reporting to work at the Fort Sam Houston Exchange, Fort Sam Houston, Texas in the following certified unit:

All regular full-time and regular part-time hourly pay plan and commission paid civilian employees; all off-duty military personnel employed in either of the foregoing categories, and all temporary employees in the above categories who are employed continuously for a period of more than 180 days, employed by the Fort Sam Houston Exchange which includes Camp Bullis, Canyon Lake, Port O'Conner, and Fort Sam Houston; excluding all temporary full-time and temporary part-time employees employed in a period of 180 days or less; on call, casual; management officials; managerial trainees (who perform supervisory duties); professional; personnel workers in other than a purely clerical capacity; watchmen; and supervisors and guards as defined in EO 11491.

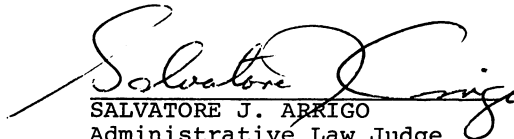
(b) Honor and enforce all terms of the existing negotiated agreement with American Federation of Government Employees, AFL-CIO, Local 3202.

(c) Immediately remit to American Federation of Government Employees, AFL-CIO, Local 3202, all monies deducted from unit employees and withheld from American Federation of Government Employees, AFL-CIO, Local 3202, which that labor organization did not receive from April 1974, together with interest thereon at 6% per annum.

(d) Commencing with the first pay period after the date of this recommended order deduct regular and periodic dues from the pay of employees in the above unit, including maintenance employees reporting to work at the Fort Sam Houston Exchange, who have made and may in the future make voluntary allotments for that purpose, and remit the dues to the above-named labor organization in accordance with the provisions of the existing collective bargaining agreement.

(e) Post at its Fort Sam Houston Exchange, Fort Sam Houston, Texas, 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 Commander and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

  
SALVATORE J. ARRIGO  
Administrative Law Judge

DATED: March 13, 1975  
Washington, D. C.



## NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to accord appropriate recognition to American Federation of Government Employees, AFL-CIO, Local 3202, or refuse to honor the existing negotiated agreement with American Federation of Government Employees, AFL-CIO, Local 3202, as it pertains to maintenance employees at the Fort Sam Houston Exchange.

WE WILL NOT withdraw recognition from American Federation of Government Employees, AFL-CIO, Local 3202, with regard to its right to represent all employees exclusively represented by that labor organization without providing that labor organization with appropriate notice of our intention to withdraw recognition from that labor organization and afford it an opportunity to meet and confer with regard thereto to the extent consonant with law and regulations.

WE WILL NOT interfere with, restrain or coerce unit employees at the Fort Sam Houston Exchange by refusing to accord appropriate recognition to their exclusive bargaining representative, American Federation of Government Employees, AFL-CIO, Local 3202; by refusing to honor the existing negotiated agreement with that labor organization; by withholding from that labor organization union dues deducted from unit employees' pay; and by failing to provide that labor organization with appropriate notice of any intention to withdraw recognition from it and affording it an opportunity to meet and confer with regard thereto.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees represented by American Federation of Government Employees, AFL-CIO, Local 3202,

in the exercise of rights assured by Executive Order 11491, as amended.

WE WILL upon request, accord appropriate recognition to American Federation of Government Employees, AFL-CIO, Local 3202, as the exclusive collective bargaining representative for our employees, including maintenance employees reporting to work at Fort Sam Houston Exchange, Fort Sam Houston, Texas in the following certified unit:

All regular full-time and regular part-time hourly pay plan and commission paid civilian employees; all off-duty military personnel employed in either of the foregoing categories, and all temporary employees in the above categories who are employed continuously for a period of more than 180 days, employed by the Fort Sam Houston Exchange which includes Camp Bullis, Canyon Lake, Port O'Conner, and Fort Sam Houston; excluding all temporary full-time and temporary part-time employees employed in a period of 180 days or less; on call, casual; management officials; managerial trainees (who perform supervisory duties); professionals; personnel workers in other than a purely clerical capacity; watchmen; and supervisors and guards as defined in EO 11491.

WE WILL honor and enforce all terms of the existing negotiated agreement with American Federation of Government Employees, AFL-CIO, Local 3202.

WE WILL immediately remit to American Federation of Government Employees, AFL-CIO, Local 3202, all monies deducted from unit employees and withheld from American Federation of Government Employees, AFL-CIO, Local 3202, which that labor organization did not receive from April 1974, together with interest thereon at 6% per annum.

WE WILL henceforth deduct regular and periodic dues from the pay of employees in the above unit, including maintenance employees reporting to work at the Fort Sam Houston Exchange, who have made and may in the future make voluntary allotments for that purpose, and remit the dues to the above-named labor

July 31, 1975

organization in accordance with the provisions of the existing collective bargaining agreement.

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

DATED \_\_\_\_\_ By \_\_\_\_\_  
(Agency or Activity) (Signature)

DEPARTMENT OF NAVY,  
NAVAL AIR REWORK FACILITY  
A/SLMR No. 543

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

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

This case involved an unfair labor practice complaint filed by Lodge 39, District 74, International Association of Machinists and Aerospace Workers, AFL-CIO, (IAM) alleging that the Department of Navy, Naval Air Rework Facility (Respondent) violated Section 19(a)(1) and (2) of the Order by preparing and then cancelling a proposed 10 day suspension of union representative Coet Combs for distributing certain union literature, warning other union representatives as a result of their participating in the distribution of the literature, and issuing a letter or reprimand to Combs for failing to appear in a supervisor's office when requested to do so by the supervisor. The Respondent contended, among other things, that the literature in question was scurrilous and libelous and its distribution, therefore, was not protected conduct.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the distribution of the literature in question was a protected activity and that the Respondent's oral warnings to the union stewards based on their conduct in distributing such literature violated Section 19(a)(1) of the Order.

Further, the Assistant Secretary found that, although the Respondent did not immediately carry out its expressed intentions to suspend Combs, as evidenced by its notice of intention to suspend Combs on October 16, 1973, based on his involvement in the distribution of the literature in question, the threat of such action had the effect of improperly interfering with, restraining and coercing Combs in the exercise of activity protected by the Order. Consequently, he found that the Respondent's October 16, 1973, notice of intention to suspend Combs constituted an independent violation of Section 19(a)(1) of the Order.

The Assistant Secretary also found, in agreement with the Administrative Law Judge, that the letter of reprimand issued to Combs by Respondent for his failure to report promptly to his supervisor's office as requested on September 28, 1973, did not violate Section 19(a)(1) of the Order as there was no connection between this event and the flyer distribution and there was insufficient evidence to indicate that there was any anti-union motivation in the issuance of the said reprimand.

Finally, the Assistant Secretary found, in agreement with the Administrative Law Judge, that the evidence herein did not support a violation of Section 19(a)(2) of the Order as alleged in the complaint.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF NAVY,  
NAVAL AIR REWORK FACILITY

Respondent

and

Case No. 22-5183(CA)

LODGE 39, DISTRICT 74,  
INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS, AFL-CIO

Complainant

DECISION AND ORDER

On January 14, 1975, Administrative Law Judge Milton Kramer issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, including the Respondent's and the Complainant's exceptions and supporting briefs, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations, except as modified below.

A portion of the instant complaint alleging that the Respondent's October 16, 1973, proposal to suspend employee Combs for 10 days violated Section 19(a)(1) of the Order was not ruled upon specifically by the Administrative Law Judge. The record in this regard discloses that on October 16, 1973, John B. Cherry, the Respondent's Production Department Head, sent Combs a notice of an intention to suspend the latter for a period of 10 days for distributing and causing to be distributed on

1/ On page 5 of his Report and Recommendations, the Administrative Law Judge inadvertently indicated that employee Coet Combs gave J. B. Sullivan, the Administrative Department Head, a copy of a handbill, which the Complainant was going to distribute, on December 19, 1973, rather than on September 19, 1973. This inadvertent error is hereby corrected.

September 20, 1973, a handbill known as the "Caution flyer" which the Respondent considered to be scurrilous and libelous. On November 6, 1973, Combs received a notice from Cherry cancelling the previous October 16, 1973, notice. 2/

The Administrative Law Judge found, and I concur, that under the circumstances herein, the distribution of the "Caution flyer" was a protected activity and that, therefore, any retaliation by the Respondent as a result of the distribution of the flyer would be violative of Section 19(a)(1) of the Order. Although, as noted above, the Respondent did not immediately carry out its expressed intention to suspend Combs based on his involvement in the distribution of the flyer, I find that the threat of such action had the effect of improperly interfering with, restraining, or coercing him in the exercise of activity protected by the Order. Accordingly, I conclude that the October 16, 1973, notice of intention to suspend Combs constituted an independent violation of Section 19(a)(1) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Naval Air Rework Facility of the Department of Navy, Norfolk, Virginia, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees

- Coet Combs
- Raymond J. Potts
- Charles E. Schwartz
- Harry H. Thiede
- William R. Robinson
- Carolyn M. York
- Charles E. Bozoti
- Hursel N. Wiggins
- Ivan W. Pearce
- Jack E. Moseman
- William O. Parks
- Vernon L. Patterson
- Henry R. DeFelice
- Worth W. Cox

2/ The proposal to suspend Combs was reinstated on November 30, 1973, and was approved on December 17, 1973, which resulted in Combs' suspension from January 7 through January 18, 1974. As the actual suspension of Combs was not included in the instant complaint, this matter is not before me and I make no determination as to whether or not the Respondent's conduct in this regard violated the Order.

,or any other employee, by giving oral or written warnings or otherwise discouraging them in the distribution of legitimate literature on behalf of a labor organization.

(b) Threatening to suspend employee Coet Combs, or any other employee, for distributing or causing to be distributed legitimate literature on behalf of a labor organization.

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

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

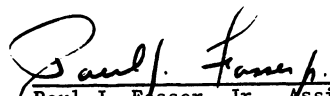
(a) Rescind and expunge any notation or reference in any records, permanent or temporary, if any such notation or record exists, of the warning given the employees named in paragraph 1(a) of this order in November 1973 because of their distribution of allegedly libelous or scurrilous literature.

(b) Post at its facility at the Naval Air Rework Facility, Norfolk, Virginia, copies of the attached notice on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to assure that such notices are not altered, defaced, or covered by other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges additional violations of Section 19(a)(1) and violations of Section 19(a)(2) of Executive Order 11491, as amended, be, and it hereby is, dismissed.

Dated, Washington, D. C.  
July 31, 1975

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

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees Raymond J. Potts, Charles E. Schwartz, Harry H. Thiede, William R. Robinson, Carolyn M. York, Charles E. Bozoti, Hursel N. Wiggins, Ivan W. Pearce, Jack E. Moseman, William O. Parks, Vernon L. Patterson, Harry R. DeFelice, Worth W. Cox, Coet Combs, or any other employee, by giving written warnings or otherwise discouraging them in the distribution of legitimate literature on behalf of a labor organization.

WE WILL NOT threaten to suspend employee Coet Combs, or any other employee, for distributing or causing to be distributed legitimate literature on behalf of a labor organization.

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

WE WILL RESCIND AND WILL EXPUNGE any notation of, and any reference to, warnings given to the employees, named above, in November 1973 because of their distribution of literature on behalf of a labor organization.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



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 DEPARTMENT OF NAVY :  
 NAVAL AIR REWORK FACILITY :  
 Respondent :  
 :  
 and :  
 :  
 LODGE 39 DISTRICT 74, :  
 INTERNATIONAL ASSOCIATION OF MACHINISTS :  
 AND AEROSPACE WORKERS, AFL-CIO :  
 Complainant :  
 .....

Case No. 22-5183 (CA)

Louis P. Poulton, Esq.  
 Associate General Counsel, IAM  
 1300 Connecticut Avenue, N. W.  
 Washington, D. C. 20036

Louis P. Smith  
 6500 Pearl Road  
 Cleveland, Ohio 44130  
 For the Complainant

Stuart M. Foss, Esq.  
 Office of Civilian Manpower Management  
 Department of the Navy  
 1735 N. Lynn Street  
 Arlington (Rosslyn), Virginia 22209  
 For the Respondent

Before: MILTON KRAMER  
 Administrative Law Judge

REPORT AND RECOMMENDATIONS

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Statement of the Case

This case arises under Executive Order 11491 as amended. The Complaint was filed January 21, 1974 alleging violations of Subsections 19(a) (1) and (2) of the Executive Order. The violations were alleged to consist of proposing and then cancelling a proposed 10-day suspension of union representative Coet Combs for distributing certain union literature, warning other union representatives for participating in the distribution of the literature, and issuing a letter of reprimand to Combs for failing to appear in a supervisor's office when requested to do so by the supervisor.

On January 28, 1974, counsel for the Complainant wrote a letter to the Area Administrator to add an allegation to the Complaint that Combs was suspended without pay for the days from January 7 through January 18 for his participation in the distribution of the literature, and correcting certain mechanical and typographical errors in the Complaint. On January 30, 1974 the Acting Assistant Area Administrator wrote to Complainant's counsel rejecting the amendment to the Complaint alleging the suspension from January 7 through January 18, 1974, because it had not appeared in the charge to the Respondent. 1/ (The alleged suspension had terminated three days before the filing of the Complaint.) He accepted the other amendments to the Complaint. 2/ The rejected amendment was not again offered, at the hearing or otherwise. Accordingly, the significance of the suspension is not before me and is not considered, 3/ although the parties stipulated that it occurred.

On February 15, 1974, the Respondent answered the Complaint contending that the literature in question was scurrilous and libelous and, in light of its history, intended to render more burdensome the conduct of Respondent's public business, and its distribution, therefore, was not protected conduct.

The Area Administrator investigated the Complaint and reported to the Assistant Regional Director. Pursuant to an amended Notice of Hearing issued by the Assistant Regional Director on June 6, 1974, hearings were held in Norfolk, Virginia on July 23, 24, and 25. Both parties were represented by counsel.

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- 1/ See Section 203.2(a) (1) of the Regulation.
  - 2/ Exh. J. 13.
  - 3/ Cf. New York Army and Air National Guard, A/SLMR No. 441, fn. 1.

At the conclusion of the hearing the time for filing briefs was extended to September 4, 1974 and thereafter, pursuant to joint request of the parties, was further extended to September 18, 1974. Both parties filed timely briefs.

Facts

General

The Respondent is one of the activities of the Naval Air Systems Command that performs the maintenance, overhaul, and repair ("rework") of naval aircraft and its various components. It has about 4,600 employees in various crafts and classes of whom about 3,600 are represented for purposes of Executive Order 11491 by the Complainant Local 39. The other 1,000 civilian employees are represented by various labor organizations. Since a substantial part of the Respondent's work on the airplanes has to be done "on site", where the planes are when they need work on them, temporary duty travel ("TDY") is often required, and most of the job descriptions state that travel is required. TDY details vary in duration from a few days to several months. Although the Respondent has the right to detail employees to TDY regardless of their wishes, it maintains a roster of employees who volunteer for that purpose in the belief that detailing volunteers is more conducive to higher morale and better work. Only once in recent years has the Respondent had to send employees on TDY who had not volunteered for that purpose.

Around the middle of September 1972, two groups of employees represented by the Complainant were sent on TDY, nine of them to Pensacola, Florida and forty-seven to Dallas, Texas. The detail sent to Pensacola returned around Christmas, 1972. The detail to Dallas returned at various times, the last of them early in April 1973.

When the employees detailed to Pensacola returned to Norfolk, some disagreements arose concerning their per diem allowance. They had obtained lodging at a motel. A day or two after checking in, they had persuaded the motel owner to reduce their cost by two dollars per day. Their travel vouchers were disallowed by that amount, and perhaps they were rebuked. Their Chief Steward (who at the time of the hearing in this case was Local President) wrote a memorandum to the shop stewards captioned:

F I E L D T R I P S  
WHY GO?

In that memorandum the Chief Steward, Charles E. Bozoti, stated the foregoing facts, argued that the men deserved the

two dollars per day because the saving was brought about by their efforts, decried the claimed lack of recognition of the fine work done by men detailed to TDY and their away-from-home hardships, and predicted that if situations arose again as after the Pensacola trip there would be no volunteers for TDY. 4/ Some of the shop stewards posted the memorandum on union bulletin boards. No disciplinary or other action was taken as a result of the memorandum and its posting. Bozoti told a supervisor in the hearing of others that he was going to advise the men to stop volunteering for TDY, but in fact he did not do so and neither he nor anyone else removed his name from the list of volunteers for TDY.

At the time the employees left on the Dallas TDY, the governing travel regulations (D.O.D. Joint Travel Regulations) permitted \$25 per diem for lodging and meals and an employee was permitted his average cost not to exceed \$13.20 per day for lodging. No receipts were required but an employee might be required to justify his claim for reimbursement. The practice by Respondent normally was not to require justification for lodging expense if the average cost did not exceed \$13.20 per day.

In December 1972, after the employees had left for Dallas, the travel regulations were amended to require employees to state their actual cost of lodging and to provide that receipts might be required.

The changes in the Joint Travel Regulations were received by the Respondent early in January 1973. That month the Respondent's Executive Officer, Commander Walter J. Zaborniak, had a meeting with representatives of the labor organizations that represented Respondent's employees to tell them about the changes in the regulations. It was decided that each employee would be given a set of instructions with his travel vouchers when he left on a trip. At the suggestion of the then President of the Complainant, the changes were printed in bolder type and the new information was sent to each person then on TDY. The new material had a cover page printed in large capital letters in red ink. The first line had the caption "Caution" and the second line was "Important Notice". The rest of the first page, in the same large type in red ink, cautioned against possible disciplinary action for fraudulent travel claims, stated that there would be spot checks for complete verification of travel claims in which receipts for lodging might be required, and advised that travellers claim only the amounts actually expended for lodging and retain lodging receipts until the claim

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4/ Exh. R1.

was processed. 5/

In April 1973 Commander Zaborniak was advised by the travel section that one of the employees in the Dallas TDY detail had submitted a travel reimbursement claim for lodging expenses much lower than the others. Zaborniak requested the travel section to check the lodging claims. Three employees in the travel section called the places at which the Dallas TDY employees had stayed and asked what the charges had been and for copies of receipts. Some refused to give any information but others gave information showing that many claims for lodging were greater than the costs. When it appeared to Zaborniak that there was a large discrepancy in the amounts claimed and the actual lodging costs, he sent Security Officer Noel to Dallas to obtain further information.

Noel returned from Dallas in June 1973 and reported to Zaborniak that the lodging claims were greatly in excess of the actual costs. Zaborniak several times discussed the matter with Combs and the Business Representative of the Complainant, William Barnes, who argued that in the past the per diem had been a flat \$25 per day and nobody had been concerned about how or whether it had been spent, and that the matter should be forgotten. Zaborniak took the position that there had to be compliance with the new regulations, and requested each of the employees involved in the discrepancies to verify his claim. Two employee claims were paid on the basis of the original travel voucher, most of the rest were paid on the second voucher, a substantial number had to file a third claim, and a few had to file four or five times. At the time of the hearing a few of the claims were still being questioned by the Navy's Regional Finance Center.

The "Caution" Flyer

On December 19, 1973, at about 3:10 p.m., Coet Combs, the then Chairman of the Union Shop Committee, gave J. B. Sullivan, the Administrative Department Head, a copy of a handbill the Complainant was going to distribute the next morning to the employees it represented as they were coming to work. Mr. Sullivan showed the handbill to the Commanding Officer of Respondent, Captain E. F. Shine, Jr. At about 3:55 p.m. Sullivan gave Combs a memorandum to Combs from Captain Shine stating that Shine considered the flyer scurrilous and libelous and in violation of paragraph 8(c) of NARF Instruction 12721.1.

That section of the local Instruction 6/provides that literature distributed on behalf of a labor organization must not contain scurrilous or libelous material and that

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5/ Exh. R2.

6/ Exh. J11, p.5.

employees distributing literature would be held responsible for adhering to that restriction. The collective bargaining agreement between the Complainant and the Respondent provides 7/ that items to be posted on union bulletin boards would be submitted to the Civilian Personnel Department twenty-four hours prior to posting and that the Chairman of the Shop Committee would be responsible that nothing would be posted that "contains scurrilous or libelous attacks against the Employer, individuals or Activities of the Federal Government."

Combs had made arrangements with thirteen shop stewards (including chief stop stewards) to meet the next morning and distribute the handbill to the employees as they were coming to work. The next morning, September 20, 1973, at about 5:45 a.m., Combs and the thirteen stewards met and distributed the handbill in non-work areas during non-work time.

The handbill that was distributed on this occasion was from the Complainant addressed to "All Wage Grade (Blue Collar) Employees, NARF, Norfolk." It was captioned "CAUTION!!!" It was a one-page flyer. It recited the Complainant's version of the lodging disagreement pertaining to the Dallas TDY, and near the end stated:

"Some months ago the Commanding Officer stated he was in favor of the \$25.00 maximum per diem for Civilian employees on TDY unless government mess or quarters were utilized. DID THE COMMANDING OFFICER MEAN WHAT HE SAID OR DOES HE SPEAK WITH FORKED TONGUE? Your union believes that he already has the authority to pay the maximum \$25.00 provided he really wanted to...." 8/

The Commanding Officer was in fact in favor of allowing a flat \$25 per diem for employees on TDY and even increasing it to \$35, and had so expressed himself, but under the DOD Joint Travel Regulations he was without authority to do so. Combs believed the Commanding Officer did have authority to allow a flat \$25 per diem. Other union officials knew that the Commanding Officer was trying to obtain such authority.

The Oral Warnings to the Stewards

The thirteen shop stewards (other than Combs) were each given oral warnings in November 1973 for infraction of local

7/ Exh. J8, p. 82.  
8/ Exh. J1.

NARF Instruction 12721.1. 9/ The fact that the oral admonishment had been given was noted on a form (SF7-B) kept by the individual employee's immediate supervisor and the notation retained by the supervisor temporarily for a period of six months to a year. No record of such a warning is kept in the employee's personnel file. Such oral warnings are not considered by the Respondent to be the imposition of discipline. At the time of the hearing in this case, July 1974, the notation that the oral warning had been given had already been deleted from the SF7-B's of some of the thirteen shop stewards.

The Letter of Reprimand to the Chairman of the Shop Committee

On September 27, 1973, late in the afternoon, Ralph Barnes, Combs' Section Head, called Combs at the union office and left a message with Combs' secretary for Combs to be in John B. Cherry's office at 10:00 a.m. the next morning. Cherry was the Production Department Head and Combs' fifth level supervisor. The secretary asked what it was about, and Barnes said it was a private matter. The secretary gave the note to Combs as he was coming into the office at the end of the business day and she was leaving. When Combs clocked out for the day he found an "Intra-Activity Pass" (an authorization to go to another part of the Facility) on his card. It stated that he was authorized to "visit" Mr. Cherry at 10:00 a.m. on September 28. The Pass had two boxes for such purposes, to "visit" or "report to", one of which was to be checked. The "nature of business" was stated to be "private matter". 10/

Combs did not go to Cherry's office the next day at 10:00 a.m. Instead, he attended to some union business. At 10:30 Combs' third level supervisor, Reamy, learned (the record does not indicate how) that Combs had not yet gone to Cherry's office. He directed another of Combs' supervisors, Hurst, to find Combs and direct him to report to Cherry's office. Hurst and Reamy found Combs at 11:00 a.m. and directed him to report to Cherry's office at once. They gave Combs another Intra-Activity Pass authorizing him to "report to" Cherry. Combs then attended to some other union business, then went to his office, found Bozoti there, asked Bozoti and Bozoti agreed to accompany him to Cherry's office, and they arrived there at 12:10 p.m. Combs had not called Cherry's office to explain the delay or make arrangements to "visit" or "report" late.

9/ Their names are set forth in the recommended Order, infra.  
10/ Exh. C2.



Cherry asked Combs why he had not come at 10:00 a.m. and Combs answered (according to his own testimony) that he did not make a habit of making personal visits with department heads. Cherry asked that Bozoti not remain. He told Combs that he wanted to investigate certain aspects of the "Caution" flyer and that in accordance with the collective agreement such discussion was to be in private. <sup>11/</sup> Combs agreed and the rest of the discussion was in private.

After the meeting on September 28, 1973, Cherry called Combs' Division Director and asked him to look into the reasons Combs had reported late and to take whatever action was appropriate. Combs' immediate supervisor, Nat Jaffee, made the investigation. On October 9 Jaffee discussed the matter with Combs informally. On October 31 Jaffee met with Combs again, in the presence of a union steward, and told him he was going to issue a letter of reprimand to Combs "for your first infraction of delay in carrying out orders/instructions of supervisor on 28 September 1973." The next day the letter of reprimand was issued. <sup>12/</sup> It recited most of the foregoing facts. It recited also that the "reckoning period" of the reprimand would be one year from September 28, 1973 and that a repetition of the infraction during the reckoning period might result in more severe disciplinary action.

Discussion and Conclusions

The Distribution of the "Caution" Flyer Was a Protected Communication and Any Restraint on or Retaliation for Such Conduct a Violation of Section 19(a)(1).

In Cafeteria Employees Union v. Angelos, 320 U. S. 293, 64 S.Ct. 126 (1943) an injunction had been issued against orderly and peaceful picketing for organizing purposes. The picketing signs contained misleading statements, and some of the pickets told prospective customers of the cafeteria that the food was bad and that patronage would aid fascism. In reversing the grant of the injunction on constitutional grounds, the Supreme Court said (320 U.S. at 295):

"To use loose language or undefined slogans that are part of the give-and-take in our economic and political controversies--like 'unfair' and 'fascist'--is not to falsify facts."

There are numerous cases elaborating that thought, not on constitutional grounds, but on the ground that the federal

<sup>11/</sup> See Exh. J8, p. 67, Sec. 2 and p. 90, Sec. 5.

<sup>12/</sup> Exh. C4.

labor laws encourage full and robust communication by protagonists in labor matters free of fear of reprisal and that those laws countenance exaggeration and hyperbole.

Of particular interest is Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 94 S.Ct. 2770 (1974). That case is of particular interest because it arose when the postal workers were covered by Executive Order 11491 and thus the case was governed by the policy of the Executive Order concerning freedom of communication without fear of reprisal for exaggeration or inaccuracy. It is the only Supreme Court decision on that subject under the Executive Order. The Supreme Court said that although the Executive Order rather than the NLRA was the relevant federal law,

"...we think that the same federal policies favoring uninhibited, robust and wide-open debate in labor disputes are applicable here...." 94 S.Ct. at 2776.

The Supreme Court said further (at 2777):

"...we see nothing in the Executive Order which indicates that it intended to restrict in any way the robust debate which has been protected under the NLRA." <sup>13/</sup>

That case was in substance a libel action under the Virginia "insulting words" statute. The union in one of its publications had repeatedly called the plaintiffs "scabs" and in a later issue gave a pejorative definition of a "scab" <sup>14/</sup> in hyperbolic terms as one who, among other things, had engaged in conduct for which another had had sufficient character to hang himself, as one who had had the Devil close the gates of Hell on him, and who was a traitor to his God, his country, and his family.

The Supreme Court held that false statements by labor unions in labor matters are not of themselves actionable and

<sup>13/</sup> Accordingly, decisions under the National Labor Relations Act, at least decisions of the Supreme Court under that Act, are more than an interesting analogy in determining the scope of permissible debate under the Executive Order. But cf. Charleston Naval Shipyard, A/SLMR No. 1, pp. 3-4.

<sup>14/</sup> 94 S.Ct. at 2773.

that the theretofore established legal remedies for false statements were preempted by federal labor law if the false statements were made without knowledge of their falsity or were not in reckless disregard of the truth; 15/ that calling someone a scab, even accompanied by its exaggerated (even untrue) definition, did not justify any restraint on robust and untrammelled discussion in labor matters, and that the appellation "traitor" in such context was not to be understood in its literal sense; and that federal labor law gives a union license to use intemperate and abusive language in labor matters without fear of penalty if it believes such rhetoric to be effective to make its point.

In reaching these conclusions the Supreme Court relied on its earlier decisions and especially Linn v. Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657 (1966). It quoted from that decision in which the Court had said, with approval, concerning decisions of the National Labor Relations Board (94 S.Ct. at 2778, quoting from 383 U.S. at 60-61, 86 S.Ct. at 662):

"Likewise, in a number of cases, the Board has concluded that epithets such as 'scab', 'unfair', and 'liar' are commonplace in these struggles and not so indefensible as to remove them from the protection of §7, 16/ even though the statements are erroneous and defame one of the parties to the dispute."

In Letter Carriers the Supreme Court added this observation after the foregoing quotation:

"These considerations are equally applicable under the Executive Order. Section 1 of the Order guarantees federal employees the same rights". 17/

Again quoting from Linn, the Supreme Court in Letter Carriers said (94 S.Ct. at 2781):

"...Linn recognized that federal law gives a union license to use intemperate, abusive, or insulting language without fear or restraint or penalty if it believes such rhetoric to be an effective means to make its point...."

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15/ Compare New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964).

16/ Of N.L.R.A.

17/ E.O. 11491, Sec. 1: "the right freely and without fear of penalty or reprisal, to form, join, and assist a labor organization." See supra, fn. 13.

"Mr. Justice Clark put it quite bluntly:

" 'The most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth.' " 383 U.S. at 63; 86 S.Ct. at 663.

The principle is thus thoroughly established that "short of deliberate or reckless untruth" the distribution of the "Caution" flyer would be immune from retaliation. The Respondent argues 18/ that the core of its objection to the flyer was that part that stated that some months earlier the Commanding Officer had stated that he was in favor of a flat \$25.00 per diem for employees on TDY (unless Government mess or quarters were furnished) and then in effect posed the rhetorical question whether when the Commanding Officer made such statement did he mean it or was he lying ("speak with forked tongue")?

The issue is not whether the statement was untrue but whether it was a deliberate or reckless untruth. The first part of that statement was unquestionably true; the Commanding Officer had stated he was in favor of a \$25.00 per diem. The second part was untrue. Captain Shine was sincere in his statement; he had even enlisted the various unions' aid (unsuccessfully) in trying to get authority for a \$25.00 per diem. But there is no persuasive evidence that Combs knew it, and not even an indication concerning what knowledge the other thirteen shop stewards had.

Combs had testified earlier on other matters, and near the end of the hearing was recalled for further examination by the Respondent. On direct examination by Respondent the following testimony was elicited:

"Q. Did you believe the Commanding Officer has authority to pay a maximum of \$25.00 a day?

A. Sure did.

....

Judge Kramer: It is not does he believe it now, [but] did he then believe it?

Mr. Foss: Did he believe it then.

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18/ Brief, p. 14.

"The Witness: The answer to that was yes". 19/

And at page 249:

"Q. I believe I asked you a few minutes ago whether or not you still believe, and did you believe at the time the flyer was distributed, that the Commanding Officer had the authority to pay the \$25.00 a day per diem. Do you recall that?

A. Yes.

Q. Do you still believe he has that authority?

A. As far as I know I haven't seen anything stating that he does not have that authority. As far as I know, I think it was common knowledge at the time. Several of them knew of other programs we have going on down there spending thousands of dollars. Certainly we thought he had authority to spend \$25.00 a day to our employees that certainly deserved it.

Mr. Foss: No further questions."

Combs is a mechanic, a craftsman, and there is no evidence he is trained or versed in the niceties and distinctions of Government accounting or fiscal policies or budgets. I conclude that Combs believed, mistakenly, that the Commanding Officer had the authority to allow the \$25.00. That leaves the matter of whether posing the rhetorical question implying that the Commanding Officer had lied was a "reckless untruth."

The union of which Combs is a member and official of the local is a large union which overwhelmingly represents employees employed in private industry, not employees of the Government. We learn from the Letter Carriers case that the standard of abusive and inaccurate language employed in intra-union communication that is to be tolerated and that remains within the protection of the right to assist a labor organization is no less than in the private sector. The Supreme Court in Letter Carriers and in Linn recognized that in labor disputes in the private sector epithets such as "liar" "are commonplace". 20/ I conclude that the language involved in this case, while perhaps unseemly, was immune from reprisal by the Respondent.

19/ Tr. 246.

20/ Linn, 383 U.S. at 60-61, 86 S.Ct. at 662; Letter Carriers, 94 S.Ct. at 2778.

The Respondent argues that the distribution of the "Caution" flyer was unlawful, and therefore not protected, because it was calculated to discourage employees from volunteering for TDY, would thus compel the Respondent to send non-volunteers on TDY, would therefore tend to result in lower morale and less efficient work, and was thus a quasi-violation of Section 19(b)(4) of the Executive Order which proscribes engaging in a strike or slowdown. It bases such argument not primarily on the "Caution" flyer itself but on its antecedents, basically the "Why Go?" flyer distributed some six months earlier. 21/

This is too thin an argument on which to predicate a conclusion that the distribution of the "Caution" flyer was unlawful under the Executive Order. The only part of Section 19(b)(4) that might be relevant would be the proscription of calling or condoning a slowdown. It is, of course, conceivable that that flyer, in the light of the events six months earlier with respect to another TDY assignment, might have induced some employees to remove their names from the volunteer TDY roster. It is also conceivable that as a result some people, in the future, might be sent on TDY who had not volunteered for such assignments. If that combination of conceivable events had materialized, perhaps the morale of such men on TDY would have declined and perhaps the quality of their work would have been lowered. But such a series of "conceivables" and possibilities is too tenuous a thread by which to hang a quasi-violation of Section 19(a)(4), a quasi-calling or quasi-condoning of a quasi-slowdown. Especially is this so since the right to distribute literature is not only a right protected by the Executive Order but its restraint raises constitutional questions. See Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

There are regulations of the Respondent and of higher Departmental authority that prohibit the distribution of "libellous" or "libellous or scurrillous" material by employees. We need not decide whether the flyer here involved was in violation of those regulations. To the extent, if any, that those regulations prohibit activity permitted by Executive Order 11491 as amended, they are invalid. 22/

21/ R. Brief, pp. 40-46; Tr. 28.

22/ Cf. U.S. Merchant Marine Academy, FLRC No. 71A-15; Joint Technical Communications Office, Department of Defense, A/SLMR No. 396 (1974); Charleston Naval Shipyard, A/SLMR No. 1, pp. 4-5 (1970).

### The Oral Warning to the Stewards

Since the distribution of the flyer was a protected communication, any restraint on or retaliation for distributing it was a violation of Section 19(a)(1) of Executive Order 11491. There is nothing in the record that even indicates that the thirteen stewards who did the distributing knew or had reason to know or suspect that the flyer contained any false or misleading statements. Accordingly, any retaliation for their having participated in the distribution was a violation of the Executive Order.

There is evidence in the record that the management of the Respondent did not consider the administering of an oral warning to be a form of discipline, that there is no record in the employee's personnel file that such a warning had been administered, that the only record of such a warning is made only on a card (form SF 7B) kept by the employee's supervisor, that such record is kept for only six months or a year, and that such card is not normally seen by others than the employee's supervisor.

None of that negates the fact that an oral reprimand is derogatory and at least temporarily prejudicial and is administered only for what is considered misconduct. Since the conduct for which it was administered was protected activity, I will recommend that such records as exist of such warning be physically expunged.

### The Letter of Reprimand

The question posed by the facts pertaining to the letter of reprimand to Combs is not whether the conduct for which the letter of reprimand was issued justified such letter but whether in fact the letter was motivated in whole or in part by Combs' part in the distribution of the "Caution" flyer. I conclude that improper motivation has not been established.

Combs' explanation that he did not report at 10:00 a.m. to Cherry's office on September 28, 1973 because he thought he was asked to be there on a personal matter and had other things to do and was not in the habit of making personal calls on department heads does not ring true. He was not told it was a personal matter, but a "private" matter. Combs had not had personal dealings before with Cherry. And he knew very well that the investigatory stage of contemplated discipline was to be a "private" discussion as provided by the contract. Worse, when he was told by two supervisors at 11:00 a.m. that he was ordered to report to Cherry's office "at once" he then delayed by taking care of some other union business, then going to the union office, and only then going to Cherry's office and arriving there at 12:10 p.m. This was plainly insubordination.

That the letter of reprimand was not motivated by the "Caution" flyer is indicated by the facts that although Cherry may have been annoyed by the flyer, principally because of what he believed to be its factual misstatements, it was not Cherry who issued the letter of reprimand. He instigated the investigation that was made concerning Combs reporting more than two hours late for the September 28 discussion, which investigation resulted in the letter of reprimand. But the record does not show that he had anything else to do with the letter of reprimand. The reprimand was issued by Jaffee, who was four steps removed from Cherry. The record does not show that Jaffee had any union animus or Combs animus or any feelings about the flyer or consulted Cherry about the matter. So far as the record shows the relations between Combs and Jaffee, his immediate supervisor, were completely amicable. To conclude that Jaffee was motivated in issuing the letter of reprimand by the flyer would be based not on evidence in the record but on sheer speculations. That is not enough on which to predicate an unfair labor practice, a violation of Section 19(a)(1) of the Executive Order.

To argue, as the Complainant did during the hearing, that "but for" the flyer the letter of reprimand would not have been issued is to argue the obvious but does not prove the flyer motivated the reprimand. To be sure, if the flyer had not been distributed there would have been no occasion for the September 28 meeting and Combs would not have reported late for it and there would have been no investigation concerning his reporting late and no reprimand as the result of the investigation. But because "but for" the flyer there would have been no reprimand, in that sense, does not prove or even indicate that the flyer motivated the reprimand. Surely "but for" Combs having been hired by the Respondent there would have been no reprimand, but that does not prove that his hiring motivated the letter of reprimand.

I recognize that this produces what may be considered somewhat of an anomalous result. The stewards and chief stewards who received little more than a slap on the wrist have that action rescinded while the Chairman of the Shop Committee, who wound up with two more serious disciplines, the letter of reprimand and the ten-day suspension, has neither rescinded.

But this is because I have concluded there was no legal causation between the flyer and the reprimand, as set forth above. And I found above, in the Statement of the Case, that the matter of the suspension is not before me because the Area Administrator rejected a tendered amendment to the complaint to add that additional count.

The Complainant argues that the suspension is nevertheless before me because the 10-day suspension was a sequel to the original proposed 10-day suspension which was later cancelled. The actual suspension followed a later proposed suspension which was not the subject of an unfair labor practice charge as required by Section 202(a)(1) of the Regulations. The original proposed suspension was a subject of the charge and both it and its cancellation were alleged in the complaint.

Of course an agency may not repeatedly take and cancel action to frustrate its ever coming to trial. But here there is no indication that the original proposed suspension was cancelled for any but sincere and pure motives. The allegation of a proposed suspension and its cancellation does not allege an unfair labor practice absent an allegation those steps were taken as harassment of union activities. There is no such allegation nor was there evidence of it. The fact is immutable that the Area Administrator rejected a tendered amendment to the complaint to allege the suspension. He may have been in error. But I do not sit in review on appeal from his actions, nor was that action appealed. The proposed amendment was never tendered to the Assistant Regional Director or to the Assistant Secretary or to me. It is thus not part of the complaint before me. I do not consider it part of my official function to ferret out unfair labor practices not included in complaints before me and to recommend remedial action.

The Provision of the Executive Order Violated

The complaint alleges violations of Sections 19(a)(1) and (2).

The oral warnings to the thirteen stewards for engaging in conduct protected by the Order, assisting a labor organization by distributing its literature, constituted interference or coercion in the exercise of a right assured by the Order, and hence was violative of Section 19(a)(1). But I do not find a violation of Section 19(a)(2).

Section 19(a)(2) is in pari materia with, almost verbatim the same as, Section 8(a)(3) of the National Labor Relations Act. In interpreting Section 8(a)(3), the Supreme Court said in Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 42-43; 74 S.Ct. 323, 337 (1954):

"The language of §8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by

discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

Section 19(a)(2) proscribes encouragement or discouragement of membership "by discrimination in regard to hiring, tenure, promotion, or other conditions of employment". No discrimination of such nature is shown here; all were treated alike, nor were non-members treated more favorably in similar circumstances. Nor did the oral warnings constitute a condition of employment. The warnings did constitute an impediment to or discourage the employees against distributing union literature, and thus interfered with their rights under the Order, but that was a violation of Section 19(a)(1) of the Executive Order, not Section 19(a)(2). There was neither discrimination nor did it pertain to a condition of employment.

The Remedy

Having violated the rights of the thirteen stewards under the Executive Order, the Respondent should be ordered to cease and desist from such conduct. In addition, the Respondent should be ordered to expunge such records as may still exist, permanent or temporary, of the oral warnings having been given. Further, the Respondent should be ordered to post notices that it will not engage in such conduct in the future and has rescinded, and expunged all records of, the warnings having been given.

A suggested form of Order and a suggested form of Notice are attached hereto.




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MILTON KRAMER  
Administrative Law Judge

Dated: January 14, 1975  
Washington, D. C.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations thereunder, the Assistant Secretary of Labor for Labor-Management Relations orders that the Naval Air Rework Facility of the Department of Navy, Norfolk, Virginia, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing

- Raymond J. Potts
- Charles E. Schwartz
- Harry H. Thiede
- William R. Robinson
- Carolyn M. York
- Charles E. Bozoti
- Hursel N. Wiggins
- Ivan W. Pearce
- Jack E. Moseman
- William O. Parks
- Vernon L. Patterson
- Henry R. DeFelice
- Worth W. Cox

or any other employee by giving oral or written warnings or otherwise discourage them in the distribution of legitimate literature on behalf of a labor organization.

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

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

(a) Rescind and expunge any notation or reference in any records, permanent or temporary, if any such notation or record exists, of the warning given to the employees named in paragraph 1(a) of this Order in November 1973 because of their distributing allegedly libelous or scurrilous literature.

(b) Post at its facility at the Naval Air Rework Facility, Norfolk, Virginia, copies of the attached Notice on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty consecutive days thereafter in conspicuous places including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take

reasonable steps to assure that such notices are not altered, defaced, or covered by other material.

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

The complaint, insofar as it alleges other violations of Section 19(a)(1) and violations of Section 19(a)(2) of Executive Order 11491, as amended, is dismissed.

\_\_\_\_\_  
PAUL J. FASSER, JR.  
Assistant Secretary of Labor for  
Labor-Management Relations

Dated:  
Washington, D. C.

## N O T I C E T O A L L E M P L O Y E E S

## PURSUANT TO

## A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce Raymond J. Potts, Charles E. Schwartz, Harry H. Thiede, William R. Robinson, Carolyn M. York, Charles E. Bozoti, Hursel N. Wiggins, Ivan W. Pearce, Jack E. Moseman, William O. Parks, Vernon L. Patterson, Henry R. DeFelice, Worth W. Cox, or any other employee by warning any of them against the distribution of lawful literature on behalf of a labor organization.

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

WE WILL RESCIND AND WILL EXPUNGE any notation of and any reference to warnings given to the employees named in the first paragraph of this notice in November 1973 because of their distributing literature on behalf of a labor organization.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By: \_\_\_\_\_  
(Signature)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is 14120 Gateway Building, 3535 Market St., Philadelphia, Pennsylvania 19104.

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

DEPARTMENT OF THE ARMY,  
HEADQUARTERS, FORT CARSON AND  
HEADQUARTERS, FOURTH INFANTRY DIVISION (MECHANIZED)  
A/SLMR No. 544

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, AFL-CIO, Local 1345, (AFGE), seeking clarification of the status of an employee in the job classification, Theatre Specialist, GS-9. The Activity took the position that the incumbent in that position was a supervisor and should be excluded from the unit.

The Assistant Secretary found that the Theatre Specialist, GS-9, was not a supervisor within the meaning of Section 2(c) of the Order. In this regard, he noted that the Theatre Specialist, GS-9, did not hire, discharge, recall or promote other employees, or have the authority to recommend effectively such actions, and that he did not approve leave or adjust grievances. Moreover, it was noted that such assignments as he made in the theatre productions were in the nature of the authority vested in the incumbent in his artistic capacity, as distinguished from a supervisor effectively assigning work in the interest of an agency to an employee. Accordingly, the Assistant Secretary clarified the exclusively recognized unit by including within the unit the position of Theatre Specialist, GS-9.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
HEADQUARTERS, FORT CARSON AND  
HEADQUARTERS, FOURTH INFANTRY DIVISION (MECHANIZED) 1/

Activity

and

Case No. 61-2610(CU)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO, LOCAL 1345

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Patricia L. Wigglesworth. 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, the American Federation of Government Employees, AFL-CIO, Local 1345, herein called AFGE, which is the exclusively recognized representative of a unit of employees at Fort Carson, filed the instant petition for clarification of unit (CU) seeking to clarify the status of an employee in the job classification of Theatre Specialist, GS-9, who the Activity asserts is a supervisor within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the exclusively recognized unit.

The record reveals that the incumbent in the position of Theatre Specialist, GS-9, is assigned to the Fort Carson Little Theatre which is a subprogram of the Activity's Music and Theatre Branch of the Recreation Services Division. The Little Theatre is responsible for providing live theatre entertainment on a regular basis, as well as providing instruction in various aspects of theatre work and technical support, assistance and guidance to other groups at Fort Carson.

The position of Theatre Specialist, GS-9, is one of two civilian positions in the Little Theatre. Thus, also assigned to the Little Theatre is a Theatre Specialist (Technical), GS-7. Both of the incumbents in these positions are under the direct supervision of the Director of the Music and Theatre Branch. In addition to these two employees, one or more military personnel may be assigned to the Little Theatre on a temporary basis.

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

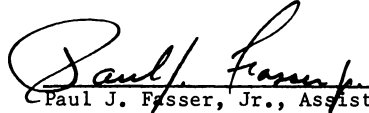
The evidence establishes that the Theatre Specialist, GS-9, and the Theatre Specialist (Technical), GS-7, work closely together in the production of plays, and that the Director of the Music and Theatre Branch may assign either to serve as the director of a particular play. The record testimony reveals that the Theatre Specialist, GS-9, does not have the authority to hire, discharge, recall or promote any other employee or to make effective recommendations with respect to such matters. Nor does the Theatre Specialist, GS-9, approve leave or adjust grievances. The evidence further establishes that the Theatre Specialist, GS-9, assigns work only in his capacity as the director of a particular play, and, as noted above, the Theatre Specialist (Technical), GS-7, may also serve as the director of a play and, in this regard, would have the same prerogatives of assigning work while serving in this capacity.

Under all of these circumstances, I find that the Theatre Specialist, GS-9, is not a supervisor within the meaning of Section 2(c) of the Order. As noted above, the record reveals that the employee in this job classification does not hire, discharge, recall or promote other employees, or have the authority to recommend effectively such actions. Nor does he approve leave or adjust grievances. Moreover, such assignments of work as the incumbent may make with respect to individuals who participate in a Little Theatre production are in the nature of the authority vested in a theatre director in his artistic capacity, as distinguished from a supervisor effectively assigning work in the interest of an agency to an employee. Accordingly, as the Theatre Specialist, GS-9, is not a supervisor within the meaning of Section 2(c) of the Order, I shall order the exclusively recognized unit be clarified to include the employee in this classification in the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the American Federation of Government Employees, AFL-CIO, Local 1345, on May 18, 1967, at Fort Carson, Colorado, be, and it hereby is, clarified by including in said unit the position of Theatre Specialist, GS-9.

Dated, Washington, D.C.  
August 28, 1975

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



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

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,  
 POST EXCHANGE,  
 DEFENSE DEPOT MEMPHIS  
 A/SLMR No. 545

This case involved a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 2501 (AFGE), seeking a unit of all nonappropriated fund employees of the Post Exchange at the Defense Depot Memphis, Memphis, Tennessee. The Activity contended that the proposed unit would lead to fragmented collective bargaining and would not promote effective dealings or efficiency of agency operations, and that the appropriate unit should include all nonappropriated fund employees of the Post Exchange, Blytheville Air Force Base, Blytheville, Arkansas, including the employees of the Memphis Post Exchange.

The Assistant Secretary found that the unit sought by the AFGE was not appropriate for the purpose of exclusive recognition. In this regard, he noted that the Memphis Post Exchange was a component of the Blytheville Post Exchange, that the Exchange Manager at Blytheville exercised close supervisory authority over both Exchanges, that there were frequent visits from other personnel of the Blytheville Exchange to the Memphis Exchange to handle personnel and maintenance matters, that job vacancy announcements were posted at both Exchanges, that the two Exchanges had similar categories of employees and common personnel policies, and that labor relations matters for the Memphis Post Exchange were handled by the Exchange Manager in Blytheville. In these circumstances, the Assistant Secretary found that the employees in the claimed unit did not share a separate and distinct community of interest from other employees of the Blytheville Post Exchange, and that the proposed fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

ARMY AND AIR FORCE EXCHANGE SERVICE,  
 POST EXCHANGE,  
 DEFENSE DEPOT MEMPHIS

Activity

and

Case No. 41-4082(RO)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, AFL-CIO, LOCAL 2501

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 Carol D. Carter. 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 2501, herein called AFGE, seeks an election in a unit of all eligible nonappropriated fund employees of the Post Exchange at the Defense Depot Memphis, Tennessee. The Activity contends that the unit sought is not appropriate, and that the appropriate unit should include all nonappropriated fund employees of the Post Exchange, Blytheville Air Force Base, Blytheville, Arkansas, which includes the nonappropriated fund employees of the Post Exchange at the Defense Depot Memphis. In the Activity's view, the claimed unit would lead to fragmented collective bargaining and would not promote effective dealings or efficiency of agency operations.

The Army and Air Force Exchange Service, whose function is to provide military personnel and other authorized patrons with certain merchandise and services, operates a number of installations throughout the world. The Alamo Exchange Region, which is one of five regional exchanges in the continental United States, has jurisdiction over the post exchanges in the south central United States, and is subdivided into six area exchanges, one of which is the Louisiana Area Exchange. The Post Exchange at Blytheville Air Force Base is a component of the Louisiana Area Exchange.

August 28, 1975

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

VETERANS ADMINISTRATION,  
WADSWORTH HOSPITAL CENTER  
A/SLMR No. 546

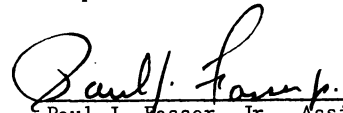
The record reveals that the Blytheville Post Exchange has four subdivisions - the main store, cafeteria and service station, all of which are located at the Blytheville Air Force Base, and the Post Exchange at the Defense Depot Memphis. There are approximately 45 employees located in Blytheville and approximately 17 employees located in Memphis. The Blytheville Post Exchange is headed by an Exchange Manager who, in this capacity, also exercises control over the Memphis Post Exchange. Thus, while there is a Retail Branch Store Manager at the Memphis Post Exchange, the evidence establishes that the Retail Branch Store Manager reports to the Exchange Manager, and that the Exchange Manager has review authority with respect to performance appraisals, hiring, disciplinary actions, grievances and other personnel actions for employees at the Memphis Post Exchange, and has exercised this authority on a number of occasions. In addition, the record reflects that the Exchange Manager exercises close control over the operation of the Memphis Post Exchange and, in this regard, makes frequent visits and telephone calls to the Memphis Post Exchange. The record reveals that there is no personnel officer at Memphis and, therefore, the Blytheville Post Exchange Personnel Supervisor makes visits to the Memphis Post Exchange on a routine basis for the purpose of checking personnel records and handling other personnel matters. Also, as there is no maintenance employee at Memphis, the maintenance employee from the Blytheville Post Exchange visits the Memphis Post Exchange to perform certain maintenance duties. The record further reveals that the two Post Exchanges have similar categories of employees, have common personnel policies, that job vacancy announcements are posted at both Exchanges, and that the Exchange Manager, rather than the Retail Branch Store Manager in Memphis, is responsible for labor relations for the Memphis Post Exchange.

Based on the foregoing circumstances, I find that the petitioned for unit is not appropriate for the purpose of exclusive recognition in that the claimed employees do not share a clear and identifiable community of interest separate and distinct from other employees of the Blytheville Post Exchange. Thus, as noted above, the Exchange Manager at the Blytheville Air Force Base Post Exchange exercises close supervisory authority over both Exchanges, there are frequent visits from other personnel of the Blytheville Post Exchange to the Memphis Post Exchange to handle personnel matters and maintenance functions, job vacancy announcements are posted at both Exchanges, the two Exchanges have similar categories of employees and common personnel policies, and labor relations matters for the Memphis Post Exchange are handled by the Exchange Manager in Blytheville. Accordingly, and noting also that the proposed fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 41-4082(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
August 28, 1975

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

This case, involving a representation petition filed by the California Association for Medical Laboratory Technology Engineers and Scientists of California, presented two issues: (1) whether a unit composed solely of medical laboratory technologists, or in the alternative, a unit composed of medical technologists, chemists, and microbiologists, in the medical laboratory, is an appropriate unit; and (2) whether medical technologists are professional employees? The Activity maintained that the unit petitioned for, or the alternative unit, was inappropriate and would not promote effective dealings and efficiency of agency operations. Although the Activity and the Petitioner were in agreement that the medical technologists are professional employees within the meaning of the Order, the Intervenor, American Federation of Government Employees, AFL-CIO, Local 1061, contended that they are nonprofessional employees and, therefore, are part of the unit of all nonprofessional employees which it represents at the Activity.

The Assistant Secretary found that the medical technologists were professional employees within the meaning of the Order. In addition, he concluded that neither the petitioned for unit, nor the alternative unit, were appropriate for the purpose of exclusive recognition. In reaching this conclusion, the Assistant Secretary considered the conditions of employment of the claimed employees in relation to other professional employees at the Activity and found that neither the petitioned for unit, nor the alternative unit, contained employees who share a community of interest separate and distinct from other professional employees of the Activity. Moreover, he found also that such units, limited to one or several of the some 25 professional employee classifications at the Activity, would result in a proliferation of units and would not promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

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

VETERANS ADMINISTRATION,  
WADSWORTH HOSPITAL CENTER 1/

Activity

and

Case No. 72-5037

CALIFORNIA ASSOCIATION FOR  
MEDICAL LABORATORY TECHNOLOGY  
ENGINEERS AND SCIENTISTS OF  
CALIFORNIA

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 1061

Intervenor

DECISION AND ORDER

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

Upon the entire record in this case, including the brief filed by the Activity, 2/ the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, California Association for Medical Laboratory Technology Engineers and Scientists of California, seeks an election in a unit of all medical laboratory technologists of the Veterans Administration, Wadsworth Hospital Center, West Los Angeles, California, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and

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

2/ The Petitioner's brief was not timely filed and, therefore, was not considered.

guards as defined in the Order. The record reflects that there are some 30 medical laboratory technologists in the petitioned for unit. At the hearing, the Petitioner indicated that, in the alternative, it would be willing to proceed to an election in a unit consisting of medical laboratory technologists and the seven chemists and three microbiologists who work in the medical laboratory and are under the separate and distinct direction of the medical laboratory. 3/

The Activity contends that both the petitioned for unit and the alternative unit sought are inappropriate because the employees in either of the proposed units do not share a community of interest separate and distinct from the other professional employees employed at the Activity and, further, that such units would not promote effective dealings and efficiency of agency operations. 4/

The Intervenor, American Federation of Government Employees, AFL-CIO, Local 1061, which is the exclusive representative in an Activity-wide unit of nonprofessional General Schedule and Wage Grade employees, contends that the medical laboratory technologists are nonprofessional employees and, therefore, are included in its exclusively recognized unit.

The record reveals that, in addition to the unit represented by the Intervenor, the California Nurses Association (CNA) represents a unit of registered nurses at the Activity. The Activity's professional employees, except for the registered nurses represented by the CNA, are not represented exclusively. 5/ There are approximately 25 professional job classifications at the Activity — including the medical technologists, chemists and microbiologists — encompassing approximately 172 employees, with from one to thirty-one employees in each of the various professional classifications. These professional classifications include, among others, physicists, physiologists, psychologists, histologists, and biologists.

The Activity is located in West Los Angeles, California. Its mission is to provide general medical and surgical services to eligible veterans in the area in which it is located. The Activity is equipped to accommodate an approximate 820 bed capacity, and it employs approximately

- 3/ The record reveals, in this regard, that there are other chemists and microbiologists employed by the Activity outside of the laboratory.
- 4/ Both the Activity and the Petitioner agreed that medical technologists are professional employees within the meaning of the Order.
- 5/ In setting forth the alleged professional classifications employed by the Activity, the parties, in addition to omitting the registered nurses represented by the CNA, did not list medical doctors and dentists, who are classified as DM&S employees rather than General Schedule employees. In this regard, it appears that such employees are appointed under separate and unique rules and regulations pursuant to Title 38 of the United States Code, Chapter 73. In view of the disposition herein, I find it unnecessary to determine their eligibility for inclusion or exclusion in any unit of professional employees found appropriate.

2600 employees. Overall direction of the Activity is vested in the Hospital Center Director. Reporting directly to him is the Assistant Director who has primary responsibility for the Hospital Center's administrative services which include building management, fiscal, medical administration, and personnel functions. Also reporting to the Director is the Chief of Staff, who exercises overall direction with respect to all Activity employees, including those petitioned for herein, who are engaged in performing functions in the services specifically related to patient care, namely the medical, surgical, psychiatry, nursing, and laboratory services. Each such service is headed by its own chief.

The Medical Laboratory has two sections, the Anatomic Pathology Section and the Clinical Pathology Section. Each section is under the direction of a chief. Within the Clinical Pathology Section, where all of the claimed medical laboratory technologists are employed, are five units - Microbiology, Blood Bank, Hematology, Chemistry, and Emergency - each of which is under the direction of a supervisor. Each of the five units in the Clinical Pathology Section includes medical technologists, and, in fact, the Blood Bank, Hematology, and Emergency units are supervised by medical technologists. 6/ The total number of medical technologists in the Clinical Pathology Section of the laboratory is approximately 39, of whom, as noted above, approximately 30 are eligible for inclusion in the petitioned for unit.

#### PROFESSIONAL STATUS OF MEDICAL TECHNOLOGISTS

The record indicates that the medical laboratory technologists are engaged in testing and examining samples of fluids and other body substances of patients. Physicians who request these analyses use the reports of findings of tests and examinations in their diagnosis, care and treatment of patients. The work of the medical technologists may be of a "generalist" nature or may be specialized in one of the fields of medical technology such as microbiology, hematology, blood banking, and chemistry. Reports prepared by the medical laboratory technologists contain a recitation of the specific test performed, its results, as well as the opinions and sometimes the recommendations of the technologist based on the test results. In addition to these duties, the medical laboratory technologists participate in reviewing and developing new techniques and methods in the laboratory. Also, they make special studies to evaluate and standardize new or improved methods, procedures, and equipment for use in the laboratory, they are involved in the training of medical personnel who rotate throughout the Activity, and they are required to maintain their equipment.

The basic educational requirements for the position of medical technologist are four years of college with a bachelor of science in medical technology or a degree in a related science; three years of academic study and the successful completion of a course of training of approximately one year in a school of medical technology approved by a nationally recognized accrediting agency 7/; or three years of academic study and

6/ The Microbiology unit is supervised by a microbiologist and the Chemistry unit by a chemist.

7/ The Activity has a school of technology which is accredited by The American Society of Clinical Pathologists (ASCP).

approximately one year of education, training, and supervised experience in related sciences such as biology, cytology, chemistry, or histology. 8/ The majority of medical technologists are certified by the ASCP, but they are not required to be licensed by the Veterans Administration.

Under all the circumstances, I find that the medical technologists are professional employees within the meaning of the Order. 9/ Thus, the evidence establishes that the technologists' work is predominantly intellectual and varied, involves the exercise of discretion and judgment, cannot be standardized, and requires knowledge of an advanced type acquired by a prolonged course of specialized intellectual instruction. It was noted particularly in this regard that the technologists spend a major portion of their time investigating and analyzing the contents of materials, relying upon their independent judgment in determining the results and the validity of particular tests with minimal supervision; that they are responsible for the outcome of the test results; that they review and develop new laboratory techniques; and that their job requires highly specialized training. Accordingly, as the medical technologists are professional employees within the meaning of the Order, I find that they are not included within the exclusively recognized unit of nonprofessional employees represented by the Intervenor.

#### Unit Issues

The record indicates that the medical technologists are governed by the same personnel policies and practices, and rules and regulations, are serviced by the same personnel and fiscal offices, and enjoy other similar terms and conditions of employment as other General Schedule professional employees of the Activity. Further, the record reflects that the medical technologists have work contacts with other professional employees in the laboratory, as well as with other professional employees of the Activity, such as physicians, pharmacists and the medical librarian. In addition, the medical laboratory technologists, as do other professionals involved in patient care, visit the wards and have direct contact with the patients in performing their regular duties in the patients' rooms. It was noted also that the Petitioner's alternative proposed unit of medical technologists, chemists and microbiologists in the medical laboratory, would not include all of the professional employees at the Activity within these particular job classifications, as there are some 15 chemists and 9 microbiologists employed outside of the medical laboratory.

Based on the foregoing circumstances, I find that the petitioned for unit is not appropriate for the purpose of exclusive recognition under the

8/ Other combinations of education and experience are applicable to employees who have completed their education and experience prior to January 1, 1962 and September 15, 1963, respectively. The record reveals that candidates for grades GS-7 and above (the Activity is not now hiring medical technologists below GS-7) must have either professional experience or a graduate education (or an equivalent combination of both) in addition to meeting the basic requirements.

9/ See Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170.

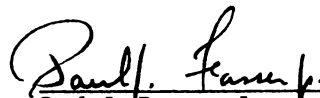
Order. Thus, in my view, the claimed unit of medical laboratory technologists, or the alternative unit of medical technologists, chemists and microbiologists within the laboratory, does not contain employees who share a community of interest separate and distinct from other professional employees of the Activity with whom they share common supervision, working conditions and personnel practices. Moreover, to find appropriate units of one or several professional classifications out of some 25 such classifications at the Activity could, in my judgment, lead ultimately to a myriad of separate units at the Activity, each involving employees in different professional groups in the paramedical services. In my view, this would result in a proliferation of units at the same facility and, clearly, would not promote effective dealings and efficiency of agency operations. 10/

Accordingly, I find that neither a unit of medical laboratory technologists, nor, in the alternative, a unit of medical laboratory technologists and the chemists and microbiologists in the laboratory, is appropriate for the purpose of exclusive recognition and, therefore, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 72-5037 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
August 28, 1975



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

10/ Cf. Veterans Administration Hospital, Tampa, Florida, A/SLMR No. 330  
and Veterans Administration, Veterans Administration Hospital,  
Buffalo, New York, A/SLMR No. 60.

August 28, 1975

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,  
NORFOLK NAVAL SHIPYARD  
A/SLMR No. 547

This case involved a petition for clarification of unit filed by the Tidewater Virginia Federal Employees Metal Trade Council, AFL-CIO (MTC), seeking to clarify the status of Physical Science Technicians in the exclusively recognized unit represented by the MTC and a petition filed by the Activity seeking to exclude the aforementioned Physical Science Technicians, certain employee classifications alleged to be supervisory, and employees engaged in the operation, repair and/or maintenance of cryptographic equipment from the exclusively recognized unit represented by the MTC. The MTC represents exclusively a unit composed primarily of Wage Board (WB) employees of the Activity. At the hearing, the MTC joined with the Activity and the Intervenor, the International Federation of Professional and Technical Engineers, Local No. 1 (IFPTE) in a stipulation of facts and issues in support of the Activity's petition but specifically declined to withdraw its own petition.

With respect to the employee classified as a Supervisory Supply Technician, GS-7, and the approximately 12 Supervisory Firefighters, below GS-9, the Assistant Secretary noted the parties' stipulation that such employees exercise the supervisory authority as set forth under Section 2(c) of the Order and that their exercise of this authority is not of a routine or clerical nature but requires the use of independent judgement. Further, with regard to the approximately 27 employees who operate, repair and/or maintain cryptographic equipment, the record revealed that under Section 3(b) (3) of the Order, the Secretary of the Navy had excluded such employees from the coverage of the Order.

Under these circumstances, the Assistant Secretary ordered that the MTC unit be clarified to exclude a Supervisory Supply Technician, GS-7, in the Inventory Division; Supervisory Firefighters below GS-9 in the Firefighting Branch, and employees who operate, repair and/or maintain cryptographic equipment at the Activity.

With regard to the approximately 32 Physical Science Technicians in the Activity's Radiological Monitoring Division, the employees in question were at one time Wage Board (WB) employees but, as a result of a reclassification action on December 24, 1972, they became General Schedule (GS) employees. Concurrently, the Activity informed the MTC that the Physical Science Technicians had been added to an existing unit of professional and technical employees represented exclusively by the IFPTE.

Noting that, despite the change in their designation and method of compensation and their increased education requirements, the Physical Science Technicians' duties had not changed substantially and their frequent job contacts with WB employees had not been altered, the Assistant Secretary found that the employees in question continue to share a clear and identifiable community of interest with the WB employees of the Activity represented by the MTC.

Accordingly, he ordered that the MTC unit be clarified to include the GS Physical Science Technicians in the Activity's Radiological Monitoring Division.

A/SLMR No. 547

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

DEPARTMENT OF THE NAVY,  
NORFOLK NAVAL SHIPYARD

Activity

and

Case No. 22-3834(CU)

TIDEWATER VIRGINIA FEDERAL EMPLOYEES  
METAL TRADES COUNCIL, AFL-CIO

Petitioner

DEPARTMENT OF THE NAVY,  
NORFOLK NAVAL SHIPYARD

Activity-Petitioner

and

Case No. 22-5252(CU)

TIDEWATER VIRGINIA FEDERAL EMPLOYEES  
METAL TRADES COUNCIL, AFL-CIO

Incumbent Labor Organization

and

INTERNATIONAL FEDERATION OF PROFESSIONAL  
AND TECHNICAL ENGINEERS, LOCAL NO. 1

Invervenor

DECISION AND ORDER CLARIFYING UNIT

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer D. 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 the subject cases, the Assistant Secretary finds:

In Case No. 22-3834(CU), the Petitioner, the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, herein called the MTC, the exclusive representative of certain employees of the Activity, 1/ seeks to clarify the status of approximately 32 Physical Science Technicians, formerly called Radiation Monitors, requesting that they be included in the exclusively recognized unit represented by the MTC. 2/

In Case No. 22-5252(CU), the Activity-Petitioner seeks to clarify the status of four employee classifications in the exclusively recognized unit represented by the MTC, requesting that one Supervisory Supply Technician, approximately 12 Supervisory Firefighters, approximately 27 employees operating, repairing and/or maintaining cryptographic equipment, and the aforementioned 32 Physical Science Technicians be excluded from the MTC unit. In addition, for the sake of clarity, the Activity-Petitioner seeks certain editorial changes in the unit definition.

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1/ On August 24, 1972, the MTC was certified as the exclusive representative in a unit of "All nonsupervisory graded employees in the Inventory Branch of the Planning Division, Supply Department; all nonsupervisory graded employees in the Fire Division, Administrative Department, all ungraded employees below the level of foreman (leading man), in ratings authorized for use at and listed on the Norfolk Naval Shipyard' Schedule of Wages in the Planning, Production, Public Works, Supply and Administrative Departments, except those employees in the following ungraded ratings: Inspectors (all options); Ship Progressmen (all options); Ship Scheduler (all options); Ship Surveyor (all options); Planner and Estimator (all options); Pattern-maker; Shop Planner Pattern-maker and Apprentice Pattern-Maker. Employees within the unit temporarily promoted to another position in the unit or detailed to another position in the unit are eligible; temporary employees appointed for a period in excess of 90 days are eligible; employees temporarily promoted out of the unit not to exceed 120 days are eligible. Excluded: Supervisors in the ungraded service; supervisors at GS-9 or higher level in the graded service. Employees engaged in Federal personnel work in other than purely clerical nature; professional employees; management officials and guards. Employees from another unit temporarily promoted into the unit for a period not to exceed 120 days on detail into the unit."

2/ At the hearing, the MTC did not present evidence in support of its petition in Case No. 32-3834(CU) but, rather, stipulated evidence in support of the Activity's petition in Case No. 32-5252(CU). However, the MTC specifically declined to withdraw its petition in Case No. 32-3834(CU).

The mission of the Activity is to provide logistic support for the Navy and to construct, repair and overhaul Naval ships, including nuclear ships. The Intervenor in Case No. 22-5252(CU), the International Federation of Professional and Technical Engineers, Local No. 1, herein called IPFTE, represents a unit of professional and technical employees in the engineering sciences at the Activity. 3/

With regard to the Supervisory Supply Technician, GS-7, in the Inventory Division of the Supply Department and the Supervisory Firefighters, below GS-9, in the Fire Branch of the Security Division, the parties stipulated that these employees exercise supervisory authority as set forth under Section 2(c) of the Order and that their exercise of this authority is not of a routine or clerical nature but requires the use of independent judgement. In the absence of any evidence that such stipulation is improper, I find that the Supervisory Supply Technician, GS-7, in the Inventory Division of the Supply Department and the Supervisory Firefighters, below GS-9, in the Fire Branch of the Security Division are supervisors within the meaning of the Order and, therefore, should be excluded from the exclusively recognized unit represented by the MTC.

Further, the parties stipulated that the employees who operate, repair and/or maintain cryptographic equipment in the Electrical-Electronics

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3/ The IPFTE is certified as the exclusive representative in a unit of, "all graded professional and non-professional technical employees in the engineering sciences and associated fields in the present and future organizational components of the Norfolk Naval Shipyard, including: Planning Department; Design, Combat Systems Office, and Nuclear Power Department; Professional engineers (all options); Naval architects; physicists; architects; mathematicians; technicians; draftsmen; production controller specialists (1152 series); equipment specialists; student trainees; Production Department; Repair, Quality and Reliability Assurance, and Production Engineering Divisions; Professional engineers (all options); chemists; metallurgists; technicians; technologists; production specialists (1152 series); equipment specialists; illustrator (technical equipment); student trainees; Public Works Department, Engineering Division: Professional engineers (all options); architects; technicians; draftsmen; student trainees; Supply Department, Technical Division: Equipment specialists; As required by Section 10 of Executive Order 11491 this unit excludes (1) any management official, (2) any employee engaged in Federal personnel work in other than a purely clerical capacity, and (3) supervisors (as defined by Executive Order 11491)."

Shop at the Activity should be excluded from the unit on the grounds that under Section 3(b)(3) of the Order 4/ the head of the agency had determined, in his sole judgement, that these employees perform intelligence, investigative or security work as their primary function and that the Order cannot be applied in a manner consistent with national security requirements and considerations. In this regard, the record reveals that the Secretary of the Navy, in fact, excluded from the coverage of the Order, "Employees operating any item of cryptographic equipment, either 'off line' or 'on line'" and "Employees who repair and/or maintain cryptographic equipment." Under these circumstances, I find that employees who operate, repair and/or maintain cryptographic equipment at the Activity should be excluded from the exclusively recognized unit represented by the MTC. 5/

With respect to the Physical Science Technicians employed in the Radiological Monitoring Division of the Activity's Radiological Control Office, the record reveals that prior to December 24, 1972, these employees had been classified as Radiation Monitors and, as such, were Wage Board (WB) employees represented by the MTC. As of that date, they were reclassified as Physical Science Technicians and became General Schedule (GS) employees. In this connection, the Activity informed the MTC that the reclassification would result in the removal of these employees from the unit represented by the MTC and their inclusion in the unit represented by the IFPTE. The parties stipulated that the Physical Science Technicians are technical employees and that, since their reclassification, they have been represented by the IFPTE.

The Activity instituted the classification of Radiation Monitor in 1963. The record reveals that, since that time, the amount of repair and overhaul work involving nuclear ships has increased greatly and that, in the process of generating nuclear energy, radiation is emitted which can be lethal in sufficient amounts. Consequently, the Activity's Radiological Monitoring Division is responsible for, among other things, the detection

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

(b) This Order (except section 22) does not apply to --

(3) 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.

5/ In this regard, see Naval Electronic Systems Command Activity, Boston, Mass., FLRC No. 71A-12.

and measurement of radiation in working areas and throughout the Shipyard, conducting surveillance of work involving radioactive materials, ensuring compliance with radiological controls, assuring proper control of radioactive materials, and protecting Activity personnel and the general public from radiation and radioactive contamination.

As noted above, at present there are approximately 32 employees performing radiological monitoring functions. Concurrent with the increased work load, the Activity has sought to upgrade the basic requirements of the Physical Science Technician position. Thus, the Department of the Navy issued a manual setting forth the minimum knowledge requirements for Physical Science Technicians and established a program of classroom training for such employees. It also was required that these employees take periodic examinations to demonstrate their knowledge of radiological principles. The record further reveals that, since their reclassification, the Activity began concentrating its recruitment efforts for Physical Science Technicians on individuals who had received college level training in science and mathematics and have eligibility on the Civil Service register, rather than hiring individuals from craft-type positions within the Activity as had been done previously.

With respect to the specific duties performed by these employees, the evidence establishes that the Physical Science Technicians in the Radiological Monitoring Division are responsible for maintaining radiological control areas where work involving radioactive materials is being performed. In this regard, they conduct surveillance of radiologically controlled areas for compliance with established radiological work practices and procedures, and they use instruments to perform quantitative analyses of air, liquid, and surface samples to determine radiation levels and amounts of radioactive materials. While it appears that the duties of the Physical Science Technicians have undergone certain changes due to increased workload and technological advances, the evidence indicates that they are performing essentially the same duties as they performed prior to the reclassification action.

The record reveals that the employees in question spend the preponderant share of their working time in areas of the Shipyard where work on nuclear ships is being performed and, in this connection, they come in frequent contact with WB employees. While the record reveals that, subsequent to the reclassification, the headquarters of the Radiological Monitoring Division was removed from the Production Shop area of the Shipyard, there is no indication that the reclassification reduced the frequency of the work contacts between the Physical Science Technicians and the WB employees.

Based on all of the foregoing circumstances, I find that Physical Science Technicians employed in the Radiological Monitoring Division continue to share a clear and identifiable community of interest with the WB employees of the Activity represented by the MTC. Thus, as noted above,



the duties of the employees in question have not changed substantially despite the change in their designation and method of compensation. Nor have their numerous work contacts with WB employees been altered or reduced. 6/

Accordingly, I find that the existing exclusively recognized unit represented by the MTC should be clarified to include the Physical Science Technicians in the Activity's Radiological Monitoring Division.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, was certified on August 24, 1972, be, and hereby is, clarified by including in said unit the Physical Science Technicians in the Radiological Monitoring Division, Radiological Control Office and by excluding from said unit the following positions: Supervisory Supply Technician, GS-7, in the Inventory Division of the Supply Department; Supervisory Firefighters, below GS-9, in the Fire Branch of the Security Division; and employees who operate, repair and/or maintain cryptographic equipment at the Norfolk Naval Shipyard, Portsmouth, Virginia.

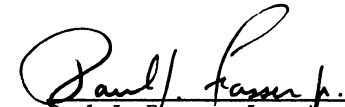
Accordingly, the existing unit, as clarified, represented by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, at the Norfolk Naval Shipyard, Portsmouth, Virginia, is as follows:

All ungraded employees including leaders; all Physical Science Technicians in the Radiological Monitoring Division, Radiological Control Office; all graded employees in the Inventory Division of the Supply Department and in the Fire Division of the Administrative Department, excluding all inspectors, ship progressmen, ship schedulers, ship surveyors, planners and estimators, patternmakers, production shop planners (patternmakers), apprentice patternmakers, all employees who operate, repair and/or maintain cryptographic equipment, professional

6/ See Department of the Navy, Charleston Naval Shipyard, A/SLMR No. 302. While noting the participation of the MTC in stipulations in support of the Activity's proposed clarification to remove the Physical Science Technicians from the unit represented exclusively by the MTC, in my view, I am not necessarily bound by such stipulations in determining the scope of a unit. In this regard, see Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25; Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83; and United States Army Safeguard Logistics Command, Huntsville, Alabama, A/SLMR No. 224. Moreover, I view the MTC's determination not to withdraw its petition in Case No. 32-3834(CU) as an indication of its willingness to continue to represent these employees.

employees, employees engaged in Federal personnel work in other than a purely clerical capacity, temporary employees with non-recurring appointments for less than ninety (90) days, guards and watchmen, management officials, and all supervisors as defined in the Order.

Dated, Washington, D.C.  
August 28, 1975

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

August 28, 1975

A/SLMR No. 548

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

UNITED STATES DEPARTMENT OF LABOR

DEPARTMENT OF THE NAVY,  
NORFOLK NAVAL SHIPYARD  
A/SLMR No. 548

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BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
NORFOLK NAVAL SHIPYARD

Respondent

and

Case No. 22-5518(CA)

This case involved an unfair labor practice complaint filed by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, (Complainant) alleging essentially that the Respondent violated Section 19(a)(1), (2), and (5) of the Order because of its failure to allow the Complainant to represent a probationary employee at a discussion where his retention in employment was being considered.

TIDEWATER VIRGINIA FEDERAL EMPLOYEES  
METAL TRADES COUNCIL, AFL-CIO

Complainant

The Administrative Law Judge dismissed the complaint in its entirety finding that any discrimination involved was with regard to the employee's status as a probationary employee rather than being based on, or motivated by, membership activity or sympathy with regard to the Complainant and that an official of the Complainant was allowed to participate freely in the discussion in spite of the Respondent's position that the official be present only as an observer.

DECISION AND ORDER

Noting particularly that no exceptions were filed with respect to the Administrative Law Judge's Report and Recommendation, the Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

On May 29, 1975, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. No exceptions were filed with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations. 1/

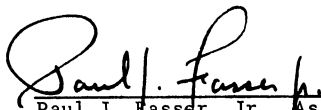
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1/ In reaching the above disposition, it was noted that, although the representative of the probationary employee in question was informed initially that he could remain at the meeting involved only as an "observer," he, in fact, as found by the Administrative Law Judge, "...participated in the discussion when he wanted to and was not stopped" by management. Cf. Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 534.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-5518(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
August 28, 1975

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

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



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In the Matter of :

DEPARTMENT OF THE NAVY :

NORFOLK NAVAL SHIPYARD :

Respondent :

and : Case No. 22-5518 (CA)

TIDEWATER VIRGINIA FEDERAL EMPLOYEES :

METAL TRADES COUNCIL, AFL-CIO :

Complainant :

.....

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Washington, D. C.  
For the Respondent

Before: MILTON KRAMER  
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated August 29, 1974 and filed August 30, 1974. The complaint alleged that on July 1, 1974 William E. Coley, employed as a welder in his probationary first year, at a meeting with the Superintendent of his shop concerning his retention in employment, was told he was not permitted representation by the Complainant, and that his employment was terminated four days later. This was alleged to constitute a violation of Sections 19(a)(1), (2), and (5) of the Executive Order. (The complaint alleged additional conduct allegedly in violation of those provisions of the Executive Order 1/, but this additional allegation was withdrawn on November 5, 1974 2/, and the withdrawal approved by the Assistant Regional Director on November 11, 1974. 3/). Under date of October 4, 1974 the Respondent filed a response to the complaint. 4/

On November 18, 1974 the Acting Assistant Regional Director issued a Notice of Hearing to be held on January 10, 1975 in Norfolk, Virginia. On December 18, 1974 the Assistant Regional Director issued an Order Rescheduling Hearing continuing the hearing to February 19, 1975. A hearing was held before me on February 19, 1975. The Complainant was represented by its President and the Respondent was represented by a Labor Relations Advisor of the Labor Disputes and Appeals Section of the Office of Civilian Manpower Management of the Department of the Navy. At the conclusion of the oral hearing the time for filing briefs was extended to March 25, 1975. Both parties filed timely briefs.

Also at the close of the oral hearing on February 19, 1975, the oral hearing was closed but the record kept open to permit the Respondent to offer an exhibit not yet available which was to be identified as Exhibit R-2. On February 20, 1975 the Respondent tendered the Exhibit which was a decision of an Arbitrator in a matter related to a motion to dismiss made by the Respondent. 5/ On February 20, 1975 I rejected

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- 1/ Exh. AS-1.
  - 2/ Exh. AS-5.
  - 3/ Exh. AS-6.
  - 4/ Exh. AS-4.
  - 5/ Tr. 107-109.

the tendered Exhibit R-2, for the purpose for which it was offered, on the ground that under the third sentence of Section 19(d) of the Executive Order grievance decisions are not to be construed as precedents in unfair labor practice proceedings. I accepted R-2 in evidence for the limited purpose of showing that, prior to the commencement of this proceeding, the Complainant had pursued by way of the grievance procedure on behalf of another employee, M. L. Montgomery, the same remedy as is sought here on behalf of William E. Coley through the unfair labor practice procedure.

Facts

The Complainant is the certified exclusive representative of certain classes or crafts of employees of the Respondent. One of the crafts consists of welders. William Coley was employed by Respondent on July 9, 1973 at Grade WG-8 as a welder and at all times involved herein was in his probationary first year of employment. The Respondent employs about 50 welders at grade WG-8 and about 375 at grade WG-10. Welders employed at the WG-10 rate are expected to have more knowledge of and higher skills in welding than those employed at the WG-8 rate. Almost half the WG-8 welders were in their probationary first year of employment.

On July 1, 1974, eight days before Coley's year of probation would have expired, Harold P. Rogers, the Production Superintendent of the welding shop, had a meeting with Coley to determine whether to recommend the termination of Coley's employment. Rogers had received a memorandum from one Dickson, who at the time was Coley's immediate supervisor, which was critical of Coley's work. Present also were Edgar L. Lane, Jr., the Administrative Officer of Respondent's Personnel Division, and Terry Goldfarb, then the President and Chief Steward of Local 1481, a welders' and cutters' local of the International Association of Machinists, one of the components of the Complainant. Rogers had invited Goldfarb to the meeting because he had been told by the Personnel Office that a representative of the Metal Trades Council should be given the opportunity to have a representative present at such a meeting as an observer. 6/

At the beginning of the meeting Rogers and Lane said that Coley was not entitled to union representation at the meeting

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6/ There is a conflict in the testimony on whether others in the supervisory or management level were present. I find these others were not present and that those who testified to the contrary were confusing the July 1 meeting with another meeting held a few days later concerning the equal employment opportunity aspect of the matter.

but that the Council would be permitted to have a representative present as an observer. However, Goldfarb did speak up at various points and was not stopped and was permitted to say what he thought although apparently without persuasive effect. Rogers read aloud the memorandum concerning Coley that he had received from Dickson, Coley's then immediate supervisor. Coley mentioned some personal difficulties he had had with Dickson, and Goldfarb protested that most of the deficiencies that Dickson related concerning Coley related to work that should not have been assigned to or expected of a WG-8 welder and that if Coley were to be expected to perform such work he should have been a WG-10. 7/

At the conclusion of the meeting Rogers stated that he intended to recommend that Coley's employment be terminated but would think about it overnight and if he changed his mind he would tell Coley and Goldfarb the next day. He did not change his mind and Coley's employment was terminated effective July 5, 1974, four days before his probationary appointment would have become permanent. (There were other subsequent proceedings rescinding this action but those subsequent proceedings were not under the Executive Order and are irrelevant to a consideration of this case.)

The current "Negotiated Agreement" between the parties was signed by the parties on August 22, 1973, was approved on September 24, 1973, and by agreement of the parties became effective October 9, 1973. Article 31, Section 2 of the Agreement 8/ provides for a pre-action investigation "when it is determined by the supervisor having authority that formal discipline or adverse action may be necessary". It does not distinguish between probationary and other employees in this respect, although it does make such distinction with respect to other steps in the discipline procedure. 9/ On August 16, 1973 the Respondent had issued Instruction 12300.1. It provides for termination of probationary employees by the Branch or Shop Head for conduct after appointment without mention of any pre-action investigation.

Discussion and Conclusions

The Respondent takes the position that the issues in this case are the same as the issues in Department of Defense, U. S. Navy, Norfolk Naval Shipyard and Tidewater Virginia Federal

7/ Tr. 53-57.

8/ Exh. R-1, p. 71.

9/ See, e.g., Section 3 and Section 6 of Article 31, Exh. R-1.

Employees Metal Trades Council, AFL-CIO, Case No. 22-5283(CA). The Complainant asserts that some of the issues are different. Most of the issues in that case are the same as in this case but some are different. The hearing in that case was held by me in August and September 1974 and my decision was issued March 4, 1975. Thus that case was sub judice before the Administrative Law Judge at the time of the hearing in this case. That case has not yet been considered by the Assistant Secretary. With respect to some matters I will repeat, mutatis mutandis, or paraphrase, what I said in that case.

I. Whether the Complainant is Pursuing Both the Grievance Procedure and an Unfair Labor Practice Over the Same Issue.

The second sentence of Section 19(d) of the Executive Order provides:

"Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures."

On April 16, 1974, the Complainant filed a grievance under the contract grievance procedure. The grievance arose because an employee, M. L. Montgomery, a probationary employee in another Shop of the Respondent, Shop 51, was called in to see the Shop Head who was contemplating separating Montgomery from his employment. Montgomery asked for a Union representative and the Shop Head told a shop steward, who was present, that as a probationary employee Montgomery would not be permitted to have Union representation at the discussion. The merits of the propriety of the procedure followed in the Montgomery case are the same as the merits of the propriety of the procedure followed in this case.

The Respondent argues that: the Montgomery grievance raised the "issue" of whether a probationary employee is entitled to representation by the Complainant at a discussion with the deciding official on whether his probationary appointment should be terminated and the "issue" of whether the Complainant has a right to be "represented" at such discussion; the same issues are raised in this proceeding under the unfair labor practice procedure of the Executive Order by the complaint filed later in this case; ergo, the Complainant made an irrevocable election in the Montgomery instance to pursue the contract grievance procedure for the resolution of such issues and is precluded by the above-quoted provision of Section 19(d) of the Executive Order from pursuing the unfair labor practice procedure of the Executive Order with respect to this case and Case No. 22-5283. I cannot subscribe to such verbal literalism.

To be sure, the second sentence of Section 19(d) literally speaks in terms of "issues" that may be raised under the grievance procedure or the unfair labor practice procedure but not both. The Respondent candidly concedes that its position is predicated on Section 19(d) being "issue oriented" and not "incident oriented".

It is antithetical to the common-law tradition to find that one who is wronged (assuming he was wronged) and pursues one remedy against the wrongdoer for that incident is thereafter bound to pursue the same remedy against the same wrongdoer if the same wrong should again be committed in another incident. The termination of the appointment of Montgomery does not raise the same issues in a realistic sense, or may not, as the termination of the appointment of Coley.

I conclude that the second sentence of Section 19(d) refers not to issues in the abstract but to issues in the same incident. Accordingly, presenting the issues by the grievance procedure in the Montgomery case did not preclude the Complainant from presenting the same issues in this case in an unfair labor practice proceeding.

#### II. Whether the Policy Expressed in Report No. 49 Precludes Entertainment of the Complaint.

In Report No. 49, issued February 15, 1972, the Assistant Secretary said that:

"...where a complaint alleges as an unfair labor practice, a disagreement over the interpretation of an existing collective bargaining agreement which provides a procedure for resolving the disagreement, the Assistant Secretary will not consider the problem in the context of an unfair labor practice but will leave the parties to their remedies under their collective bargaining agreement."

The Respondent argues that since the collective agreement provides a procedure for resolving the basic issue in this case, Report No. 49 precludes consideration of that issue in this case.

The policy announced in Report No. 49 does not have the broad sweep given to it by the Respondent's interpretation. Of course, not all contract violations are unfair labor practices. Where there is a bona fide disagreement over the meaning of a contractual provision and the Respondent acts in accordance with its interpretation, Report No. 49 would govern and the parties will be left to their remedies under their collective bargaining agreement. However, where one party

initiates a course of conduct clearly inconsistent with the terms of the collective agreement, such conduct constitutes an attempted unilateral change in the agreement and would be not only in violation of the agreement but a violation of Section 19(a)(6) or 19(b)(6) and would be entertained as an unfair labor practice. Veterans Administration Hospital, Charleston, South Carolina and Service Employees International Union, A/SLMR No. 87, at page 5, August 3, 1971.

Although the Charleston Veterans Hospital case antedated Report No. 49, that Report was not intended to rescind the principle followed in that case. In NASA, Kennedy Space Center and American Federation of Government Employees the Assistant Secretary expressly so stated. A/SLMR No. 223 at page 3, December 4, 1972. See also Veterans Administration Center, Bath, New York and Local 491, National Federation of Federal Employees, A/SLMR No. 335, January 8, 1974.

In Department of the Air Force, Base Procurement Office, Vandenburg Air Force Base and National Federation of Federal Employees, Local 1001, A/SLMR No. 485, February 4, 1975, the Respondent filed with the Assistant Regional Director a motion to dismiss on the ground that the dispute was essentially a matter of contract interpretation subject to resolution under the negotiated grievance procedure, the same contention as is made here. The Assistant Regional Director denied the motion stating that the issues went beyond merely contract interpretation and that Section 19(d) of the Executive Order gave the Complainant the election of proceeding by way of the grievance procedure or by way of complaint of an unfair labor practice. The motion was renewed before the Administrative Law Judge. In his Report and Recommendation Judge Devaney recommended that the motion be denied on two grounds one of which was that the second sentence of Section 19(d), especially in view of the explicit language of the Report and Recommendation on the Amendment of Executive Order 11491, clearly and unambiguously gave the aggrieved party the option to pursue his grievance under the grievance procedure or to pursue a remedy by way of an unfair labor practice complaint under the Order. The Assistant Secretary denied the motion without considering this point.

I conclude that the policy expressed in Report No. 49 does not preclude deciding this case under a complaint of an unfair labor practice.

#### III. The Respondent's Disparate Procedure in Disciplining Probationary and Non-Probationary Employees Is Not Unlawful Discrimination in Violation of Section 19(a)(2).

The Complainant argues that by permitting the Union to be present at a "pre-action investigation" of a permanent employee and recognizing the right of such an employee to have a union

representative represent him at such a meeting, while denying such right to probationary employees, the Respondent makes union membership less valuable and less attractive to probationary employees, thereby discourages probationary employees from joining the Union, and therefore violates Section 19(a) (2) of the Executive Order. I find such conclusion unsound, although it has some literal validity.

Section 19(a) (2) makes it an unfair labor practice for agency management to:

"encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;"

The right to have a union representative act on behalf of an employee at a pre-termination conference or at a pre-discipline investigation is a condition of employment. And the Respondent does discriminate between probationary and non-probationary employees in that condition of employment. And that discrimination does make union membership less attractive to probationary employees. But I conclude that such discrimination is not in violation of Section 19(a) (2).

I conclude that not all discrimination in conditions of employment that makes union membership less valuable and therefore discourages membership would be in violation of Section 19(a) (2) of the Executive Order. I believe that for the discrimination to be proscribed it must be based on or motivated by, at least in part, union membership or activity or sympathy, that it must have a union relationship.

If the Respondent permitted all employees to be represented by the Union at a pre-termination conference or the imposition of discipline and at discipline investigations, except employees named Jones, such disparate procedure would make union membership less valuable to employees named Jones and perhaps discourage them from seeking membership. But I believe that such procedure, however reprehensible otherwise, would not violate the proscription of Section 19(a) (2). The same result would follow if the discrimination were based on sex or religion or race instead of surname. The discrimination would be wrong and probably remediable, but not under Section 19(a) (2) or any other provision of the Executive Order. I find the discrimination involved here, against employees whose status is that of probationary employee, to be of that nature. There is no intimation that union animus is involved in this case. I conclude there was no violation of Section 19(a) (2) of the Executive Order.

IV. The Conduct of the July 1, 1974 Meeting Was Not In Violation of Section 10(e) of the Order.

The last sentence of Section 10(e) of Executive Order 11491 provides:

"The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

The right of a labor organization to be represented at such discussions means the right to be represented as a participant, not merely as an observer. Being permitted to be present only as an observer would frustrate not only the labor organization's interests in the discussion but could also frustrate its fulfilling its obligation imposed by the second sentence of Section 10(e), the obligation to represent the interests of all employees in the unit. Should agency management deny to a labor organization the opportunity to be represented at such discussions as a participant, it would violate the proscription of Section 19(a) (6) against refusing to confer. And since all employees in the unit have the right to have the Union fulfill its obligation of the second sentence of Section 10(e) to represent them, it would also violate Section 19(a) (1).

The question here then is whether the July 1, 1974 discussion was a formal discussion and if it was whether it concerned "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit".

I conclude that the July 1, 1974 meeting was "formal" in nature within the meaning of Section 10(e). The discussion was with the head of the welding shop, several supervisory steps above the employee, with an executive from the Personnel Office also representing management. It was held pursuant to a formal Instruction promulgated by the Commander of the Activity, the Norfolk Naval Shipyard. The subject was whether the employee should be retained in employment and, in accordance with the Instruction, the employee was to be told at the conclusion of the discussion whether he was to be retained. <sup>10/</sup> A discussion in which the employee's job is at stake and at which a decision is to be made, and communicated to the employee, whether he will be retained or terminated as an employee, cannot be characterized as an informal discussion. There remains the the question whether it concerned "grievances, personnel

<sup>10/</sup> Exh. C-1.

August 28, 1975

policies and practices, or other matters affecting general working conditions of employees in the unit."

As the July 1, 1974 discussion developed, it did include a matter affecting general working conditions. A "general" working condition need not be one affecting all the employees in the unit. How many more than one employee must be affected to make a working condition a "general" working condition need not be decided. Here about 50 of the approximately 425 welders were employed at WG-8 and the other 375 at WG-10. The July 1 meeting did include a discussion of the complexity and difficulty of welding work that management could properly assign to WG-8 employees and expect satisfactory performance. I find a working condition potentially affecting fifty employees (out of 425) to be sufficiently "general" to be included within Section 10(e) of the Order.

But although Goldfarb was told he was present as an observer, unlike the situation in Case No. 22-5283, that is not the way management acted. Goldfarb participated in the discussion when he wanted to and was not stopped. <sup>11/</sup> He stated and argued his views that the work standards being applied to Corey, a WG-8, were standards that could properly be expected only of a WG-10 or higher. That was the only part of the discussion that could be said to be "general". The rest applied only to Coley and thus did not fall within Section 10(e). Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438.

This constituted compliance with the last sentence of Section 10(e) of the Executive Order, and hence was not in violation of Sections 19(a)(1) and (6). (There is not even an allegation that Section 19(a)(6) was violated.) There is an allegation that Section 19(a)(5) was violated. But an allegation that the Respondent wrongfully conducted the bargaining relationship is not properly an allegation that Section 19(a)(5) was violated. United States Army School/Training Center, Fort McClellan, A/SLMR No. 42, page 7. And even if it were, I have concluded above that, under the decisions of the Assistant Secretary, the Respondent did not improperly conduct the bargaining relationship in violation of the Executive Order.

Recommendation

I recommend that the complaint be dismissed.



MILTON KRAMER  
Administrative Law Judge

Dated: May 29, 1975  
Washington, D. C.

<sup>11/</sup> Tr. 53-57, esp. 56-57.

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

DEPARTMENT OF THE AIR FORCE,  
31ST COMBAT SUPPORT GROUP,  
HOMESTEAD AIR FORCE BASE,  
HOMESTEAD, FLORIDA  
A/SLMR No. 549

The Petitioner, Local F-182, International Association of Firefighters (IAFF), sought an election in a unit of all nonsupervisory, nonprofessional General Schedule firefighters, crew chiefs, and fire inspectors employed at and by Homestead Air Force Base in Florida.

The record evidence established that, at the time the IAFF filed its petition in the instant case, the Activity and the Intervenor, Local 1167, National Federation of Federal Employees (NFFE), were parties to a negotiated agreement encompassing a unit of "all Air Force civilian employees serviced by the Central Civilian Personnel Office at Homestead AFB, Florida..." The evidence established that at the time the NFFE was granted exclusive recognition in 1967 three nonsupervisory, civilian firefighter positions were occupied; that at the time of the hearing 32 civilian firefighter positions were occupied, including 5 civilian supervisors' positions; and that the civilian firefighters were serviced by the same central civilian personnel office as the other civilian employees in the bargaining unit. Further, no record evidence was presented that the parties sought or intended, at any time during their bargaining history, to exclude the civilian firefighter classifications from the base-wide unit.

Based on these considerations, the Assistant Secretary found that the unit of firefighters sought by the IAFF was covered by a current negotiated agreement and that, therefore, the petition herein was filed untimely. Accordingly, the Assistant Secretary ordered that the petition be dismissed.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,  
31ST COMBAT SUPPORT GROUP,  
HOMESTEAD AIR FORCE BASE,  
HOMESTEAD, FLORIDA

Activity

and

Case No. 42-2574(RO)

LOCAL F-182, INTERNATIONAL  
ASSOCIATION OF FIREFIGHTERS 1/

Petitioner

and

LOCAL 1167, NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer 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 a brief filed by the Intervenor, Local 1167, National Federation of Federal Employees, herein called the NFFE, 2/ the Assistant Secretary finds:

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

2. The IAFF seeks an election in the following unit:

All non-supervisory, GS Firefighters,  
Crew Chiefs, and Fire Inspectors employed

1/ The name of the Petitioner, Local F-182, International Association of Firefighters, herein called the IAFF, appears as corrected at the hearing.

2/ The Activity filed an untimely brief which was not considered.

at and by Homestead Air Force Base, Florida, excluding all supervisors, professionals, guards, management officials, and employees engaged in Federal personnel work, except in a purely clerical capacity within the meaning of the Order.

The NFFE, which had been granted exclusive recognition in July 1967, for a unit of "...all Air Force civilian employees serviced by the Central Civilian Personnel Office at Homestead AFB, Florida...", and the Activity contend that at the time the IAFF filed the instant petition the employees sought were covered by an existing negotiated agreement which constituted a bar to the petition. 3/ The IAFF asserts, in substance, that the fire-fighters classification is not part of the existing unit but is, in effect, a new employee classification which is unrepresented.

The employees in the claimed unit are in the Fire Protection Branch-- one of seven branches of the 31st Civil Engineering Squadron. The Squadron plans, directs, supervises, and coordinates all civil engineering activities of the 31st Combat Support Group which, in turn, is responsible for providing the overall command with direction, plans, and staff supervision in the fulfillment of the mission of 31st Tactical Fighter Wing located at Homestead Air Force Base.

The Fire Protection Branch administers and performs the fire protection duties and responsibilities of the 31st Civil Engineering Squadron. The supervisory complement of the Branch includes one Fire Chief, five Assistant Fire Chiefs, and four Station Chiefs (two on each shift). At the time of the hearing in this matter, the complement of the Branch included 55 military incumbents and 32 civilian incumbents, 5 of whom were civilian supervisors.

The record indicates that the Fire Protection Branch began, during the first quarter of fiscal year 1974 (July through September 1973), to convert gradually from an essentially military to a civilian operation. However, the evidence establishes that at the time the NFFE was granted exclusive recognition in 1967 three nonsupervisory, civilian firefighter positions were occupied. Further, the record shows that civilian firefighters are serviced by the same central civilian personnel office as are the other employees in the bargaining unit, that new civilian firefighters employed by the Activity are advised of the exclusive representative status of the NFFE during their initial orientation, and that the parties' negotiated agreement is posted on bulletin boards in work areas of the Fire Protection Branch. Moreover, there is no record evidence that the Activity or the NFFE sought or intended, at any time during their bargaining history, to exclude the civilian firefighter classifications from the base-wide unit.

Based on the foregoing circumstances, I find that the employees sought by the IAFF are part of the existing unit at the Activity covered by a negotiated agreement and that the instant petition, therefore, was filed

3/ The IAFF filed its petition herein on August 23, 1974. The Activity and the NFFE were parties to a negotiated agreement which had been approved on April 4, 1972. The term of the agreement was for two years with provision for automatic renewal. The record evidence indicates that the agreement was, in fact, automatically renewed for one year.

untimely <sup>4/</sup> under Section 202.3 (c) of the Assistant Secretary's Regulations. <sup>5/</sup> Thus, in my view, the parties' negotiated agreement, which covered all Air Force civilian employees serviced by the Central Civilian Personnel Office at Homestead Air Force Base, Florida, encompassed the employees in the claimed unit and, therefore, constituted a bar to the instant petition. Accordingly, I find that the dismissal of the instant petition is warranted.

August 28, 1975

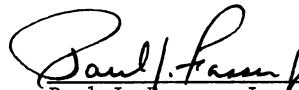
UNITED STATES DEPARTMENT OF LABOR  
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS  
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY  
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 42-2574(RO) be, and it hereby is, dismissed.

DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE  
A/SLMR No. 550

Dated, Washington, D. C.  
August 28, 1975

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

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally issuing new travel regulations and by failing to bargain about their implementation and impact.

Noting the Respondent's denial that the travel regulations superseded or changed the travel provisions of the Multi-District and Multi-Center Agreements between the Respondent and the NTEU, the Assistant Secretary concurred in the finding of the Administrative Law Judge that the evidence failed to establish that the aforementioned travel regulations were applied in such a way as to change any of the travel provisions in the above-noted agreements. Accordingly, the Assistant Secretary, in agreement with the Administrative Law Judge, found that dismissal of the instant complaint was warranted.

In view of the disposition herein, the Assistant Secretary found it unnecessary to pass upon the Administrative Law Judge's finding that the Respondent and the Complainant voluntarily decided, by multi-unit bargaining, to merge the separate units represented by the Complainant in the District Offices and the Service Centers into nationwide District Office and Service Center units without utilizing the prescribed election procedures. Nor was it considered necessary to pass upon the Administrative Law Judge's finding that, absent some form of national recognition or national consultation rights, the Respondent was not obliged to meet and confer with the Complainant concerning the issuance of new travel regulations.

<sup>4/</sup> See United States Department of the Air Force, Davis-Monthan Air Force Base, Arizona, A/SLMR No. 462, FLRC No. 74A-92. I find also that the evidence did not establish that the employees in the claimed unit had been denied effective and fair representation by the NFFE.

<sup>5/</sup> Section 202.3(c) provides, in pertinent part, that "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows: (1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed and dated...."

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE

Respondent

and

Case No. 22-5243(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On June 4, 1975, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant and the Respondent filed exceptions with respect to the Administrative Law Judge's Report and Recommendations.

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

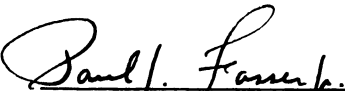
The instant complaint alleged that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally issuing new travel regulations and by failing to bargain about their implementation and impact. The Respondent denied that its conduct in this matter was violative of the Order and, in this regard, it contended that the travel regulations contained in Manual Transmittal 1763-22 did not supersede or change the travel provisions of the Multi-District Agreement or the Multi-Center Agreement between the Respondent and the Complainant. In

this connection, the Administrative Law Judge found, and I concur, that the travel regulations promulgated by the Respondent were not applied so as to change any of the travel provisions in the above-noted negotiated agreements. 1/ Under these circumstances, I find that dismissal of the instant complaint is warranted. 2/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-5243(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
August 28, 1975

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

1/ Compare Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390.

2/ In view of the disposition herein, I find it unnecessary to pass upon the Administrative Law Judge's finding that the Respondent and the Complainant voluntarily decided, by multi-unit bargaining, to merge the separate units represented by the Complainant in the District Offices into a nationwide District Office unit, or to merge the separate units represented by the Complainant in the Service Centers into a nationwide Service Center unit, without utilizing the prescribed election procedures. Nor, under the circumstances, was it considered necessary to pass upon his finding that, absent some form of national recognition or national consultation rights, the Respondent was not obliged to meet and confer with the Complainant concerning the issuance of the new travel regulations.

U.S. DEPARTMENT OF LABOR  
 OFFICE OF ADMINISTRATIVE LAW JUDGES  
 WASHINGTON, D.C. 20210



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 In the Matter of :  
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 NATIONAL TREASURY EMPLOYEES UNION :  
 :  
 Complainant, :  
 :  
 and : Case No. 22-5243 (CA)  
 :  
 DEPARTMENT OF THE TREASURY, :  
 INTERNAL REVENUE SERVICE, :  
 :  
 Respondent. :  
 :  
 .....

Neal Fine, Esquire  
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 Suite 1101  
 Washington, DC 20006  
 For the Complainant

Roger Kaplan, Esquire  
 1111 Constitution Avenue, N. W.  
 Room 4109  
 Washington, DC 20224  
 For the Respondent

Before: SAMUEL A. CHAITOVITZ  
 Administrative Law Judge

REPORT AND RECOMMENDATIONS

Pursuant to a Complaint filed on March 8, 1974 under Executive Order 11491, as amended, herein called the Order, by National Treasury Employees Union (hereinafter called the Complainant or NTEU) against the Internal Revenue Service (hereinafter called IRS or Respondent) alleging that Respondent violated Sections 19(a)(1) and (6) by unilaterally issuing new travel regulations and failing to bargain about their implementations and impact, a Notice of Hearing on Complaint was issued by the Assistant

Regional Director for Labor Management Services for the Philadelphia Region on June 17, 1974.

A hearing was held before the undersigned in Washington, D. C. All parties were represented and afforded a full opportunity to be heard, to present witnesses and to introduce other relevant evidence on the issues involved. Upon conclusion of the taking of testimony, both parties were given an opportunity to present oral arguments and both parties filed briefs on or about October 24, 1974, which have been fully considered.

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

Findings of Fact

At all times material herein NTEU represented employees in separate units located in each of 56 of IRS' 58 1/ Districts and 11 of 12 Service Centers.

During 1969 through 1972 NTEU negotiated separate collective bargaining agreements for approximately twelve Districts and four Service Centers. In 1970 NTEU filed three CU petitions with the U. S. Department of Labor in attempt to obtain exclusive recognition in three separate units at the national level. 2/ These three petitions were dismissed by the Regional Administrator, who was affirmed

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1/ NTEU apparently also represented employees in other units but they were not raised and are therefore not relevant to this case. Also it should be not that originally the Complainant was known as the National Association of Internal Revenue Employees (NAIRE) but subsequently changed its name to NTEU. NTEU represented professional and non-professional employees in 55 District Offices and non-professional employees only, in one.

2/ NTEU, by these petitions, attempted to merge all the District Office Units composed of both professional and non-professional employees into one nationwide unit; to merge the District Office Units composed solely of professional employees into another nationwide unit; and all the Service Center units into another nationwide unit.

by the Assistant Secretary for Labor Management Relations. The Assistant Secretary stated that the merger of the local units into national units should be accomplished by means of RO petitions rather than CU petitions. The Assistant Secretary was affirmed by the Federal Labor Relations Council. No such RO petitions were filed. 3/

In 1972 the IRS and NTEU entered into multi-unit negotiations in regard to the units in the 56 District Offices represented by NTEU. A Multi-District Agreement covering the units located in the 56 District Offices and represented by NTEU was signed on April 5, 1972 and a Multi-Center agreement covering the units located in the Service Centers and represented by NTEU was signed on April 13, 1973.

During the negotiations for these agreements matters involving travel terms and procedures for employees were discussed and some were included in the negotiated agreements. Many of these agreed upon travel terms included in the agreements were at variance with the then existing travel regulations contained in the Internal Revenue Service Manual (IRM). It was apparently understood that with respect to the employees covered by the collective bargaining agreements, the terms of those agreements, at least concerning travel, took precedence over the travel regulations contained in the IRM. Where there was no contract term covering a specific area the regulations in the IRM still controlled.

Further, during these negotiations the parties bargained about and in some instance agreed to terms that were outside the normal authority of the individual District Directors' or of the Service Center Directors'. The bargaining took place in Washington. With respect to the Multi-District agreement, the IRS team that apparently negotiated and signed the contract, was composed of two District Directors, one Assistant District Director and four members of the Washington staff. Similarly with respect to the Multi-Center agreement the IRS team was composed of three Service Center Directors and four members of the IRS Washington staff.

In the Multi-District agreement Article 1. Section 1 A provides, in part:

"The following employees comprise the Unit covered by this agreement:

All professional and non-professional employees of the districts listed in Appendix A, including those professional employees who did not vote for inclusion with units of non-professional employees."

3/ At no time has NTEU sought National Consultation Rights with respect to the employees it represented.

Article 1 Section 1. A. of the Multi-Center Agreement states, in part:

"The following employees comprise the Unit covered by this Agreement:

All certified units of professional and non-professional employees of the Centers listed in Appendix A, including those certified units of professional employees who did not vote for inclusion with units of non-professional employees."

On September 7, 1973, IRS issued Manual Transmittal 1763-22 which contained new travel regulations for its employees. These amended and changed the travel regulations in the IRM and were substantially different, in many respects from those contained in the IRM and in the collective bargaining agreements. These new regulations were not shown to NTEU before they were issued and NTEU was in no way notified or consulted prior to their issuance. The IRS witnesses testified that the new travel regulations were not intended to and did not change or alter the travel provisions of the collective bargaining agreements, with respect to employees covered by the collective bargaining agreements and such employees were still covered by the travel provisions contained in those agreements. No evidence controverted this nor was any submitted to show that these new travel regulations were applied to such employees in such a way as to be in conflict with the collective bargaining agreements.

Further, the record does not establish that NTEU, at any time requested of IRS, either locally or nationally, to bargain concerning the impact and/or implementation of these new travel regulations with respect to the employees covered by the multi-unit collective bargaining agreements.

Conclusions of Law

A. Scope of Exclusive Recognition

NTEU was originally accorded recognition in a series of separate units located in the District Offices and Service Centers. In fact separate collective bargaining agreements were entered into by NTEU and IRS covering certain of these units.

In 1972, however, NTEU and IRS entered into negotiations on a multi-unit basis. The IRS bargaining committee in the Multi-District Agreement was made up of District Office representatives and IRS officials from Washington. Similarly the IRS Multi-Center contract committee was composed of Service Center representatives and IRS officials from Washington.

During their negotiations the parties bargained about, and ultimately agreed to terms that were normally outside the scope of the authority of District Directors' and/or the Service-Center Directors. The IRS representatives had obtained prior authority from the IRS Commissioner to bargain about such terms. Both contracts, in Article 1. Section 1. A., speak in terms of the "Unit" covered by the contract being composed of all pertinent employees in the Districts or Centers listed in the Appendix attached to each respective contract. In all these circumstances it seems clear that the NTEU and IRS, by this multi-unit bargaining, intended to merge the separate units in the District Offices into one nationwide District Office unit composed of the separate units then represented by NTEU and to merge the separate Service Center units into a nationwide Service Center unit composed of the separate units represented by NTEU. However, the original Executive Order 11491 was signed in October of 1969 and provided that exclusive recognition must be obtained by a vote of the employees in the appropriate unit. It was after effective date of this Order that NTEU first tried to merge the units by means of the CU petitions. In dismissing them, it was held that the use of RO petitions, which could provide for an election, would have been the appropriate procedure for achieving exclusive recognition in these new nationwide units. NTEU failed to pursue such procedures. Rather the parties themselves by the 1972 negotiations voluntarily decided to merge the separate units into new nationwide units without utilizing any elections or RO petitions. To permit this would be to permit the parties to avoid the reasoning behind the dismissals of the CU petitions and to frustrate the purposes of Section 10 of the Order, which provides the method for obtaining exclusive recognitions. 4/

Therefore, despite the wishes and aims of the parties, it is concluded that neither the bargaining nor the multi-unit agreements had the legal effect of merging the separate local units and granting NTEU exclusive recognition in such

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4/ The Report and Recommendation of the FLRC on the Amendment of E. O. 11491, as Amended, on page 20 recommended that Section 10(a) of the Order be amended to permit such a voluntary consolidation of units, and Executive Order 11838, signed on February 5, 1975, followed that recommendation. Thus Section 10(a) of the Order has been amended to permit consolidation of units by the voluntary action of the partner.

new nationwide units. Therefore NTEU only had exclusive recognition for the employees in a series of separate units located in 56 District Offices and 11 Service Centers. Further it must be noted that NTEU neither sought nor obtained National Consultation Rights.

B. Obligation to Bargain Concerning Issuance of Manual Transmittal 1763-22

Manual Transmittal 1763-22 which contained the new travel regulations applied to all employees of IRS, many of whom were not in the units described above nor represented by NTEU. Many such employees were either unrepresented or represented by another labor organization. These new travel regulations changed and altered the travel regulations as then set forth in the IRM. 5/

The IRS was obliged by the Order to bargain with NTEU only at the level NTEU had exclusive recognition. In this case this was at the individual District Office or Service Center level. These new travel regulations were issued by IRS at the national level and applied to all employees, including many outside of the units represented by NTEU.

In such circumstances, absent some form of national recognition or national consultation rights, IRS was not obliged to bargain or consult with NTEU concerning the issuance of these new travel regulations. c. f. U. S. Merchant Marine Academy, FLRC No. 71 A-15 (November 20, 1972), Report No. 30; and Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, FLRC No. 73A-64 (October 25, 1974), Report No. 58. 6/

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5/ It must be noted that they did not apply so as to change any of the travel terms of the multi-unit collective bargaining agreements.

6/ Since these new travel regulations did not alter or change the travel terms of the multi-unit agreements, it need not be decided whether IRS would have had to bargain with NTEU about the issuance of any regulations which applied to all employees and would have altered or changed the travel provisions of these collective bargaining agreements. However, again, absent some form of national recognition or national consultation rights, I would be constrained to find that the reasoning contained by the Merchant Marine Academy Case, *supra* and the Lackland Air Force Base Case, *Supra*, indicated that IRS would have no out obligation to bargain or consult with NTEU.

C. Obligation to Bargain About Impact and Implementation:

As described above IRS had an obligation to bargain with NTEU only at the individual District Office and Service Center level. Further, the Order, as interpreted by the Assistant Secretary, is clear that an activity is obliged to bargain about the implementation and impact of a privileged change in working conditions only when a request or demand to so bargain is made by an exclusively recognized collective bargaining representative. c. f. Albany Metallurgy Research Center, U. S. Bureau of Mines, A/SLMR No. 408; US Electronics Command, Fort Monmouth, A/SLMR No. 395; U. S. Department of Interior, Bureau of Indian Affairs, A/SLMR No. 341; FAA National Aviation Facilities Experimental Center, A/SLMR No. 329; and Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR No. 289.

The record does not establish that NTEU demanded or requested IRS to bargain about the implementation or impact of Manual Transmittal 1763-22 with respect to any unit located in any IRS District Office or Service Center. 6/ Further, the record does not establish that when presented with any such demand the IRS, at any level, refused to bargain with NTEU concerning the impact and implementation of Manual Transmittal 1763-22. It is therefore concluded that the record does not establish that IRS violated Sections 19 (a) (6) and (1) of the Order by refusing to bargain with NTEU concerning the implementation and impact of Manual Transmittal 1763-22.

In light of all of the foregoing it is therefore concluded that IRS did not engage in conduct which violated Sections 19(a)(1) and (6) of the Order.

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6/ In fact the record does not establish such a demand with respect to any unit or at any level.

Recommendation

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

  
SAMUEL A. CHAITOVITZ  
Administrative Law Judge

Dated: June 4, 1975  
Washington, D. C.

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

VETERANS ADMINISTRATION HOSPITAL,  
 TAMPA, FLORIDA  
 A/SLMR No. 551

This case involved a petition for clarification of unit by the American Federation of Government Employees, AFL-CIO, Local 3402 (AFGE), seeking to clarify the existing exclusively recognized unit at the Activity in Tampa, Florida, so as to include eligible employees of the Activity's Outpatient Clinic, located in Orlando, Florida. The Activity agreed that the employees of the Orlando Outpatient Clinic should be included in the existing unit and, in this regard, both the Activity and the AFGE asserted that the Orlando Outpatient Clinic is not a separate organizational entity but, rather, is an extension of the Activity's Outpatient Clinic located at Tampa.

Based on all of the circumstances, the Assistant Secretary found insufficient basis to support a finding that the employees of the Orlando Outpatient Clinic constitute an accretion or addition to the existing unit represented exclusively by the AFGE. In this regard, the Assistant Secretary particularly noted the significant geographic separation of approximately 90 miles between the Activity and the Orlando Outpatient Clinic; the minimal amount of any interchange, transfer or job-related contact among the employees of the Activity in Tampa and the Orlando Outpatient Clinic, especially among employees in classifications represented at the Activity by the AFGE; the fact that only two employees in classifications represented at the Activity by the AFGE transferred to the Orlando Outpatient Clinic; and the lack of immediate common supervision among the employees at the Orlando Outpatient Clinic and those at the Activity represented in the exclusively recognized bargaining unit.

Accordingly, the Assistant Secretary ordered the instant petition dismissed.

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

VETERANS ADMINISTRATION HOSPITAL,  
 TAMPA, FLORIDA

Activity

and

Case No. 42-2763(CU)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, AFL-CIO, LOCAL 3402

Petitioner

DECISION AND ORDER

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

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3402, herein called AFGE, the exclusive representative of certain employees of the Veterans Administration Hospital, Tampa, Florida, 1/ seeks to clarify the existing exclusively recognized unit so as to include eligible employees of the Activity's Outpatient Clinic, located in Orlando, Florida. The Activity agrees that the employees of the Orlando Outpatient Clinic should be included in the existing unit. In this regard, the Activity and the AFGE assert that the Orlando Outpatient Clinic is not a separate organizational entity but, rather, is an extension of the Activity's Outpatient Clinic at Tampa.

The Activity, located at Tampa, Florida, provides medical and surgical services, and outpatient medical and related services, to eligible veterans in the area in which it is located. It has an authorized staff of approximately 1,590 employees, including employees who are assigned to the Orlando Outpatient Clinic. Overall direction of the Activity is vested in the Hospital Director. Reporting directly

1/ On January 31, 1974, the AFGE was certified as the exclusive representative of all employees of the Veterans Administration Hospital, Tampa, Florida, including canteen workers, 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.



to him is the Assistant Hospital Director who has primary responsibility for the Hospital's administrative services. <sup>2/</sup> Also reporting to the Director is the Chief of Staff who exercises overall direction of all employees engaged in performing the services specifically related to patient care. Reporting directly to the Chief of Staff is an Associate Chief of Staff for Ambulatory Care who exercises supervision over the Outpatient Clinic located at the Activity in Tampa, as well as the Orlando Outpatient Clinic.

The record reveals that the Orlando Outpatient Clinic, which is located approximately 90 miles from the Activity, was established on November 25, 1974, as a result of legislation authorizing the Veterans Administration to provide more convenient outpatient medical and related services to veterans. Its mission and functions do not differ materially from that of the Outpatient Clinic which is located on the Activity's premises in Tampa. Thus, the Orlando Outpatient Clinic performs medical and related services on an outpatient basis to qualified veterans, and also certifies admission to the hospital for those veterans requiring additional care and services without further examination at the Activity.

The record reveals that the Orlando Outpatient Clinic is headed by a chief, a physician, who reports directly to the Activity's Associate Chief of Staff for Ambulatory Care. In addition, the following medical and related services presently are located at Orlando: Medical Administration, Dental, Laboratory, Radiology, Psychology, Psychiatry, Nursing, Pharmacy, Prosthetics, Rehabilitation Medicines, Dietetics, and Social Work. In this connection, the evidence establishes that for each medical and related service component located at Orlando, there is a similar component located at the Activity. Further, although the Chief of each service located at the Activity in Tampa is also the Chief of the identical service at Orlando, the record discloses that the direct day-to-day supervision at Orlando is performed by a supervisor located at Orlando. The Orlando Outpatient Clinic was authorized a full-time staff of 55 permanent employees, including 29 positions in the same classifications found in the exclusively represented bargaining unit at the Activity. Initial staffing of Orlando was accomplished by recruiting from the Activity's workforce, from other Veterans Administration Hospitals, and by reinstatements and selections from Civil Service Commission registers. The record shows that of the 19 employees hired by the Orlando Outpatient Clinic in classifications represented by the AFGE at the Activity in Tampa, only two employees from the AFGE unit transferred to Orlando; the other 17 employees coming to Orlando from other sources. Further, the evidence indicates that, aside from a limited number of non-unit professional and supervisory employees, interchange and transfer of employees between the Activity and the

<sup>2/</sup> These administrative services include engineering, building management, fiscal and personnel functions.

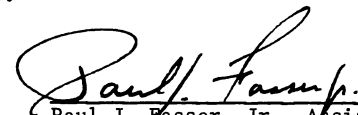
Orlando Outpatient Clinic has been minimal and is unlikely to increase, and that there is minimal job-related contact between employees of the Activity in Tampa and the Orlando Outpatient Clinic, particularly among those employees in classifications represented by the AFGE at the Activity.

Based on the foregoing circumstances, I find insufficient basis to support a finding that the employees of the Orlando Outpatient Clinic constitute an accretion or addition to the existing unit represented exclusively by the AFGE at the Activity. In this regard, particular note was taken of the significant geographic separation of approximately 90 miles between the Activity and the Orlando Outpatient Clinic; the minimal amount of interchange, transfer or job-related contact among the employees of the Activity and the Orlando Outpatient Clinic, especially among employees in classifications represented at the Activity by the AFGE; the fact that only two employees in classifications represented at the Activity by the AFGE transferred to the Orlando Outpatient Clinic; and the lack of immediate common supervision among the employees at the Orlando Outpatient Clinic and those at the Activity in Tampa represented in the exclusively recognized bargaining unit. Accordingly, I shall order that the petition herein be dismissed. <sup>3/</sup>

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 42-2763(CU) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
August 29, 1975

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

<sup>3/</sup> It was noted that the above disposition would not preclude the AFGE from filing an appropriate petition for an election among the eligible employees of the Orlando Outpatient Clinic seeking that they be added to its existing unit at the Activity in Tampa.

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

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

VETERANS ADMINISTRATION HOSPITAL,  
PALO ALTO, CALIFORNIA  
A/SLMR No. 552

VETERANS ADMINISTRATION HOSPITAL,  
PALO ALTO, CALIFORNIA 1/

Activity

and

Case No. 70-4696

This case involved a representation petition filed by the California Association for Medical Laboratory Technology Engineers and Scientists of California. The Petitioner sought a unit of all professional medical laboratory technologists employed by the Activity, or in the alternative, a unit of medical laboratory technologists and chemists and microbiologists regularly assigned to the medical laboratory. The Activity contended that neither unit was appropriate because the employees sought did not have a community of interest separate and distinct from the other professional employees of the Activity (medical technologists were stipulated to be professional employees) and, further, that such units would not promote effective dealings and efficiency of agency operations.

CALIFORNIA ASSOCIATION FOR  
MEDICAL LABORATORY TECHNOLOGY  
ENGINEERS AND SCIENTISTS OF  
CALIFORNIA

Petitioner

DECISION AND ORDER

For the reasons set forth in Veterans Administration, Wadsworth Hospital Center, A/SLMR No. 546, a case in which the Petitioner sought an election in either of two units similar to those claimed in the instant proceeding, the Assistant Secretary found that neither the claimed unit, nor the alternative unit, was appropriate for the purpose of exclusive recognition. In this connection, he noted that the claimed employees did not share a community of interest separate and distinct from other General Schedule professional employees of the Activity, and that such units, limited to one or several of some 20 professional employee classifications at the Activity, could result in a myriad of separate professional employee units, which fragmentation would not promote effective dealings and efficiency of operations. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

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

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

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, California Association for Medical Laboratory Technology Engineers and Scientists of California, seeks an election in a unit of all professional medical laboratory technologists employed at the Veterans Administration Hospital, Palo Alto, California, excluding all other professional employees, nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order. 2/ At the hearing, the Petitioner indicated that it would be willing to proceed to an election in a unit of medical laboratory technologists and "only those non-supervisory chemists and microbiologists who are normally and regularly assigned to the medical laboratory." In this regard, the record reflects that, at present, there are no nonsupervisory chemists assigned to the laboratory, although one chemist works within the laboratory under a supervisory chemist assigned to the laboratory service, and that there are no nonsupervisory microbiologists employed by the Activity.

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

2/ The unit appears as amended at the hearing.

The Activity contends that both the petitioned for unit and the alternative unit are inappropriate because the employees in either of the proposed units do not have a community of interest separate and distinct from the other professional employees employed at the Activity and, further, that such units would not promote effective dealings and efficiency of agency operations. 3/

The record reveals that the American Federation of Government Employees, AFL-CIO, Local 2110, represents a unit of all nonprofessional employees at the Activity, and that the California Nurses Association represents a unit of registered nurses. The professional employees of the Activity, except for the registered nurses represented by the California Nurses Association, are not represented exclusively. At the Activity there are approximately 20 General Schedule professional job classifications - including medical technologists and chemists - encompassing some 176 employees, with from one to approximately thirty-three employees in each of these various professional classifications.

The Activity is located in Palo Alto, California. Its mission is to provide general medical and surgical services to eligible veterans in the area in which the hospital is located. In addition to the hospital at Palo Alto, the Activity operates the Menlo Park Division, located approximately seven miles from the Palo Alto facility. The Activity is equipped to accommodate an approximate 1500 bed capacity and employs approximately 2500 employees. Overall direction of the Activity is vested in the Hospital Director who is located at the Palo Alto facility. Reporting directly to him is the Assistant Hospital Director who has primary responsibility for the hospital administrative services, which include building management, fiscal, medical administration, and personnel functions. Also reporting to the Director are three chiefs of staff who exercise overall direction of employees engaged in performing functions in the services specifically related to patient care, namely the medical, surgical, psychiatry, nursing and laboratory services.

Medical laboratories are located at both the Palo Alto and Menlo Park facilities. These laboratories have two basic sections, namely the Anatomic Pathology Section and the Clinical Pathology Section. The laboratory located in the Palo Alto facility is under the direction of the Chief of Staff for Professional Services, and the laboratory located in Menlo Park is under the direction of the Chief of Staff for the Menlo Park Division. There are approximately 20 medical technologists employed in the Palo Alto laboratory and 1 regular part-time technologist employed in the Menlo Park laboratory. As indicated above, there are no chemists or microbiologists formally assigned to the laboratories, although, in addition to the chemist who works in the laboratory, there are some eight other nonsupervisory chemists in the Activity outside of the laboratories.

The record indicates that the claimed medical laboratory technologists are governed by the same personnel policies, practices, rules and

3/ The parties stipulated, and the record supports the stipulation, that medical technologists are professional employees within the meaning of the Order. See Veterans Administration, Wadsworth Hospital Center, A/SLMR No. 546 ,

regulations, are serviced by the same personnel and fiscal offices, and enjoy other similar conditions of employment as other General Schedule professional employees of the Activity. Moreover, they have contact with other professional employees of the Activity and, like certain other professional employees of the Activity, they have contact with patients in performing their duties. Further, it was noted that, in addition to the chemist who works in the laboratory, there are other chemists employed by the Activity.

In Veterans Administration, Wadsworth Hospital Center, cited above, the Petitioner sought an election in either of two employee units similar to the alternative units sought in the instant proceeding. For the reasons set forth in that decision, I find that in the instant case neither the claimed unit, nor the alternative unit, is appropriate for the purpose of exclusive recognition as the employees sought do not share a separate and distinct community of interest from other General Schedule professional employees of the Activity, and as such units of one or several of some 20 professional job classifications could result ultimately in a myriad of separate professional employee units in the paramedical services of the Activity, which fragmentation clearly would not promote effective dealings and efficiency of agency operations. 4/

Under these circumstances, I find that a unit of medical laboratory technologists or, in the alternative, a unit of medical laboratory technologists and chemists and microbiologists regularly assigned to the laboratory, is not appropriate and, accordingly, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-4696 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
August 29, 1975

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

4/ Cf. Veterans Administration, Wadsworth Hospital Center, cited above; Veterans Administration Hospital, Tampa, Florida, A/SLMR No. 330; and Veterans Administration, Veterans Administration Hospital, Buffalo, New York, A/SLMR No. 60.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,  
 SAN FRANCISCO, CALIFORNIA  
 A/SLMR No. 553

VETERANS ADMINISTRATION HOSPITAL,  
 SAN FRANCISCO, CALIFORNIA 1/

Activity

and

Case No. 70-4679

CALIFORNIA ASSOCIATION FOR  
 MEDICAL LABORATORY TECHNOLOGY  
 ENGINEERS AND SCIENTISTS OF  
 CALIFORNIA

Petitioner

DECISION AND ORDER

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

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

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

2. The Petitioner, California Association for Medical Laboratory Technology Engineers and Scientists of California, seeks an election in a unit of all professional medical laboratory technologists employed at the Veterans Administration Hospital, San Francisco, excluding all other professional employees, nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order. 2/ At the hearing, the Petitioner indicated that, in the alternative, it would be willing to proceed to an election in a unit which would include the medical laboratory technologists and the two nonsupervisory chemists and the one nonsupervisory microbiologist who are assigned permanently to the clinical pathology service within the medical laboratory.

The Activity contends that both the petitioned for unit and the alternative unit are inappropriate because the employees in either of

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

2/ The unit appears as amended at the hearing.

This case involved a representation petition filed by the California Association for Medical Laboratory Technology Engineers and Scientists of California. The Petitioner sought a unit of all professional medical laboratory technologists employed by the Activity, or in the alternative, a unit of medical laboratory technologists, chemists and microbiologists assigned permanently to the Clinical Pathology Service within the medical laboratory. The record indicated that, in addition to the chemists and microbiologists in the laboratory, a number of employees in these two classifications were employed outside the laboratory. The Activity contended that neither unit was appropriate because the employees sought did not have a community of interest separate and distinct from the other professional employees of the Activity (medical technologists were stipulated to be professional employees) and, further, that such units would not promote effective dealings and efficiency of agency operations.

For the reasons set forth in Veterans Administration, Wadsworth Hospital Center, A/SLMR No. 546, a case in which the Petitioner sought an election in either of two units similar to those claimed in the instant proceeding, the Assistant Secretary found that neither the claimed unit, nor the alternative unit, was appropriate for the purpose of exclusive recognition. In this connection, he noted that the claimed employees did not share a community of interest separate and distinct from other General Schedule professional employees of the Activity, and that units, limited to one or several of some 22 professional employee classifications at the Activity, would lead to excessive fragmentation of units among the professional groups in the paramedical services of the Activity and, therefore, would not promote effective dealings and efficiency of operations. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

the proposed units do not have a community of interest separate and distinct from the other professional employees employed at the Activity, and, further, that such units would not promote effective dealings and efficiency of agency operations. 3/

The record reveals that, at the Activity, the National Federation of Federal Employees represents a unit of all nonprofessional General Schedule employees; the Service Employees International Union represents a unit of all Wage Grade employees; the American Nurses Association represents a unit of all registered nurses; the International Federation of Federal Police represents a unit of all guards and policemen; and the Laborers International Union of North America represents a unit of cemetery employees. The professional employees at the Activity, except for the registered nurses represented by the American Nurses Association, are not represented exclusively. There are approximately 22 General Schedule professional job classifications within the Activity - including medical technologists, chemists, and microbiologists - encompassing some 123 employees, with from one to approximately thirty-two employees in each of these various professional classifications.

The Activity is located in San Francisco, California. Its mission is to provide general medical and surgical services to eligible veterans in the area in which it is located. The Activity's bed capacity presently is approximately 330 and it employs approximately 1400 employees. Overall direction of the Activity is vested in the Hospital Director. The Activity is basically divided into two major segments, namely, the administrative services, which include building management, fiscal, medical administration, and personnel functions, and which are under the direction of the Assistant Hospital Director, and the professional services, which are under the direction of the Chief of Staff who is assisted by an Assistant Chief of Staff. With few exceptions, the Activity's General Schedule professional employees are under the jurisdiction of the Chief and Assistant Chief of Staff. The Medical Laboratory has two sections, namely, the Clinical Pathology Section and the Anatomical Pathology Section. There are some 29 medical technologists in the Clinical Pathology Section of the laboratory and one medical technologist in the Anatomical Pathology Section. Further, there are two chemists and one microbiologist in the Clinical Pathology Section of the laboratory who would be included in the Petitioner's alternative unit. The record indicates, however, that, in addition to the chemists and microbiologists in the Medical Laboratory, there are approximately 14 chemists and 2 microbiologists employed by the Activity outside the laboratory.

The record indicates that the medical technologists, as well as the chemists and microbiologists in the laboratory, are serviced by the same personnel and fiscal offices, and are governed by the same personnel policies and practices as are other General Schedule professional employees of the Activity. Further, the evidence establishes that the medical technologists have work contacts with other professional employees in the laboratory, as well as with other professional employees of the Activity,

3/ The parties stipulated, and the record supports the stipulation, that medical technologists are professional employees within the meaning of the Order. See Veterans Administration, Wadsworth Hospital Center, A/SLMR No. 546.

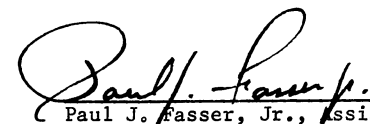
and that they, as do other professionals involved in patient care, visit the wards and have direct contact with patients in performing their duties in the patient's room. Moreover, it was noted that the Petitioner's alternative unit would not include all professional employees at the Activity within the particular job classifications sought as there are some 14 chemists and 2 microbiologists employed outside of the medical laboratory.

In Veterans Administration, Wadsworth Hospital Center, cited above, the Petitioner sought an election in either of two similar employee units of medical laboratory technologists, or, in the alternative, of medical laboratory technologists and chemists and microbiologists in the laboratory. For the reasons expressed in A/SLMR No. 546, I find that in the instant case neither the petitioned for unit of medical laboratory technologists, nor the alternative unit of the medical laboratory technologists, chemists, and microbiologists in the laboratory, is appropriate for the purpose of exclusive recognition as the employees sought do not share a community of interest separate and distinct from other General Schedule professional employees of the Activity, and as such units of one or several of some 22 professional job classifications, even if the unit included all employees in the particular job classifications sought, would lead to excessive fragmentation of units among the professional groups in the paramedical services of the Activity and, therefore, would not promote effective dealings and efficiency of agency operations. 4/ Accordingly, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-4679 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
August 29, 1975

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

4/ Veterans Administration, Wadsworth Hospital Center, cited above; Veterans Administration Hospital, Tampa, Florida, A/SLMR No. 330; and Veterans Administration, Veterans Administration Hospital, Buffalo, New York, A/SLMR No. 60.

August 29, 1975

A/SLMR No. 554

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VANDENBERG AFB,  
4392d AEROSPACE SUPPORT GROUP,  
VANDENBERG AFB, CALIFORNIA  
A/SLMR No. 554

VANDENBERG AFB,  
4392d AEROSPACE SUPPORT GROUP,  
VANDENBERG AFB, CALIFORNIA

Respondent

and

Case No. 72-4109  
A/SLMR No. 435  
FLRC No. 74A-77

On September 30, 1974, the Assistant Secretary issued his Decision and Order in A/SLMR No. 435, in which he found the Respondent Activity had violated Section 19(a)(1) and (6) of the Order by walking out of a scheduled bargaining session, and refusing to meet and confer on other subjects of bargaining. Under the circumstances of the case, and contrary to the conclusion of the Administrative Law Judge, such conduct, in the Assistant Secretary's view, constituted more than a "technical violation" of the Order.

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,  
LOCAL 1001,  
VANDENBERG AFB, CALIFORNIA

Complainant

SUPPLEMENTAL DECISION AND ORDER

On August 8, 1975, the Federal Labor Relations Council (Council) issued its Decision on Appeal, FLRC No. 74A-77, in which it held that the finding of a violation of Section 19(a)(1) and (6), in the circumstances of the case, was inconsistent with the purposes of the Order. Accordingly, the Council set aside the Assistant Secretary's decision in A/SLMR No. 435, and remanded the case to him for appropriate action.

On June 10, 1974, Administrative Law Judge Francis E. Dowd issued his Report and Recommendations in the above-entitled proceeding in which he found that the Respondent had committed a "technical violation" of Section 19(a)(6) of the Order by walking out of a scheduled bargaining session. The Administrative Law Judge found further that the violation was rendered moot by subsequent actions of the Respondent, and he recommended, therefore, that the complaint be dismissed in its entirety. Thereafter, on September 30, 1974, in A/SLMR No. 435, the Assistant Secretary disagreed with the Administrative Law Judge's conclusion that the Respondent's conduct constituted merely a "technical violation" which did not require a remedial order and ordered the Respondent to remedy its violation of Section 19(a)(1) and (6) of the Executive Order.

Based on the Council's holding in FLRC No. 74A-77 and the rationale contained therein, the Assistant Secretary ordered that the complaint in the case be dismissed in its entirety.

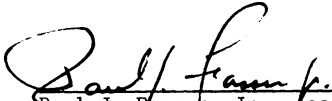
On August 8, 1975, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the subject case, finding that the Assistant Secretary's decision was, under the circumstances of this case, inconsistent with the purposes of the Order. Accordingly, pursuant to Section 2411.17(b) of its Rules, the Council set aside the Assistant Secretary's decision and remanded the case to him for appropriate action consistent with its decision.

Based on the Council's holding in the instant case and the rationale contained therein, I shall order that the complaint herein be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-4109 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
August 29, 1975

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

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

Vandenberg Air Force Base,  
4392d Aerospace Support Group,  
Vandenberg Air Force Base,  
California

and

Local Union 1001, National  
Federation of Federal Employees,  
Vandenberg Air Force Base,  
California

A/SLMR No. 435  
FLRC No. 74A-77

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary who, upon a complaint filed by Local Union 1001, National Federation of Federal Employees, Vandenberg Air Force Base, California (herein called the union), held that the 4392d Aerospace Group, Vandenberg Air Force Base, California (herein referred to as the activity), had violated section 19(a)(1) and (6) of the Order by unilaterally terminating the parties' regularly scheduled negotiating session based on an alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining.

The factual background of this case, as found by the Administrative Law Judge and adopted by the Assistant Secretary, is as follows: The union is the certified representative of separate units of professional and nonprofessional employees at the activity. During the negotiation of the initial contract for the professional unit, the union proposed that the parties jointly negotiate a single agreement covering both units, since the contract covering the nonprofessional unit was about to terminate, but the first session in this format broke down. Subsequently, the activity proposed a different negotiating procedure -- joint bargaining of separate contracts -- and the union accepted the proposal as the first agenda item for the next regularly scheduled bargaining session. However, when the activity attempted to discuss the proposal at that session, the union refused to discuss the proposal and refused to let the activity explain its position. The activity's chief negotiator then stated that he considered the negotiations to be at an

impasse, and when the union negotiator attempted to begin discussion of the next agenda item, the activity's negotiator stated further that he did not intend to continue the negotiations until the impasse was resolved.<sup>1/</sup> In response, the union negotiator stated that he would file an unfair labor practice charge citing the activity's refusal to bargain. Thereupon, the activity negotiating team left the session. However, on the next day, the activity's chief negotiator communicated to his union counterpart an offer to resume negotiations and, in an informal contact with a member of the activity negotiating team, the union's chief negotiator was informed that the activity would not insist on discussing the first agenda item. This offer was reaffirmed in response to the unfair labor practice charge which the union filed 2 days later with the activity, but the union suspended negotiations pending resolution of its complaint. Subsequently, efforts by the Federal Mediation and Conciliation Service to facilitate the resumption of negotiations proved to be without effect.<sup>2/</sup>

The Administrative Law Judge found that when the activity walked out of the meeting, it had committed a technical violation of section 19(a)(6) of the Order in that it did not have a right to insist, to the point of impasse, that the union discuss its proposal for dual-simultaneous negotiations. The Administrative Law Judge then, however, reviewed the subsequent events and concluded:

However, I further find that this violation was rendered moot the following day when the Union was advised twice . . . that the Activity had receded from its position and was willing to return to the bargaining table. In these circumstances, I cannot understand why the Union refused to accept this offer by the Activity. Even if the Union had some doubt about the Activity's good faith, it could quickly test this good faith by returning to the bargaining table. Instead, the Union insisted upon filing an unfair labor practice charge to which the Activity promptly responded . . . that

<sup>1/</sup> The record indicates that the union, during the discussion of the ground rules for negotiation, had declared an impasse and refused to proceed with the agenda, and that the parties at that time requested the intervention of the Federal Mediation and Conciliation Service. Further, the record indicates that, upon declaring the impasse at the negotiation session herein, the activity's chief negotiator stated his intention to request the intervention of the Federal Mediation and Conciliation Service. Official Report of Proceedings, pp. 134-160.

<sup>2/</sup> The record indicates that the activity's chief negotiator and the union's chief negotiator for the professional unit had a small number of meetings regarding the professional unit contract subsequent to the meeting with the Federal Mediation and Conciliation Service, although no formal negotiations were held. Official Report of Proceedings, pp. 152-160.

the Activity's decision with respect to the charge was to "negotiate seriously on any appropriate matter." There is no evidence in the record to suggest that the Activity had in mind anything but to do precisely what an Assistant Secretary's order would accomplish if a violation were found, i.e., to order the Activity back to the bargaining table. I conclude that as of the date that the unfair labor practice charge was filed, the Activity was not insisting to impasse upon multi-unit bargaining as a condition precedent to bargaining. Therefore, I recommend that no violation of section 19(a)(6), (1), and (2) of the Executive Order be found.

In light of the foregoing, I further conclude that the Union's conduct in this entire matter, both at the [regularly scheduled bargaining session] and thereafter, raises a serious question as to its own genuine willingness to bargain in good faith. It is noted, however, that apparently the Activity did not file an unfair labor practice charge against the Union. Instead, the Activity has attempted to bargain with the Union, despite the Union's apparent unwillingness to do so, at the same time that it is bargaining in good faith with the same Union for a contract covering a different unit at the same location. [Emphasis in original.]

On review, the Assistant Secretary agreed with the Administrative Law Judge that, in the particular circumstances of the case, the activity violated section 19(a)(6) of the Order by unilaterally terminating the parties' negotiation session based on the alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining. The Assistant Secretary also found that such conduct constituted an improper interference with employee rights in violation of section 19(a)(1) of the Order. The Assistant Secretary then concluded:

However, I disagree with the Administrative Law Judge's conclusion that, under the circumstances of this case, the Respondent's improper conduct constituted merely a "technical violation" of the Order which did not require a remedial order. Accordingly, I shall order that the Respondent remedy its violation of Section 19(a)(1) and (6) of the Order.

The activity appealed the Assistant Secretary's decision to the Council, alleging that the decision was arbitrary and capricious and presented major policy issues. The Council accepted the activity's petition for review, concluding that a major policy issue was present concerning the finding of a violation of section 19(a)(1) and (6) and the issuance of a remedial order in the circumstances of this case. The Council also determined that the activity's request for a stay met the criteria for granting such a request as set forth in section 2411.47(c)(2) of its rules and granted the request. The activity and the union filed briefs with the Council as provided in section 2411.16 of the Council's rules.



Opinion

As indicated above, the Assistant Secretary found that the activity violated section 19(a)(1) and (6) by unilaterally terminating the parties' regularly scheduled bargaining session. In the opinion of the Council, the finding of a violation of section 19(a)(1) and (6), based on the activity's conduct in the circumstances of this case, is inconsistent with the purposes of the Order.

Section 11(a)<sup>3/</sup> of the Order imposes on an agency (or activity) and a labor organization engaged in the process of negotiating a collective bargaining agreement the duty to negotiate in good faith. Section 19(a)(6)<sup>4/</sup> provides that agency management shall not refuse to negotiate as required by the Order. Thus, the issue before the Assistant Secretary in this case was whether, based wholly on the series of events complained of herein, the activity violated the Order by failing to negotiate in good faith with the union.

While an impasse in negotiations which results from a demand that certain improper conditions be met before negotiations can continue may, under certain circumstances, constitute a refusal to negotiate in good faith, it is difficult to conclude that the circumstances of this case are an appropriate basis for the finding of such a refusal to negotiate. Though the activity's chief negotiator did refuse to negotiate regarding the second agenda item pending the mediation of the impasse over the first item on the agenda, almost as soon as that refusal was made, the activity retracted it and offered to resume negotiations. Subsequently and consistently, both in its response to the union's unfair labor practice charge and in informal contacts with the union, the activity reiterated its willingness to resume negotiations and to withdraw its insistence on negotiation of the first agenda item. However, the labor organization has consistently refused to return to the negotiating table until its complaint was resolved.

3/ Section 11(a) provides, in pertinent part, as follows:

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions . . . .

4/ Section 19(a)(6) provides, in pertinent part, as follows:

Sec. 19. Unfair labor practices. (a) Agency management shall not—  
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(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.  
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What is at issue in this case is whether a violation of the Order should have been found on the basis of so brief an interruption in the negotiations. In our view, when all of the circumstances of the situation are taken into account, it is evident that the activity's conduct in this one instance was of a de minimis nature and thus is not sufficient to constitute a failure to negotiate in good faith in violation of the Order. Experience in labor relations, whether in the Federal labor-management relations program, on the state and local government level, or in the private sector, indicates that there are occasions when, during the course of negotiating an agreement, representatives of either party, management or labor organization, engage in conduct which might, standing alone, constitute the basis for an unfair labor practice complaint. However, that experience also indicates that it is not uncommon for the party quickly to cease engaging in such conduct and to continue negotiations in good faith.<sup>2/</sup> The Council feels strongly that in appropriate factual situations, such as that in this case, similarly brief interruptions of negotiations with a de minimis effect should not warrant the finding of a violation. Rather, an isolated incident which results in such a brief interruption should be examined in the context of the totality of the respondent's bargaining conduct for a determination as to whether it would effectuate the purposes of the Order to find a violation when no further benefit would accrue from that finding and from the resultant remedial order. Thus, we conclude that in the instant case, where the representatives of the activity ceased to engage in the alleged improper conduct immediately after it occurred, and where the activity at all times sought to continue the negotiations in good faith, a finding that the activity violated the Order is not warranted.<sup>6/</sup>

Moreover, in addition to our conclusion that the conduct of the activity in the circumstances herein did not constitute a violation of the Order, it is also the opinion of the Council that litigation of this case is itself inconsistent with the purposes of the Order. The negotiations between the parties to this case have been suspended since the unfair labor practice charge was originally filed. This has occurred in the face of the express offer and the continued willingness of the activity to resume bargaining. This has meant, in its most serious aspect, that

3/ While private sector precedents are not controlling in the Federal labor-management relations program, various decisions of the National Labor Relations Board illustrate this observation. See, for example, Fred F. Knipschild, et al., d/b/a General Dehydrated Foods, 45 NLRB No. 145 (1942), Nocona Boot Company, 116 NLRB No. 273 (1956), and Whiting Milk Company, 145 NLRB No. 137 (1964).

6/ The Assistant Secretary's finding that the activity violated section 19(a)(1) is based on the same conduct as that which he found to constitute a violation of section 19(a)(6). Accordingly, as there is no basis in that conduct for the finding of a violation of section 19(a)(6), there is also, and for the same reasons, no basis for the finding of a violation of section 19(a)(1).

the employees in the professional unit have been without the protection afforded by a collective bargaining agreement during the entire period in which the complaint was processed. In the opinion of the Council, litigation of this sort does not effectuate the long-term establishment of collective bargaining in the Federal program. The Preamble of Executive Order 11491, as amended, states one of the purposes of the Federal labor relations program as "the maintenance of constructive and cooperative relationships between labor organizations and management officials . . . ."7/ To that end, the Order provides the means for the establishment and maintenance of such relationships. Nevertheless, the primary responsibility for maintaining cooperation between labor organizations and management lies with those parties themselves.8/ Thus, it

7/ The Preamble of Executive Order 11491, as amended, reads as follows:

WHEREAS the public interest requires high standards of employee performance and the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and

WHEREAS 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

WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; and

WHEREAS subject to law and the paramount requirements of public service, effective labor-management relations within the Federal service require a clear statement of the respective rights and obligations of labor organizations and agency management:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the executive branch of the Government in all dealings with Federal employees and organizations representing such employees. [Executive Order 11491, As Amended, Labor-Management Relations in the Federal Service (1975), p. 7.]

8/ In the report accompanying Executive Order 11491, emphasis was placed on the informal resolution by the parties of alleged unfair labor practices prior to the filing of a complaint with the Assistant Secretary: "Alleged unfair labor practices other than those subject to an applicable grievance or appeals procedure should be investigated by the agency and labor organization involved and informal attempts to resolve the complaints should be made by the parties. If informal attempts are unsuccessful in disposing of the complaints within a reasonable period of time,

(Continued)

does not serve the purposes of the Order when the parties use the sanctions provided therein as the first, and not the last, resort for the settlement of their disputes. Cooperative labor relations are not established or maintained when a labor organization or the management of an agency establishes as its first priority, not the negotiation of a collective bargaining agreement, but the vindication of its position in an unfair labor practice proceeding.

The purposes of the Order will best be served if cases such as the one herein are screened from the unfair labor practice procedures of the Assistant Secretary. In its recent review of the Federal labor relations program under the Executive Order, the Council concluded "that the processing of unfair labor practice cases can be improved greatly if the Assistant Secretary, pursuant to his authority to prescribe regulations needed to administer his functions under the Order, modifies his procedure to permit members of his staff to conduct such independent investigation in these cases as he deems necessary in order to determine whether there is a reasonable basis for the complaint. . . . This procedure will, in our view, facilitate the informal resolution of unfair labor practice issues."9/ Consistent with this recommendation, the Assistant Secretary

(Continued)

both parties may agree to stipulate the facts to the Assistant Secretary and request a decision. In lieu of a joint request, either party may request the Assistant Secretary to issue a decision on the matter." Study Committee Report and Recommendations, August 1969, Labor-Management Relations in the Federal Service (1975), Section D.3., p. 69. The Assistant Secretary's regulations, as a condition precedent to the filing of a complaint, require that an attempt be made by the parties to resolve informally the alleged unfair labor practice. Rules and Regulations of the Assistant Secretary, section 203.2.

Moreover, by way of analogy, what was said in that same report pertaining to the resolution of negotiation impasses is equally applicable to the resolution of disputes between parties over unfair labor practices: "The ready availability of third-party procedures for resolution of negotiation impasses could cause the undesired escalation effect whereby the parties, instead of working out their differences by hard, earnest and serious negotiation, continually would take their problems to a third party for settlement. . . . It is generally recognized that agreements voluntarily arrived at by the parties are the hallmark of the industrial democracy enjoyed in this country." Study Committee Report and Recommendations, August 1969, Labor-Management Relations in the Federal Service (1975), Section F, pp. 72-73.

9/ Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, As Amended, Labor-Management Relations in the Federal Service (1975), Section VIII.2., p. 49.

has promulgated and published regulations which establish his authority to investigate unfair labor practice complaints.<sup>10/</sup> In the opinion of

10/ The Rules and Regulations of the Assistant Secretary, section 203.6 provide as follows:

Section 203.6 Investigation of complaints; cooperation by activities, agencies and labor organizations; official time for witnesses; burden of proof; and availability of evidence.

The Area Director shall conduct such independent investigation of the complaint as he deems necessary.

(a) A party may request the Area Director to conduct an independent investigation upon a showing:

- (1) That there is sufficient information to warrant further processing of the complaint; and
- (2) that there are prospective individual witnesses from whom he has been unable to obtain a signed statement because of geographic dispersion of the witnesses or because of their reluctance to provide information to a party; the request must clearly identify any such witnesses and indicate the nature of their expected testimony; or
- (3) that the requesting party lacks access to pertinent documents or data; the request should clearly identify such documents or data, establish their relevance, and indicate the reason why the requesting party has been unable to obtain them.

(b) At the conclusion of any independent investigation conducted at the request of a party, to the extent legally permissible, the Assistant Regional Director shall:

- (1) transmit to the requesting party any data or copies of any documents obtained as a result of such investigation, notifying all other parties so that they may be supplied copies of the same upon request;
- (2) transmit to all parties copies of signed statements obtained from any witness interviewed;
- (3) notify the requesting party of the names of all prospective witnesses identified by him who have been contacted and who have not signed statements.

(c) In connection with the independent investigation of complaints, activities, agencies and labor organizations are expected to cooperate fully in such investigations with the Area Director.

(d) When, during the course of an independent investigation by the Area Director, it is determined that a certain employee or certain employees should be interviewed, such employee or employees shall be granted official time for the period of such interview(s) only insofar as such interview(s) occur(s) during regular work hours and when the employee(s) would otherwise be in a work or paid leave status.

(e) The complainant shall bear the burden of proof at all stages of the proceeding regarding matters alleged in its complaint, except as otherwise provided in section 203.7(b).


(f) A complaint alleging a violation of section 19(b)(4) of the order shall receive the highest priority investigation.

(g) A complaint alleging a violation of section 19(a)(2) of the order shall be given priority over all other complaints under section 19 except those involving section 19(b)(4) of the order.

the Council, this investigative authority of the Assistant Secretary provides a mechanism by which unnecessary litigation of this sort may be diverted from the unfair labor practice procedures. Through investigation into the circumstances of cases in which contract negotiations have broken down due to conduct alleged to constitute an unfair labor practice, the Assistant Secretary will be able to identify those in which a continued willingness to bargain exists and the effects of the alleged impropriety, if any improper conduct occurred, have been removed. Where such circumstances are found to exist, and it is clear that nothing more is to be gained by the parties, the employees, or the Federal program in the further processing of the complaint, the Assistant Secretary may properly dismiss that complaint, thereby removing it from the litigation process.<sup>11/</sup>

For the foregoing reasons, we find that the Assistant Secretary's decision that the activity violated section 19(a)(1) and (6) in the circumstances of this case is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.17(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for appropriate action consistent with our decision.

By the Council.

  
Henry B. Frazier II  
Executive Director

Issued: August 8, 1975

11/ It should be noted that this is not the only means open to the Assistant Secretary for screening unnecessary litigation from the unfair labor practice procedures. In the report and recommendations accompanying Executive Order 11491, it was stated: "If the Assistant Secretary finds . . . that a satisfactory offer of settlement has been made, he may dismiss the complaint." Study Committee Report and Recommendations, August 1969, Labor-Management Relations in the Federal Service (1975), Section D.3., p. 69. Pursuant to this recommendation, the Assistant Secretary has provided in his regulations for such settlements. Rules and Regulations of the Assistant Secretary, section 203.7(a)(3). See also section 203.7(b)(4).

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

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

DEPARTMENT OF AGRICULTURE AND  
OFFICE OF INVESTIGATION  
A/SLMR No. 555

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DEPARTMENT OF AGRICULTURE AND  
OFFICE OF INVESTIGATION

Respondent.

and

Case No. 22-5666(CA)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1375

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1375 (Complainant), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to consult with the Complainant prior to its issuance of a number of directives affecting both personnel practices and working conditions.

The Assistant Secretary adopted the Administrative Law Judge's finding that the Respondent violated Section 19(a)(1) and (6) by changing promotion and appointment practices without first meeting and conferring with the Complainant.

The Respondent's exceptions, which were limited to the Administrative Law Judge's recommended notice to employees to be posted by the Respondent as part of the remedial order, argued against inclusion in the notice of any reference to the Complainant as the exclusive representative of the Respondent's employees because the Acting Secretary of Agriculture allegedly had exempted the employees in the unit involved from coverage under the Order under the provisions of Section 3(b)(4) of the Order.

Having been advised administratively in another unfair labor practice case (Case No. 22-5821(CA)) that Acting Secretary of Agriculture Campbell had, in fact, made the 3(b)(4) determination on January 2, 1975, and having concluded on appeal that the issuance of a notice of hearing in Case No. 22-5821(CA) was warranted in order to ascertain whether the Acting Secretary's action was arbitrary or capricious, the Assistant Secretary found that the issuance of a bargaining order in this matter running to the Complainant would be inappropriate until such time as the question whether the Complainant currently is the exclusive representative of the employees involved is resolved.

On May 23, 1975, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendation. Thereafter, the Respondent and the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, including the Respondent's and the Complainant's exceptions, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge to the extent consistent herewith. 1/

The Respondent's exceptions, which are limited to the Administrative Law Judge's recommended notice to employees to be posted by the Respondent as part of the remedial order, argue against the inclusion in the notice of any reference to the Complainant herein as the exclusive representative

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1/ In agreement with the Complainant's contention contained in its exceptions herein, I find that the Administrative Law Judge's recommended remedial order does not provide an appropriate remedy for the improper actions of the Respondent in unilaterally changing established practices in the area of promotions and appointments which the Administrative Law Judge found, and in which findings I concur, constituted violations of Section 19(a)(1) and (6) of the Order. Accordingly, I have modified his recommended order, as set forth below.

the Respondent's employees. Thus, the Respondent would have such notice make reference only to "any exclusive representative of our investigative employees, that in the future there /sic/ may be properly and duly designated to so represent said employees." The Respondent's contention in this regard is based on the alleged determination by the Acting Secretary of Agriculture on January 2, 1975, exempting the employees in the unit involved from coverage by the Order under the provisions of Section 3(b)(4) of the Order. 2/

With respect to the Respondent's contention, I have been advised administratively in Case No. 22-5821(CA) that on January 2, 1975, Acting Secretary of Agriculture Campbell, in a letter to the National President and the General Counsel of the National Federation of Federal Employees, stated that he had determined that the Department's Office of Investigation and Office of Audit fell within the meaning of Section 3(b)(4) of the Order as, in his judgment, the Executive Order cannot be applied to these Offices in a manner consistent with the internal security of the Department of Agriculture. Noting the Federal Labor Relations Council's Decision on Appeal in Audit Division (Code DU), National Aeronautics and Space Agency, FLRC No. 70A-7, I have concluded on appeal that the issuance of a notice of hearing in Case No. 22-5821(CA) is warranted in order to ascertain whether the Acting Secretary's action, described above, was arbitrary or capricious. Under these circumstances, I find that the issuance of a bargaining order in this matter running to the Complainant would be inappropriate at this time as there is a question whether the Complainant currently is the exclusive representative of the employees involved herein. Thus, while I agree with the Administrative Law Judge's conclusions as to the merits of this case which involved improper conduct by the Respondent occurring prior to January 2, 1975, and note that the Respondent has not excepted to such conclusions, in view of the above noted subsequent events, I find that the remedial order herein must be tailored to the current circumstances.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Agriculture and Office of Investigation, Washington, D. C., shall:

2/ Section 3(b)(4) of the Order provides:

- (b) This Order (except section 22) does not apply to -- (4) 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-

1. Cease and desist from:

(a) Implementing any changes unilaterally in the promotion or appointment practices as set forth in the memoranda issued by the Director, Office of Investigation, without first affording any exclusive representative of the investigative employees the opportunity to meet and confer on such changes.

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

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

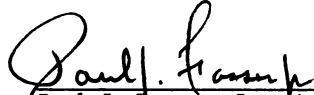
(a) Upon a finding that the National Federation of Federal Employees, Local 1375, is the current exclusive representative of the investigative employees, we will reestablish all promotion and appointment practices in effect prior to June 10, 1974.

(b) Upon a finding that the National Federation of Federal Employees, Local 1375, is the current exclusive representative of the investigative employees, we will, upon request, meet and confer with the National Federation of Federal Employees, Local 1375, with respect to any proposed changes in the promotion or appointment practices.

(c) Post at its Regional facilities throughout the United States copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Office of Investigation and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.  
August 29, 1975

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

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NOTICE TO ALL EMPLOYEES



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

and in order to effectuate the policies of  
EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT implement unilaterally any changes in the promotion or appointment practices as set forth in the memoranda issued by the Director, Office of Investigation, without affording any exclusive representative of our investigative employees the opportunity to meet and confer on such changes.

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

WE WILL, upon request, meet and confer with any labor organization determined to be the exclusive representative of our investigative employees with respect to any proposed changes in the promotion or appointment practices.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

..... :  
In the Matter of :  
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DEPARTMENT OF AGRICULTURE AND :  
OFFICE OF INVESTIGATION :  
 :  
Respondent :  
 :  
and : Case No. 22-5666 (CA)  
 :  
NATIONAL FEDERATION OF :  
FEDERAL EMPLOYEES, Local 1375 :  
 :  
Complainant :  
 :  
..... :

Mr. E. Joseph Taccino  
Chief, Employee Relations Branch,  
Personnel Operations Division, United  
States Department of Agriculture  
For the Respondent

Irving Geller, Esquire  
General Counsel, National Federation  
of Federal Employees  
1737 H Street, N. W.  
Washington, DC  
For the Complainant

Before: BURTON S. STERNBURG  
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to a complaint filed on December 5, 1974, under Executive Order 11491, as amended, by Local 1375, National Federation of Federal Employees, hereinafter called the Union or Complainant, against the Department of Agriculture and the Office of Investigation, hereinafter called the Agency or Respondent, a Notice of Hearing on Complaint was issued by the Acting Regional Director for the Philadelphia, Pennsylvania Region on January 29, 1975.

The complaint alleges, in substance, that Respondent violated Sections 19(a)(1), (2), (5) of the Executive Order by virtue of its actions in issuing a number of directives affecting both personnel and working conditions without first consulting with the Union which is the recognized representative of the Agency's employees. 1/

A hearing was held in the captioned matter on April 1, 1975 in Washington, D. C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

The Union has been the recognized exclusive representative of the investigators and auditors comprising the Office of the Inspector General (OIG) for many years. A collective bargaining agreement between the Union and the Respondent was executed on April 10, 1968, effective for two years and year to year thereafter, absent 90 days advance notice to terminate by either party. 2/

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1/ During the course of the hearing Complainant was, upon motion unopposed by the Respondent, allowed to amend the complaint dated December 5, 1974, to include a 19(a)(6) allegation and delete the 19(a)(2) and 19(a)(5) allegations. The 19(a)(6) amendment was allowed solely on the basis that the events set forth in the complaint, if proved, would also support violation of Section 19(a)(6) of the Executive Order.

2/ Although the Respondent in its post hearing brief contends that the 1968 collective bargaining agreement is no longer in effect, the record is barren of any evidence supporting such contention.

Prior to November 1973, the Office of Inspector General handled the investigative and audit functions of the Department of Agriculture. In November 1973, the Office of Inspector General was abolished and the functions previously housed therein, i. e. audit and investigation, were divided into two newly established separate offices, Office of Audit and Office of Investigation. Upon the establishment of the two new offices, most of the existing supervisory personnel were assigned to the Office of Audit. Consequently, the Office of Investigation, which was composed of some six or seven regions throughout the United States, was forced to appoint a number of acting regional directors, who in some cases, held G. S. grades lower than those of some of the employees working under them in the respective regions.

On or about April 28, 1974, John V. Graziano was appointed to the position of Director, Office of Investigation and made responsible for the complete operation of such office. Mr. Graziano, in accordance with prior arrangements, met with representatives of the Union on June 10, 1974, for purposes of getting acquainted and discussing pending problems and unanswered questions with respect to the operation of the new Office of Investigation. While such items as promotions and dress were generally and/or informally raised during the June 10th meeting, no specific proposed changes were presented by Mr. Graziano to the Union representatives for consideration.

Beginning on June 10, 1974 and continuing through September 12, 1974, Mr. Graziano, through the medium of memoranda to the various acting Regional Directors or Assistant Regional Directors, effected various changes in established practice in the area of promotions and appointments. 3/ Thus GS 12 position vacancies which had in practice normally been publicized only within the regional area were to be publicized nationwide. 4/ Additionally, regional evaluation panels were abolished and the selection of individuals in the GS 12 positions and below (other than clericals) was left solely to the Director, Mr. Graziano, rather than the respective Regional Directors. Additionally the nationwide evaluation panel for GS 13 positions was also

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3/ The Union was not informed of the changes by Respondent, but rather learned of them indirectly by means not set forth in the record.

abolished and the selection for such positions was again vested solely in Mr. Graziano. Lastly, with respect to promotions, the element of mobility was made an important element in the selection for GS 12 and 13 positions and eligible employees were, contrary to prior practice, required to make a positive bid for the vacancies.

Other memoranda during the period June 10 - September 12, 1974, dealt with the creation of a "Special Investigations Unit" and "acceptable modes of dress and appearance". In this latter context, although no specific mode of dress was prescribed, Mr. Graziano cautioned against "Outlandish, extreme clothes" which might "produce an image and demeanor that are offensive to the majority of the persons with whom we deal".

Discussion and Conclusions

Section 11(a) of the Executive Order imposes upon management the obligation to meet and confer in good faith with respect to personnel policies and practices and matters affecting working conditions. Subject to the rights retained by management by virtue of Section 12(b) of the Order, failure to consult on changes affecting working conditions is violative of Section 19(a)(6). National Labor Relations Board, A/SLMR No. 246. Additionally, with respect to the rights retained by management under Section 12(b), failure to consult as to the impact of changes made in the area of management prerogative is also violative of Section 19(a)(6). Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 451; Federal Railroad Administration, A/SLMR No. 418.

In the instant case, it is clear that the Respondent effected a number of changes in current promotion and appointment practices by virtue of its memoranda during the period June 10 - September 12, 1974. The general discussion of possible impending changes in the promotion plan during the June 10th "get acquainted" meeting falls short of the good faith consultation requirement set forth in Section 11(a) of the Executive Order. Without specifics,

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Footnote 4/ carried over from page 3.

4/ Although the existing promotion plan made provision for such nationwide posting, according to the uncontroverted testimony of union president Renken, in practice both the posting and selection were generally within the regional area.

it is impossible for the parties to engage in any meaningful discussion or negotiations. While it is true that the assumption of all appointment and/or promotion power by Mr. Graziano might well have been caused by the decision to abolish the Office of Inspector General and its resultant impact on the supervisory hierarchy, the fact remains that the Office of Investigation, in any event, failed to give notice and provide opportunity for good faith consultation with the Union with respect to the impact of the changes which were attributable to such business exigency. Moreover, and in any event, the change in the posting requirements, area selection, and positive bids certainly were not the product of any such business exigency.

Accordingly, in view of the foregoing, I find that the Respondent violated Section 19(a)(6) of the Executive Order by virtue of its action in changing the promotion and/or appointment practices without prior consultation with the Union. I further find that such action by the Respondent tends to interfere with, restrain, or coerce employees in the exercise of their rights assured by the Order, and therefore, also is violative of Section 19(a)(1). 5/

With respect to the memorandum dealing with the "acceptable modes of dress and appearance", I find, that inasmuch as the memorandum contains no specific changes and generally comports with the standard of dress expected of all individuals representing the U. S. Government in dealings with the private sector, insufficient basis exists for a Section 19(a)(6) finding.

Lastly, with respect to the memorandum dealing with the establishment of a "Special Investigative Unit", I find that such memorandum falls within the purview of Section 12(b) of the Order and that the Respondent was not under an obligation to consult thereon prior to its establishment.

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5/ Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454



Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25 (b) of the Rules and Regulations, I recommend that the Assistant Secretary of Labor for Labor Management Relations adopt the following Order designed to effectuate the policies of Executive Order 11491, as amended.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Agriculture and Office of Investigation, Washington, D. C., shall:

1. Cease and desist from:

(a) Unilaterally changing the promotion or appointment practices in effect or any other condition of employment without first conferring or negotiating with Local 1375, National Federation of Federal Employees or any other exclusive representative of its investigative employees.

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


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

(a) Upon request, consult, confer, or negotiate with Local 1375, National Federation of Federal Employees or any other exclusive representative of its employees with respect to changes in the promotion or appointment to vacancies practices.

(b) Post at its Regional facilities throughout the United States copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Office of Investigation and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such

notices are not altered, defaced, or covered by any other material.

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

  
BURTON S. STERNBURG  
Administrative Law Judge

Dated: May 23, 1975  
Washington, DC

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute change in the promotion or appointment to vacancies practices without consulting, conferring, or negotiating with Local 1375, National Federation of Federal Employees or any other exclusive representative of our employees.

WE WILL, upon request, consult, confer, or negotiate with Local 1375, National Federation of Federal Employees, with respect to changes in the promotion or appointment to vacancies practices.

\_\_\_\_\_  
(Agency or Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104

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

UNITED STATES FOREST SERVICE,  
SALMON NATIONAL FOREST,  
SALMON, IDAHO  
A/SLMR No. 556

This case involved petitions for clarification of unit (CU) filed by Local 1502, National Federation of Federal Employees, and by the Activity herein, seeking clarification with respect to the supervisory status of various categories of employees located in an exclusive bargaining unit at the Salmon National Forest, Salmon, Idaho. The parties also requested that the Assistant Secretary reconsider the decision in Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon, A/SLMR No. 212, that "seasonal supervisors" be excluded from the unit while acting in such capacity. In this regard, they contended that supervisors who supervise "seasonal employees" should be in the unit at all times.

The Assistant Secretary noted that the Federal Labor Relations Council (Council) had, in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, FLRC No. 72A-4, and other cases, articulated reasons why supervisory status should be determined on the basis of the authority of the individual, and why supervisors had interests in conflict with unit employees, requiring their exclusion from units. As "seasonal supervisors" spend a considerable part of the year supervising employees within the meaning of Section 2(c) of the Order, he reaffirmed that "seasonal supervisors" should be excluded from the unit while serving in such capacity and included in the unit for the portion of the year when they are not supervising seasonal employees.

With respect to certain other named individuals in certain job classifications covered by the CU petitions, the Assistant Secretary noted that during the course of the hearing the parties agreed as to their nonsupervisory status. In these circumstances, he concluded that the agreement of the parties constituted, in effect, a withdrawal request of the petitions insofar as they sought clarification with respect to the agreed upon employees. In the absence of any evidence that the parties agreement was improper, the Assistant Secretary approved the withdrawal request. As to the remaining disputed categories, the Assistant Secretary made findings with respect to the supervisory status of the job classifications involved and ordered that the unit be clarified consistent with his decision.

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES FOREST SERVICE,  
SALMON NATIONAL FOREST,  
SALMON, IDAHO

Activity-Petitioner

and

Case No. 71-2989

LOCAL 1502, NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES

Labor Organization

UNITED STATES FOREST SERVICE,  
SALMON NATIONAL FOREST,  
SALMON, IDAHO

Activity

and

Case No. 71-3008

LOCAL 1502, NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES

Petitioner

UNITED STATES FOREST SERVICE,  
SALMON NATIONAL FOREST,  
SALMON, IDAHO

Activity

and

Case No. 71-3136

LOCAL 1502, NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES

Petitioner

UNITED STATES FOREST SERVICE,  
SALMON NATIONAL FOREST,  
SALMON, IDAHO

Activity-Petitioner

and

Case No. 71-3144

LOCAL 1502, NATIONAL FEDERATION OF  
FEDERAL EMPLOYEES

Labor Organization

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Daniel P. Kraus. 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:

Local 1502, National Federation of Federal Employees, herein called NFFE, is the exclusive representative of certain employees of the Activity. In this proceeding, involving petitions for clarification of unit (CU), the parties seek to clarify the supervisory status of certain employee classifications. Moreover, the parties request consideration of whether certain classifications of employees designated as "seasonal supervisors" should be included in the unit at all times even when acting as such supervisors.

The unit represented by the NFFE, for which clarification is sought herein, covers all permanent full-time and permanent part-time nonsupervisory employees in the Salmon National Forest. In this regard, the record reveals that the Salmon National Forest has approximately 82 employees who are located in some 4 ranger districts. The mission of the Forest Service, of which the Activity is a part, is to stimulate effective management of forested land of state and private ownership. In the pursuit of this mission, the Forest Service is involved in motivating and conducting applied research in all fields pertinent to improving the management of the public and private forest and range lands.

In Case No. 71-2989, the Activity-Petitioner seeks clarification of the status of the District Clerk, North Fork Ranger District. In Case No. 71-3008, the NFFE seeks clarification of the status of the Fire Control Officer and the Budget and Accounting Officer, GS-11. <sup>1/</sup> In Case No. 71-3136, the NFFE seeks clarification of the status of the following employee classifications: Supervisory Forestry Technician, Forestry Technician, Soil Scientist, Administrative Assistant, Clerk-Stenographer, Civil Engineer, Civil Engineer Technician, Engineer Equipment Operator Foreman, Automotive and Engineering Equipment Mechanic Supervisor, Range Conservationist, Forester, and Clerk Typist. And, finally, in Case No. 71-3144, the Activity-Petitioner seeks clarification of the status of the following classifications: Forestry Technician, Forester, Supervisory

<sup>1/</sup> The record indicates that at the time of the hearing in this matter the position of the Fire Control Officer, which would be classified as a Supervisory Forestry Technician, GS-10, was not filled. Accordingly, I make no finding as to the supervisory status of an employee in this classification.

Forestry Technician, Payroll and Voucher Clerk, 2/ Surveying Technician, and Civil Engineering Technician. 3/

The parties stipulated that twenty-one of the employees involved in the petitions herein had no permanent employees reporting or assigned to them but that, during parts of the year, they supervised seasonal employees. In this connection, the parties indicated a desire for the Assistant Secretary to reconsider and reverse the decision in Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon, A/SLMR No. 212, in which it was held that employees who supervise seasonal employees should not be included in the recognized unit during such periods, but should be considered to be within the unit only for the part of the year when they are not supervising seasonal employees. The parties in the instant case contend that seasonal supervisors should be considered to be included in the unit throughout the entire year.

The record indicates that when acting as "seasonal supervisors" the employees in question effectively evaluate, direct, discipline, and effectively recommend overtime with respect to other employees. The Federal Labor Relations Council (Council) found in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, FLRC No. 72A-4, that supervisory status was intended to be

2/ The record reveals that Herbert L. Godfrey, formerly the Payroll and Voucher Clerk, GS-6, who reported to the Budget and Accounting Officer, GS-11, has recently been appointed to a newly created position, Budget and Accounting Technician, GS-6, reporting to the same supervisor, and that, although Godfrey exercised no supervisory authority in his prior position, he anticipated that pursuant to his new job description he would have supervisory responsibility. Under these speculative circumstances, I make no finding as to the supervisory status of the Budget and Accounting Technician, GS-6.

3/ The parties stipulated that certain named individuals in various job classifications involved in Case No. 71-3136 and certain named individuals in various job classifications involved in Case No. 71-3144 possessed no supervisory authority and, therefore, were to be considered included in the exclusively recognized unit. There is no evidence to indicate that the parties' agreement was improper. Under these circumstances, I view the agreement of the parties as a withdrawal of the request for clarification in this regard. Accordingly, I approve the withdrawal request and, therefore, find it unnecessary to make a determination as to these particular employees and classifications in Case Nos. 71-3136 and 71-3144. Cf. New Jersey Department of Defense, A/SLMR No. 121. The parties also stipulated in Case Nos. 71-3136 and 71-3144, respectively, that Greg Munther and Oliver Williams are no longer employees of the Activity and, accordingly, I shall make no finding as to their supervisory status. The parties further stipulated in Case No. 71-3144 that Lannis Allmaras, Assistant Fire Control Officer, should be added to the list of employees whose supervisory status should be considered as his name had inadvertently been omitted from the petition. However, as there was insufficient evidence to determine the responsibilities of the Assistant Fire Control Officer, I shall make no finding as to the supervisory status of Lannis Allmaras.

determined on the basis of the authority vested in the individual and not the number of employees supervised. The Council stated that it was the nature of the individuals' duties and responsibilities which was the basis for determining supervisory responsibilities. In this regard, the Council considered the Study Committee Report and Recommendations of 1969 in which the rationale for excluding supervisors from recognized units was articulated. Thus, it was noted that a supervisor stands as a representative of agency management and, as such, participates and contributes to formulation of policy and procedures, expresses the agency view in daily communication with employees, and that supervisors should be and are part of agency management. 4/ As the "seasonal supervisors" spend a considerable portion of the year supervising employees within the meaning of Section 2(c) of the Order, it would, in my view, be inconsistent with the stated intent of the Executive Order to place them in a position of potential conflict of interest and responsibility during such extended periods of time. Under these circumstances, I reaffirm the decision in A/SLMR No. 212 with respect to "seasonal supervisors."

As the parties stipulated that the "seasonal supervisors" in the instant proceeding have no permanent employees assigned to them for the entire year, such employees, who spend a portion of the working year as rank and file employees and the remainder of the year as supervisors, should be considered to be included in the employee bargaining unit during the "out of season" period when they are performing rank and file duties and should be considered outside the unit during the time they serve as "seasonal supervisors."

#### Employee Job Classifications

##### Budget and Accounting Officer, GS-11

The position of Budget and Accounting Officer, GS-11, is located in the Budget and Finance Section and an employee in this classification reports to the Forest Administrative Officer. The incumbent is responsible for two permanent employees and one part-time employee in his section, all of whom are junior in grade. His job functions involve providing specialized budgeting and accounting advice to the forest organization and management. The record reveals that the Budget and Accounting Officer has prepared a career-development form for a subordinate seeking a higher position, signing it as supervisor. Moreover, he has effectively evaluated two employees, 5/

4/ See also Department of the Army, United States Army Base Command, Okinawa, FLRC No. 73A-63; Department of the Air Force, McConnell Air Force Base, Kansas, FLRC No. 72A-15; and New Jersey Department of Defense, FLRC No. 72A-2.

5/ In this regard, it was noted that Executive Order 11838 amended Executive Order 11491 to eliminate performance evaluation as a sole criterion for supervisory status where the employee performs no other supervisory functions. However, such evaluations may be considered in conjunction with other authority vested in an individual in determining an employee's supervisory status. See Report and Recommendations of the Federal Labor Relations Council (January 1975).

has the authority to recommend overtime and has made a recommendation for a promotion which was effective. In addition, he is responsible for directing the work of the employees in his section and for making work assignments.

Because the employee in this classification possesses independent and responsible authority to direct other employees, schedule and assign work, and effectively recommend promotions, I find that the Budget and Accounting Officer, GS-11, is a supervisor within the meaning of the Order and, therefore, this classification should be excluded from the unit.

Administrative Assistant, Administrative Services and Resources, GS-9

The position of Administrative Assistant, Administrative Services and Resources, GS-9, is located in the business management organization under the general supervision of the Administrative Officer. The incumbent serves as chief of the section of Administrative Services and Resource Services and is responsible for five employees in his section, all of whom are junior in grade. His job functions involve the interpretation and determination of applicable laws, regulations, policies and the providing of solutions for a wide variety of physical and administrative problems. The record reveals that the incumbent has assigned work to the employees in his section, has effectively recommended merit increases for employees, has effectively evaluated such employees, and has prepared training plans for the employees under his supervision.

Because an employee in the classification of Administrative Assistant, Administrative Services and Resources, GS-9, possesses independent, responsible authority to direct other employees, and has effectively recommended merit pay increases for employees, as well as effectively evaluating such employees, I find that the incumbent is a supervisor within the meaning of the Order and, therefore, this classification should be excluded from the unit.

Supervisory Clerk-Stenographer, GS-5

The position of Supervisory Clerk-Stenographer, GS-5, is located in the Administrative Services Section, Business Management Organization, at the Activity and the incumbent in this position reports to the Administrative Assistant, GS-9. The incumbent works with three permanent employees and one part-time employee, and has the responsibility for performing stenographic and clerical duties involving the administration of the Forest. Although the incumbent has input with respect to hiring and work evaluations, and distributes work to the employees under her, the record reveals that only 40 percent of her time is spent giving direction to other employees, while 60 percent of her time is spent in taking and transcribing dictation from notes or from transcribing machines. Moreover, the evidence establishes that the work involved is such that the employees reporting to her know essentially what is expected of them and perform accordingly. The record reveals also that such work assignments as she makes and direction as she gives are usually confined to the routine implementation of workload priority requirements which, for the most part, are established by higher levels in the section.

Under these circumstances, and noting that the employee in this classification works alongside other employees a majority of the time, and that such authority as is exercised by an employee in this classification is routine in character, does not require the exercise of independent judgment, and is in the nature of a more experienced employee giving guidance to lesser experienced employees, rather than in the nature of the performance of supervisory functions, I find that the Supervisory Clerk-Stenographer, GS-5, is not a supervisor within the meaning of Section 2(c) of the Order and, therefore, this classification should be included in the unit.

District Clerk, GS-5

The position of District Clerk, GS-5, is located in the District Ranger's Office. The incumbent is responsible for the accomplishment of certain business management activities and a variety of the clerical duties involved in the general administration of the district. In this regard, she serves as Chief District Clerk and, with two full-time and an occasional part-time additional clerk, conducts the business management phase of the district. The incumbent works alongside these employees up to 70 percent of the time. Although she may audit their work, the record reveals that, for the most part, these employees know their jobs and perform without any direction from her. Moreover, if any of these employees have a problem they usually go directly to the Ranger in charge, not to the incumbent. The incumbent may routinely approve annual leave and has made routine evaluations of the performance of employees in her section; she has never prepared training plans or performed training.

Based on the foregoing circumstances, I conclude that the District Clerk, GS-5, does not possess supervisory authority. Thus, the evidence establishes that such authority as she exercises with respect to other employees is routine in nature and does not require the exercise of independent judgment. Moreover, such direction as she gives other employees is that of a more experienced employee assisting less experienced employees. Accordingly, I find that an employee in this classification is not a supervisor within the meaning of Section 2(c) of the Order and, therefore, this classification should be included in the unit.

Civil Engineer, GS-11

This position is located in the engineering department of the Activity, where the incumbent serves as head of the construction and maintenance unit, with the responsibility for developing and executing a variety of construction projects and the maintenance and physical improvements on the forest involving roads, trails, bridges, and dams. The Civil Engineer, GS-11, is directly responsible to the Supervisory Civil Engineer and has 3 full-time technicians, 1 Wage Grade employee and 5 "WAE" employees reporting to him. He has effective authority to discipline employees, has effectively evaluated employees, has prepared the performance information roster for his employees and scheduled and assigned work, and has effectively resolved grievances.

Because an employee in this classification possesses independent, responsible authority to direct other employees, to schedule and assign work and leave, to effectively evaluate employee work performance, and has

either adjusted or effectively recommended the adjustment of grievances, I find that the Civil Engineer, GS-11, is a supervisor within the meaning of the Order and, therefore, this classification should be excluded from the unit.

Heavy Mobile Equipment Mechanic, WG-11

The Heavy Mobile Equipment Mechanic is directly responsible to the Supervisory Civil Engineer and has one lower graded mechanic reporting to him. The incumbent performs a full range of journeymen-level mechanic duties, including inspection, repair, overhaul, and testing of a wide variety of heavy mobile portable and fixed industrial equipment. Although he has signed an evaluation slip for the employee reporting to him and may recommend overtime, there is no evidence his recommendations in this regard are effective. Moreover, he has not been involved in the selection of employees, and the work is such that the lower graded mechanic knows what to do and requires practically no direction. The record reveals that such direction as may be given by the incumbent to the lower grade mechanic is in the nature of a more experienced employee assisting a less experienced employee as distinguished from supervision of the employee.

Based on the foregoing, I find that the employee in the job classification of Heavy Mobile Equipment Mechanic, WG-11, is not a supervisor within the meaning of the Order and, therefore, this classification should be included in the unit.

Engineering Equipment Operator Foreman, WS-9

The incumbent in the position of Engineering Equipment Operator Foreman, WS-9, serves as foreman over five or more engineering equipment operators and others performing road and bridge maintenance construction work. He serves under the general supervision of a civil engineer with whom he participates in the preparation of the annual work plan and to whom he is responsible. The record indicates that he effectively evaluates all five of his employees signing the evaluation forms as supervisor, that he has the authority to assign employees from one position to another, that he effectively recommends lay offs, and that he makes assignments of work to his subordinates.

Because the employee in the classification of Engineering Equipment Operator Foreman, WS-9, possesses independent, responsible authority to direct other employees, schedule and assign work and effectively recommend lay offs, I find that the Engineering Equipment Operator Foreman, WS-9, is a supervisor within the meaning of the Order and, therefore, this classification should be excluded from the unit.

Soil Scientist, GS-11

This position is located in the Forest Supervisor's office. The incumbent, who is directly responsible to the Forest Supervisor, has one subordinate working under him and is responsible for the management and inventory programs of the forest. He serves as forest soil management specialist and a soils advisor to the Forest Watershed staff and Forest Supervisor staff. Although it is contended that the incumbent has evaluated

his subordinate's performance, has prepared promotion rosters for the individual, has designated his day-to-day activities, and has approved annual and sick leave, the evidence indicates that his sole subordinate employee works within well-developed guidelines and is able to perform his assignments, for the most part, without direction.

In these circumstances, and noting that the record reflects that the duties and authority of the Soil Scientist, GS-11, with respect to his subordinate are routine in nature and do not require the use of independent judgement as his subordinate works within well established guidelines, I find that an employee in the classification of Soil Scientist, GS-11, is not a supervisor within the meaning of the Order. Accordingly, I find that this classification should be included in the unit.

Range Conservationist, Forester, GS-11

The position of Range Conservationist Forester, GS-11, is responsible to the District Ranger in whose office it is located. The job function of the incumbent involves the administration, development and protection of the natural resources of the district. The incumbent serves as a staff assistant responsible for analyzing, planning, directing, inspecting and reporting on the range, recreation, land usage, watershed, and wildlife management programs of the district. The record reflects that the incumbent acts in a supervisory capacity to only one seasonal employee for whom he may effectively approve leave, evaluate the employee's performance, effectively recommend overtime, and invoke discipline, if necessary.

Based on the foregoing, I conclude that the Range Conservationist, Forester, GS-11, does not have supervisory responsibilities except on a seasonal basis. Accordingly, as indicated above, I find that the employee in the job classification of Range Conservationist, Forester, GS-11, should be included in the exclusively recognized unit, except for such periods as he serves as a seasonal supervisor.

Forestry Technician, GS-11

This position is located in the Forest Supervisor's office of the Activity. The incumbent serves as the principal assistant to the Branch Chief in fire, recreation, lands and mineral functions, with primary responsibility for all fire management, air operations and communications. He has one seasonal employee reporting to him whose hiring he effectively recommended. He has evaluated the seasonal employee, has provided training for the employee and effectively directs the employee's work and recommends overtime.

Based on the foregoing, I conclude that the Forestry Technician, GS-11, does not have supervisory responsibilities except on a seasonal basis. Accordingly, for the reasons noted above, I find that the employee in this classification should be included in the exclusively recognized unit, except for such periods as he serves as a seasonal supervisor.

The position of Forester, GS-9, is located in the Timber Management Branch of the Activity. The incumbent 6/ reports to the District Timber Management Assistant and has under him one permanent employee, approximately five seasonal employees for a seven month period each year, and four other seasonal employees for a three month period. The record reveals that the incumbent is responsible primarily for sales preparation with secondary duties including, among other things, timber sales administration, and timber improvement and erosion control. The evidence establishes that the incumbent has interviewed employee applicants and his recommendations for hiring have been effective. He also has recommended the transfer and reassignment of employees which recommendations have been carried out, has evaluated his subordinates, has effectively recommended overtime and has responsibly directed the work of his subordinates.

Because an employee in this classification possesses authority to effectively direct other employees and to effectively recommend hiring and transfers, I find that the Forester, GS-9, is a supervisor within the meaning of the Order and, therefore, this classification should be excluded from the unit.

Supervisory Forest Technician, GS-7

The position of Supervisory Forest Technician is located in the Office of the Timber Management Assistant to whom he reports. The incumbent 7/ supervises, at various times during the course of a year, up to 13 employees in several work crews. He is responsible for performing a variety of duties including serving as project manager for district projects involving timber management, forest roads and trails and administrative improvements. He also has the authority to direct the performance of maintenance on the roads and various other projects. The record reflects that the Supervisory Forest Technician, GS-7, has the authority to direct the day-to-day activities of his employees, helps with developing plans for his crews, effectively evaluates employee performance, can effectively recommend changes in crews and overtime for his crews, and that he has recommended discipline for subordinates and his recommendations have been effective.

Because an employee in the classification of Supervisory Forest Technician, GS-7, possesses independent and responsible authority to direct and evaluate other employees, to effectively schedule and assign work and overtime, and to effectively recommend discipline, I find that the Supervisory Forest Technician, GS-7, is a supervisor within the meaning of Section 2(c) of the Order and, therefore, this classification should be excluded from the unit.

6/ The parties stipulated that the job functions of this classification are possessed also by another employee of the Activity.

7/ The parties stipulated that the job functions of this classification are possessed also by another employee of the Activity.

IT IS HEREBY ORDERED that the unit sought to be clarified herein, located at the Salmon National Forest, Salmon, Idaho, in which exclusive recognition was granted on July 31, 1969, to Local 1502, National Federation of Federal Employees, be, and hereby is, clarified by including in the said unit those employee classifications set forth in group A, by excluding from said unit those employee classifications set forth in group B, and by excluding from said unit those employees in classifications set forth in group C only during the period they are serving as seasonal supervisors.

Group A

Supervisory Clerk-Stenographer, GS-5  
District Clerk, GS-5  
Heavy Mobile Equipment Mechanic, WG-11  
Soil Scientist, GS-11

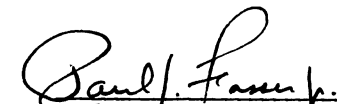
Group B

Budget and Accounting Officer, GS-11  
Administrative Assistant, Administrative  
Services and Resources, GS-9  
Engineering Equipment Operator Foreman, WS-9  
Forester, GS-9  
Supervisory Forest Technician, GS-7  
Civil Engineer, GS-11

Group C

Range Conservationist, Forester, GS-11  
Forestry Technician, GS-11

Dated, Washington, D.C.  
September 16, 1975

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

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE,  
 380th COMBAT SUPPORT GROUP,  
 PLATTSBURGH AIR FORCE BASE, N. Y.  
 A/SLMR No. 557

UNITED STATES AIR FORCE,  
 380th COMBAT SUPPORT GROUP,  
 PLATTSBURGH AIR FORCE BASE, N. Y.

Respondent

and

Case No. 35-3202(CA)

MARY J. PEMBERTON  
 STEWARD, NFFE LOCAL 368

Complainant

DECISION AND ORDER

This case involved a complaint filed by Mary J. Pemberton, Steward, NFFE Local 368 (Complainant) against the United States Air Force, 380th Combat Support Group, Plattsburgh Air Force Base, N. Y. (Respondent) alleging a violation of Section 19(a)(1) of the Executive Order. Although the complaint alleged, in substance, that the Respondent had violated the Order by the actions of its supervisor in harassing, abusing, berating, and browbeating the Complainant, the Complainant attempted to litigate the issue of an alleged denial of union representation at a meeting with her supervisor on November 14, 1973, wherein the Complainant's alleged work deficiencies were discussed. The Respondent contended, among other things, that the issue which the Complainant attempted to litigate was beyond the scope of the complaint.

On April 17, 1975, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding finding that dismissal of the instant complaint was warranted in that the basis of the alleged violation sought to be litigated was not set forth in the complaint. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendation and supporting brief, and Respondent filed an answering brief. 1/

In agreement with the Administrative Law Judge, the Assistant Secretary found that the basis set forth in the instant complaint was insufficient to present the issue of an alleged violation of Section 19(a)(1) based upon the asserted denial of union representation at the November 14, 1973, meeting. In this regard, the Assistant Secretary noted that the Assistant Regional Director had dismissed the complaint with regard to the ". . . allegation of harassment," but indicated that a Notice of Hearing would be issued "1/ regarding the remainder of the complaint. . . ." In the Assistant Secretary's view, an allegation of harassment based on discriminatory considerations and an allegation of denial of representation are clearly separate and distinct causes of action which must be separately and affirmatively alleged in a complaint. Thus, the Assistant Secretary found that, in the instant case, the issue of denial of representation was beyond the scope of the complaint.

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

The Assistant Secretary rejected the Complainant's argument that the pre-complaint charge should be read in conjunction with the complaint so as to incorporate in the complaint the specific allegation of denial of representation contained in the charge. He noted that the existing procedure of filing a pre-complaint charge directly with the party or parties against whom the charge is filed had its inception in the expressed policy of the Study Committee's Report and Recommendations that the parties involved should investigate and attempt to informally resolve such allegations prior to submitting them to the Assistant Secretary for decision. In the view of the Assistant Secretary, to construe a complaint as automatically containing the allegations contained in the pre-complaint charge as, in effect, argued herein by the Complainant, would be to render the prescribed process of informal resolution meaningless.

1/ The Complainant made a motion to deny consideration of the Respondent's answering brief on the basis that such brief was filed untimely. In this regard, the Respondent's answering brief, received by the Assistant Secretary on June 13, 1975, was considered to be timely as the Respondent was granted an extension of time to June 16, 1975, in which to file such a brief. Accordingly, the Complainant's motion is hereby denied.

Under these circumstances, the Assistant Secretary ordered that the complaint be dismissed.



The Administrative Law Judge found, and I concur, that the basis set forth in the instant complaint was insufficient to present the issue of an asserted violation of Section 19(a)(1) based upon the alleged conduct of the Respondent's supervisor in denying the Complainant the presence of her union representative at a meeting wherein Complainant's alleged work deficiencies were to be discussed. As more fully set forth in the Administrative Law Judge's Report and Recommendation, the entire basis of the complaint refers to the asserted conduct of the Respondent's supervisor in harassing, abusing, berating, and browbeating the Complainant because of the Complainant's having filed an appeal of a reprimand and an unfair labor practice complaint. 2/ Thereafter, by letter dated August 28, 1974, the Assistant Regional Director dismissed the complaint with regard to ". . . the allegation of harassment . . ." based on Section 19(d) of the Order but indicated that a Notice of Hearing would be issued "r/egarding the remainder of the complaint . . ." based on the Assistant Regional Director's conclusion that there was reason to believe that the Complainant's Section 1(a) 3/ and 10(e) rights had been violated during the course of a meeting between the Complainant and her supervisor.

In agreement with the Administrative Law Judge, I find that the Assistant Regional Director improperly issued a Notice of Hearing in this matter on an allegation which was not alleged in the complaint. In my view, an allegation of "harassment" based on discriminatory considerations and an allegation of "denial of representation" are clearly separate and distinct causes of action which, for the purposes of adjudication, must be separately and affirmatively alleged in a complaint. Thus, I find that, in the instant case, the issue of denial of representation was beyond the scope of the complaint. 4/ The Complainant's argument before the Administrative Law Judge, reiterated in the exceptions and supporting brief filed herein, that the pre-complaint charge filed by the Complainant in this matter should be read in conjunction with the complaint so as to incorporate in the complaint the specific allegation of denial of representation contained in the charge is rejected. 5/ While I agree that the requirements of

2/ In this latter regard, see 380th Combat Support Group, Plattsburgh Air Force, Plattsburgh, New York, A/SLMR No. 493.

3/ The Administrative Law Judge mistakenly interpreted the Assistant Regional Director's letter to read "19(a)(1)" rights. This inadvertent error is hereby corrected.

4/ Cf. Department of the Army, Directorate, United States Dependent Schools, European Area (USDESEA) APO, New York, A/SLMR No. 138.

5/ It was noted, in this connection, that the Complainant herself distinguished between the allegation of "harassment" and "denial of representation" when filing the pre-complaint charge. It was noted further that the Complainant did not attempt to amend the complaint so as to allege specifically the alleged improper denial of representation.

the Assistant Secretary's Regulations should be construed liberally so as to protect the rights of parties, 6/ I cannot agree that the Regulations should be so liberally applied, as argued here by the Complainant, as to read into a complaint allegations contained in a pre-complaint charge but not contained in the subsequently filed complaint.

The existing procedure of initially filing a written charge directly with the party or parties against whom the charge is directed and, thereafter, filing a complaint with the Assistant Secretary if the parties are unable to dispose informally of the charge within a prescribed period, 7/ had its inception in the Study Committee's Report and Recommendations which led to the issuance of Executive Order 11491. In this regard, the Study Committee recommended that the parties involved in the alleged unfair labor practice should investigate and informally attempt to resolve such allegations prior to submitting the matter to the Assistant Secretary for decision. 8/ Thus, in the processing of unfair labor practice cases the failure of a complainant to include in its complaint specific allegations of unfair labor practices previously contained in its pre-complaint charge will be considered to be attributable to the parties' informal resolution of those matters. In my view, to construe a complaint as automatically containing the allegations contained in the pre-complaint charge as, in effect, argued here by the Complainant, would be to render the prescribed process of informal resolution meaningless.

Under these circumstances, and in agreement with the Administrative Law Judge, I find that the Respondent's alleged conduct in denying Complainant the presence of her union representative at a meeting held with a supervisor on November 14, 1973, was beyond the scope of the complaint herein, and, accordingly, I shall order the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 35-3202(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
September 16, 1975



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

6/ See Section 206.9 of the Assistant Secretary's Regulations.

7/ See Section 203.2 of the Assistant Secretary's Regulations.

8/ See Study Committee Report and Recommendations, August 1969, at page 41. This policy has continued since that time as reflected in the recent comments of the Federal Labor Relations Council contained in the Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, as amended, January 1975, at pages 48-49.



REPORT AND RECOMMENDATION

Statement of the Case

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: In the Matter of :  
: :  
: UNITED STATES AIR FORCE :  
: PLATTSBURGH AIR FORCE BASE :  
: 380th COMBAT SUPPORT GROUP :  
: Respondent :  
: and : Case No. 35-3202 (CA)  
: :  
: MARY J. PEMBERTON :  
: STEWARD, NFFE LOCAL 368 :  
: Complainant :  
: :  
: .....

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Washington, D. C. 20006  
For the Complainant

Captain William C. Walker, Esq.  
United States Air Force  
Headquarters, Strategic Air Command  
Omaha, Nebraska 68113  
For the Respondent

Before: MILTON KRAMER  
Administrative Law Judge

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated May 16, 1974 and filed May 20, 1974. The Complainant was Mary J. Pemberton. At the hearing the complaint was amended to denominate the Complainant as Mary J. Pemberton, Steward NFFE Local 368. 1/ The complaint alleged that the Respondent, by its agent and representative Captain Robert B. Sturman, had harassed, abused, berated, and browbeaten Mrs. Pemberton because she had appealed a reprimand and filed an unfair labor practice charge against Captain Sturman dated November 1, 1973. Such conduct was alleged to be in violation of Sections 19(a)(1) and (4) of the Executive Order. Under date of May 21, 1974, the Respondent filed an answer to the complaint.

On August 28, 1974, the Assistant Regional Director dismissed the complaint insofar as it alleged harassment of the Complainant. 2/ The dismissal was based on information available to the Assistant Regional Director that the Complainant had filed a grievance, not in the record before me, over those matters before filing the complaint in this case and hence was precluded by Section 19(d) of the Executive Order from pursuing those matters as an unfair labor practice. No appeal was taken from that dismissal. 3/

In his letter of dismissal the Assistant Regional Director stated also that investigation had shown that there was reason to believe that on November 11, 1973 a violation of Section 19(a)(1) and 10(e) 4/ may have occurred during the course of a meeting between Mrs. Pemberton and her supervisor, and that a Notice of Hearing would be issued on that portion of the complaint.

On September 27, 1974, the Assistant Regional Director issued a Notice of Hearing to be held October 10, 1974 in Plattsburgh, New York on the alleged violation of Section

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1/ Tr. 13, 17.

2/ Exh. AS-5.

3/ Tr. 6.

4/ The letter incorrectly referred to "Sections 1(a) and 19(e)" but it is obvious that the references were intended to be to Section 19(a)(1) and Section 10(e). Also, the evidence shows that the reference to a meeting on November 11, 1973 must have been intended to be a reference to a meeting on November 14, 1973.

19(a)(1) of the Executive Order. On October 1, 1974 he issued an Order rescheduling the the hearing to December 10, 1974.

On November 29, 1974 the Respondent submitted to the Assistant Regional Director a Motion for Dismissal of the Complaint in accordance with Report No. 48 for lack of specificity. The Assistant Regional Director denied the Motion.

Pursuant to the Notice of Hearing and Order Rescheduling Hearing, a hearing was held before me on December 10, 1974 in Plattsburgh, New York. Both sides were represented by counsel. The Respondent renewed before me the Motion for Dismissal it had made to the Assistant Regional Director. 5/ The Motion in essence was a request for a bill of particulars on the conduct constituting the alleged harassment and abuse of Mrs. Pemberton. 6/ The Complainant stated in open hearing that the conduct referred to in the complaint was the conduct referred to with specificity in the unfair labor practice charge served on Respondent prior to the filing of the complaint pursuant to Section 203.2(a) of the Regulations. 7/ The Motion was denied. The Respondent then withdrew the Motion, and its denial was rescinded. 8/

At the conclusion of the hearing the time for filing briefs was extended to January 29, 1975. Both parties filed briefs.

The Pleadings and the Issues They Present

The complaint alleges as the "Basis of the Complaint", in its entirety, as follows:

"The 380th Combat Support Group, Plattsburgh Air Force Base, New York, by its agent and representative, Capt. Robert B. Sturman, has harassed, abused, berated and browbeat me unjustly and unmercifully because of my appeal of a reprimand and my filing an Unfair Labor Charge against him dated 1 November 1973. Hearing on that case is scheduled for 4 June 1974." 9/

5/ Exh. R-1; Tr. 14.

6/ Tr. 17.

7/ Tr. 17, 19.

8/ Tr. 19.

9/ AS-3, part 3.

The Assistant Regional Director ascertained that the Complainant had filed a grievance covering the same matter. In his letter of August 28, 1974 to the Complainant he stated:

"Since you elect to file a grievance covering the allegation of harassment and your compliance with orders issued by your supervisor as set forth in your letter of March 19, 1974, and as reflected in the grievance officer's letter to you dated April 12, 1974, this office cannot assert jurisdiction in this matter. Accordingly, this portion of the complaint is dismissed." 10/

What was dismissed, according to that letter, was the allegation of harassment, which was the totality of the "Basis of the Complaint", and "your compliance with orders issued by your supervisor", which allegation does not appear in the complaint. Neither the Complainant's letter of March 19, 1974 nor the "grievance officer's letter...dated April 12, 1974" is in the record. Indeed, the Assistant Regional Director's letter of August 28, 1974 was not furnished until after the hearing began. 11/

After dismissing what appears to have been the totality of the complaint, the Assistant Regional Director continued:

"Regarding the remainder of the complaint, investigation reveals there is reason to believe that a violation of your rights as set forth in Sections [19(a)(1) and 10(e)] of the Executive Order may have occurred on [November 14, 1973] during the course of a meeting between you and your supervisor. A Notice of Hearing will issue covering this portion of the allegation."

I can find no such allegation in the complaint. The "Basis of the Complaint" does not set forth any facts that would give "reason to believe that a violation" of Section 10(e) had occurred. I find nothing in the Regulations that gives the Assistant Regional Director authority to order a hearing on an issue that cannot be reasonably found in the complaint simply because "investigation reveals" that such a violation may have occurred. The Notice of Hearing is denominated a "Notice of Hearing on Complaint". Section 203.8 of the Regulations authorizes the Assistant Regional Director to issue a Notice of Hearing if he finds "there is a reasonable basis for the complaint". It does not authorize him to issue a Notice of Hearing on a complaint that has not been filed. In the complaint in this case there are no

10/ AS-5

11/ Tr. 5-6.

allegations that can be construed to include a violation of Section 10(e).

The Complainant argues that the complaint must be read together with the charge made to the Respondent pursuant to Section 203.2(a)(1) of the Regulations and the report of investigation made pursuant to Section 203.2(a)(4) and filed pursuant to Section 203.3(b). The report or reports of investigation are not in the record before me. The charge made pursuant to Section 203.2(a)(1) is in the record as Exhibit C-1. A copy was not attached to the complaint; at least a copy was not attached to the copy of the complaint that was furnished to me by the Regional Office. 12/

The charging letter can serve perhaps as a bill of particulars for general allegations in a complaint, and that was done here. But it cannot serve to add additional allegations not included in general allegations in the complaint. The charging letter does clearly state that at a meeting with a supervisor on November 14, 1973:

"...I requested my representative be present. I made the request THREE times and was DENIED three times...."

Such statement clearly indicates the possibility of a violation of Section 10(e) of the Executive Order and therefore a possible violation of Section 19(a)(1). But the charging letter is not part of the complaint. 13/ There is no obligation on the part of a complainant to include in the complaint everything complained of in the charging letter. One or more items in the charging letter may be omitted from the complaint for any of a variety of reasons. I find nothing in the complaint that can be construed to include a violation of Section 10(e). The Respondent objected to a violation of Section 10(e) being in issue in this case. 14/

I conclude that this case does not present an issue of a violation of Section 10(e) of the Executive Order and therefore a violation of Section 19(a)(1) because the complaint does not present such issue. This is not to say that a complaint should be read strictly and interpreted in accordance

12/ Tr. 8-9; Exh. AS-3.

13/ The record does not establish that it was attached even to the original of the complaint. Tr. 8-9.


14/ Tr. 18; Brief, pp. 15-18.

with the rules of common-law pleading. 15/ On the contrary, I believe that in accordance with the spirit of Section 206.8(a) of the Regulations it should be construed liberally to effectuate the purposes and provisions of the Executive Order. 16/ But I cannot read a complaint to contain something that is not there or even suggested by the complaint.

I reach this conclusion regretfully. But we must have some standards, however lax yet are still standards, on how issues are presented for adjudication. My regret is somewhat tempered by the dubiety of whether there was in fact a violation of Section 10(e) of the Executive Order as construed by the Assistant Secretary.

Recommendation

I recommend that the complaint be dismissed.

  
MILTON KRAMER  
Administrative Law Judge

Dated: April 17, 1975  
Washington, D. C.

15/ See Tr. 23-25.

16/ See Portsmouth Naval Shipyard, A/SIMR No. 241, p. 19 of ALJ Decision; see also Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SIMR No. 289, pp. 2-4, and pp. 4-7 of ALJ Decision.

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

DEPARTMENT OF THE NAVY,  
 PHILADELPHIA NAVAL REGIONAL MEDICAL CENTER  
 A/SLMR No. 558

This case involved a petition for clarification of unit (CU) filed by the Department of the Navy, Philadelphia Naval Regional Medical Center (Activity), seeking to clarify an existing exclusively recognized unit. The Activity contends that, as a result of a reorganization, an exclusively recognized unit located at the Philadelphia Hospital Center is "no longer appropriate." In the Activity's view, the reorganization, which created the Philadelphia Naval Regional Medical Center, caused the "accretion" to the recognized unit of the nonprofessional employees at some 13 dispensaries, located at other facilities, which employees, together with those at the Hospital, are now assigned administratively to the Regional Medical Center. The dispensaries are an average of 70 miles from the Hospital, and 8 of the 13 dispensaries currently are encompassed within broader units represented exclusively by labor organizations, including the Intervenor, Philadelphia Metal Trades Council, AFL-CIO (MTC), at the particular facilities at which they are located. The MTC contended that the reorganization did not result in the accretion to the exclusively recognized unit at the Hospital of the employees of the dispensaries.

The Assistant Secretary found insufficient basis to support the Activity's contention that the employees at the dispensaries had accreted to the unit at the Naval Hospital. In this regard, it was noted, among other things, that the dispensary employees have remained at the same locations as prior to the reorganization, performing the same work under the same immediate supervision and that the evidence failed to reveal any significant degree of interchange, transfer or commingling between dispensary and Hospital personnel.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
 PHILADELPHIA NAVAL REGIONAL MEDICAL CENTER

Activity-Petitioner

and

Case No. 20-4579(CU)

PHILADELPHIA METAL TRADES COUNCIL,  
 AFL-CIO 1/

Intervenor

DECISION AND ORDER

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

Upon the entire record in this case, the Assistant Secretary finds:

The Activity-Petitioner filed a petition for clarification of unit (CU) seeking to clarify an existing exclusively recognized unit. In this connection, the Activity-Petitioner contends that, as a result of a reorganization, the exclusively recognized unit of some 448 graded and ungraded nonprofessional civilian employees, located at the Philadelphia Naval Hospital, for which the American Federation of Government Employees, AFL-CIO, herein called AFGE, is the exclusive representative, is "no longer appropriate." Thus, in the Activity-Petitioner's view, the reorganization, which created the Philadelphia Naval Regional Medical Center, caused the "accretion" to the AFGE's recognized unit of the nonprofessional employees

1/ The name of the Intervenor, Philadelphia Metal Trades Council, AFL-CIO, herein called MTC, appears as amended at the hearing.

at some 13 dispensaries 2/ which employees, together with those at the Hospital, are now assigned administratively to the Regional Medical Center. It asserts further that the reorganization resulted in a change in the mission of the dispensaries and, based on such change, the dispensary employees no longer share a community of interest with the non-dispensary employees at the various locations where the dispensaries are located. 3/

The MTC contends that the duties performed by the dispensary employees remain essentially the same as those they performed prior to the reorganization, that there is no community of interest between the dispensary employees and the Naval Hospital personnel, and that the employees have separate identities and have been represented in the past by various labor organizations which continue to afford them representation.

The mission of the Activity-Petitioner is to provide general and specialized clinical services for active duty Navy and Marine Corps personnel, active duty members of the other armed services, dependents of active duty personnel, and other persons authorized by current directives. It is charged with providing coordinated dispensary health care services as an integral element of the Naval Regional Health Care System, including such services to shore activities as may be assigned. In the performance of its mission, it is required to cooperate with other military and civil authorities in matters pertaining to health, sanitation, local disasters and other emergencies.

2/ Eight of the 13 dispensaries, containing some 40 nonprofessional employees, currently are encompassed within broader units represented exclusively by labor organizations at the particular facilities at which they are located. These labor organizations are the AFGE, the National Federation of Federal Employees (NFFE), the National Association of Government Employees (NAGE), and the MTC. The eight dispensaries are located at the Naval Training Center, Bainbridge, Maryland; the Naval Air Training Station, Lakehurst, New Jersey; the Naval Air Development Center, Warminster, Pennsylvania; the Naval Air Station, Willow Grove, Pennsylvania; the Naval Publications and Forms Center, Philadelphia, Pennsylvania; the Naval Regional Clinic, St. Albans, New York; the Philadelphia Naval Shipyard, Philadelphia, Pennsylvania; and the Naval Home, Philadelphia, Pennsylvania.

3/ Although the Activity-Petitioner contends the existing exclusively recognized unit is no longer appropriate, it should be noted that a CU petition is not an appropriate vehicle for seeking such a determination. Cf. Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160. Moreover, as the Activity-Petitioner is not petitioning for an election in the instant proceeding it is evident that it did not inadvertently file the instant CU petition instead of an RA petition. Under these circumstances, I shall consider the CU petition in this case as addressed to the sole issue of whether the employees of the various dispensaries have, as a result of a reorganization, accreted to the exclusively recognized unit at the Philadelphia Naval Hospital, which unit's continued existence after the reorganization is not deemed to be properly challenged in the instant proceeding.

Through a reorganization which was effective on January 1, 1973, the Chief of Naval Operations directed the establishment of the Naval Regional Medical Center, Philadelphia, Pennsylvania. The reorganization modified the mission of the Philadelphia Naval Hospital. In this regard, it was provided that the 13 dispensaries, located an average of 70 miles from the Hospital, in areas as far away as Long Island, New York, and which were not previously attached to the Hospital, be placed under the administrative control of the Medical Center. The record indicates that a principal objective of the reorganization was to provide the dispensaries with direct administrative access to the Hospital facilities and services, rather than requiring the dispensaries to seek such assistance and services through requests from the commanders of the various facilities at which they were located. Pursuant to the reorganization, the dispensaries had their administrative records transferred to the Medical Center, their overall direction now emanates from the Medical Center, and the Center was given ultimate authority with respect to hiring policies, as well as authority to resolve grievances, approve promotions and transfers, and establish reduction in force areas.

The record discloses that while, pursuant to the reorganization, the administrative control of the dispensaries has been transferred to the Medical Center, the mission of the dispensaries, i.e., the provision of medical care for the employees of the various installations at which they are located, has remained unchanged. Furthermore, the dispensaries' personnel continue to utilize specialized job skills which the Hospital personnel do not share. The record discloses also that the reorganization did not lead to any personnel reassignments or interchange of the non-professional employees of the Hospital and the dispensaries; that the immediate supervision of the employees of the dispensaries has remained unchanged; and that, while the records and the administrative control of the various dispensaries were transferred to the Medical Center, the day-to-day control and direction of the employees remains at the dispensary level as it had been prior to the reorganization. In this latter regard, the record reveals that initial grievances are filed with the supervisors at the dispensaries in question and performance evaluations, while ultimately approved at the Medical Center, are made initially at the dispensaries. Moreover, there has been no physical relocation of the nonprofessional employees from the dispensaries to the Hospital or vice versa; the average distance between the dispensaries and the Hospital is, as noted above, some 70 miles; leave is approved at the dispensaries; recommendations for promotions and awards are made at the dispensaries; and employee discipline originates at the dispensaries. Although staffing, recruiting and vacation policies are established at the Medical Center, implementation of these policies is effectuated at the dispensary level subject to the particular needs of the dispensary involved.

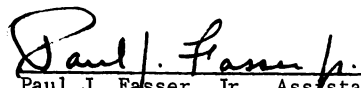
Under all of these circumstances, I find insufficient basis to support the Activity-Petitioner's contention that the employees at the dispensaries have accreted to the unit at the Naval Hospital represented exclusively by the AFGE. In this regard, particular note was taken of the fact that, notwithstanding the reorganization, the employees at the various dispensaries have remained at the particular locations where they were located prior to the reorganization, performing the same work under the same immediate

supervision as before. Moreover, the evidence failed to reveal any significant degree of interchange, transfer or commingling between the dispensaries' personnel and the Hospital employees. Accordingly, I find that the employees in the dispensaries have not accreted to the AFGE's existing exclusively represented unit at the Naval Hospital, and that the employees in the various dispensaries who are part of broader units at the particular facilities involved remain a part of those units. <sup>4/</sup> In these circumstances, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 20-4579(CU) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
September 16, 1975

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

<sup>4/</sup> There was no evidence that dispensary employees who are part of broader, existing units have been denied fair and effective representation by their current exclusive representatives.

September 16, 1975

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

DEFENSE SUPPLY AGENCY,  
DEFENSE CONTRACT ADMINISTRATION SERVICES  
REGION, SAN FRANCISCO  
A/SLMR No. 559

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2723 (AFGE), sought to represent a unit of all employees of the Defense Contract Administration Services Region (DCASR) Headquarters, Burlingame, California. In the alternative, it was willing to include in the petitioned for unit the five Defense Contract Administration Services Offices (DCASO's) in the San Francisco Bay Area and the Hawaii Residency Office. The Activity contended that the claimed unit was not appropriate because it would result in fragmentation of the DCASR with an unknown number of possible future units carved out of residual segments of the DCASR, and that the unit sought would not promote effective dealings and efficiency of agency operations. Further, it asserted that the only appropriate unit was one composed of all eligible employees of the DCASR.

The Assistant Secretary concluded that the proposed broadly based alternative unit, which encompassed all Headquarters employees as well as the five DCASO's within the same commuting area and the Hawaii Residency Office, was appropriate for the purpose of exclusive recognition under the Order. In this connection, it was noted that all employees of the DCASR perform their duties pursuant to policies and procedures established by the Regional headquarters and are subject to uniform policies and job benefits; that similar job classifications to some of these found in the Headquarters are found in the five DCASO's and the Hawaii Residency Office; that there is an administrative and functional relationship between the DCASO's and the DCASD's, with the Headquarters acting as a DCASD to the five DCASO's and the Hawaii Residency Office; that there are reassignments between Headquarters and the DCASO's, depending upon the need in terms of shifting work loads; and that there is employee contact between Headquarters and the five DCASO's and the Hawaii Residency with training sessions for certain employees located in the five DCASO's held at Headquarters. Under these circumstances, the Assistant Secretary found that there was a clear and identifiable community of interest among the employees in the Headquarters and the DCASO's and the Hawaii Residency Office.

Further, the Assistant Secretary found that such a unit would promote effective dealings and efficiency of agency operations, contrary to the Activity's position, based primarily on its assessments of the costs of less than a region-wide unit, which he concluded were speculative and conjectural. He noted that in making such a determination, he was cognizant of the Federal Labor Relations Council's (FLRC) rationale regarding the responsibility of the Assistant Secretary to make affirmative findings with respect to each of the unit criteria set forth in Section 10(b) of the Order. In this regard, he noted the FLRC's finding in negotiability decisions that

economic cost factors were not the sole criterion in determining efficiency and economy within the meaning of Section 12(b) of the Order.

Thus, the FLRC has recognized that the tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization can result in improved efficiency of agency operations, despite increased cost factors. Under the circumstances herein, the Assistant Secretary concluded that the alternative proposed employee unit would promote the efficiency of agency operations, and could, in his opinion, result in actual economic savings and increased productivity due to the homogeneity of its composition.

The Assistant Secretary also found that the alternative proposed unit would promote effective dealings, as such unit organizationally included the individuals most concerned with labor-management relations, fiscal matters, and the direction of operations. He further found that a claimed unit may be appropriate and be considered to promote effective dealings, as well as efficiency of agency operations, even though it does not include all employees directly under the area or regional head, or other activity officials who have final or initiating authority with respect to such personnel, fiscal, and programmatic matters. In this regard, it was noted that it is clearly contemplated by the Order that labor-management negotiations could properly be conducted at lower than agency, regional, or district levels, and that units of less broad proportions could be appropriate. Citing Section 11(a) of the Order, as amended by Executive Order 11838 and the principle set forth in the Preamble of the Order that efficient administration of the Government is benefited by employee participation in the formulation and implementation of personnel policies and practices affecting conditions of employment, the Assistant Secretary stated that it was evident that the Order was intended to encourage negotiations at the local level to the maximum extent possible with respect to personnel policies and practices and matters affecting working conditions. He held that such negotiations are desirable as they must perforce promote effective dealings between employees and the agency management with which the particular employees are most closely involved.

Under all of these circumstances, the Assistant Secretary directed that an election be conducted in the alternative proposed unit. As the unit found appropriate differed substantially from the unit petitioned for originally, the Assistant Secretary directed that the election be held upon completion of the posting of a Notice of Unit Determination to permit possible intervention by labor organizations for the sole purpose of appearing on the ballot.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,  
DEFENSE CONTRACT ADMINISTRATION SERVICES  
REGION, SAN FRANCISCO 1/

Activity

and

Case No. 70-4524(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 2723

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 Marilyn Koslow. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the brief filed by the Activity, 2/ 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 employees of the Defense Contract Administration Services Region (DCASR), Headquarters, Burlingame, California, 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 the Order. 3/

- 
- 1/ The name of the Activity appears as amended at the hearing.
  - 2/ The American Federation of Government Employees, AFL-CIO, Local 2723, herein called AFGE, filed an untimely brief which was not considered. The Activity requested that its brief filed in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, A/SLMR No. 461, be considered as its brief in the instant proceeding.
  - 3/ The claimed unit appears as amended at the hearing.



The Activity contends that the claimed unit is not appropriate because it would result in fragmentation of the DCASR with an unknown number of possible future units carved out of residual segments of the DCASR and, further, that the unit sought would not promote effective dealings and efficiency of agency operations. In this regard, the Activity asserts that the only appropriate unit is one composed of all eligible employees of the DCASR, San Francisco.

The DCASR, San Francisco, provides contract administration services and support for the Department of Defense, as well as other Federal agencies. It covers a geographical area which includes northern California, the States of Utah, Montana, Idaho, Washington, Oregon, Alaska, Hawaii, and Nevada (with the exception of three counties), and the Mariana and Marshall Islands. This DCASR is one of eleven of such regions of the Defense Supply Agency (DSA) and is a primary level field activity of the DSA. There are two Defense Contract Administration Services Districts (DCASD) within the DCASR, namely, DCASD Seattle, Washington, and DCASD Salt Lake City, Utah. Additionally, the DCASR includes one Defense Contract Administration Services Office (DCASO) in Portland, Oregon which is under the DCASD, Seattle, the Hawaii Residency Office, the petitioned for Headquarters located in Burlingame, California, and five DCASO's in the San Francisco Bay Area which report to the DCASR Headquarters, Burlingame. At the hearing, the AFGE indicated that it would be willing to include the five DCASO's in the San Francisco Bay Area and the Hawaii Residency Office in the petitioned for unit. Approximately 1,143 civilian employees are employed throughout the DCASR San Francisco. As of November 30, 1974, there were approximately 690 employees at DCASR Headquarters. With the exception of a unit of employees employed by the DCASD located at Salt Lake City, Utah, there is no collective bargaining history in the DCASR, San Francisco.

The DCASR is headed by a Regional Commander whose office is located at Headquarters. Directly under the Commander at Headquarters is his personal staff and a number of offices and directorates which are responsible for planning and monitoring all facets of the DCASR's operations. <sup>4/</sup> The record reflects that the DCASR's Civilian Personnel Office, located at Headquarters, has the responsibility for servicing all the DCASR's components within the Region, including the Headquarters, its five DCASO's, and the Hawaii Residency Office. Further, all employees of the DCASR perform their duties pursuant to policies and procedures established by the Regional Headquarters' staff and employees within the Regional Headquarters and the five DCASO's in the San Francisco Bay Area and the Hawaii Residency Office are subject to uniform personnel policies and job benefits. Also similar job classifications to some of those found in the Headquarters are found in the five DCASO's and the Hawaii Residency Office. The record reflects that there is an administrative and functional relationship between the DCASO's and the DCASD's. Thus, the evidence establishes that, as with the Portland, Oregon DCASO which is under the direction of the Seattle, Washington, DCASD, the five DCASO's in the San Francisco Bay Area and the

<sup>4/</sup> These include the offices of Planning and Management, Systems and Financial Management, Administrative Services, Industrial Security, and Contract Compliance and the directorates of Contract Administration, Production, and Quality Assurance.

Hawaii Residency Office are under the direction of the Headquarters of the DCASR, which, in effect, acts as a DCASD vis a vis these offices within the DCASR. <sup>5/</sup>

The record reveals that five DCASO's, namely, FMC Corporation, Philco Corporation, Sylvania Corporation, Westinghouse Corporation, and the Applied Technology Division of Itek Corporation (ATD), are located in the San Francisco Bay Area, report to Headquarters, and are within the Headquarters' commuting area. Further, the record reflects that employees are reassigned from the Headquarters to these DCASO's and vice versa based upon need in terms of work load which may have shifted. Also, the evidence establishes that there is employee contact between the Headquarters, the five DCASO's and the Hawaii Residency Office and, additionally, that training sessions for certain employees located in the five DCASO's are held at Headquarters.

Based on the foregoing circumstances, I find that there is a clear and identifiable community of interest among employees in the Headquarters of the DCASR, San Francisco, the five DCASO's in the San Francisco Bay Area, and the Hawaii Residency Office. In this regard, it was noted that such employees share a common mission and are covered by the same personnel and labor relations policies. Moreover, there are similar job classifications in each of the components within the Headquarters, the five DCASO's and the Hawaii Residency Office, there have been reassignments to and from the Regional Headquarters and the DCASO's and there is employee contact between these offices.

Further, I find that such a unit will promote effective dealings and efficiency of agency operations and that the Activity's contentions to the contrary are, at best, speculative and conjectural. In reaching this conclusion I am cognizant of the Federal Labor Relations Council's (Council) recent decision in Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airways Facilities Sector (Tulsa), FLRC No. 74A-28, in which the Council indicated that the Assistant Secretary should, in making unit determinations, make affirmative findings with respect to each of the unit criteria, including effective dealings and efficiency of agency operations, set forth in Section 10(b) of Executive Order 11491, as amended.

With respect to the issue whether a proposed unit will promote efficiency of agency operations, in my view, more than cost factors should be involved in making such determinations. Thus, the Council has stated previously in Local Union No. 2219, International Brotherhood of Electrical

<sup>5/</sup> There are four employees assigned to the Hawaii Residency Office, one of whom is a supervisor, and a fifth employee who is attached, for support purposes but is, in fact, assigned to the DCASR Headquarters.

Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., FLRC No. 71A-46, 6/ that:

In our opinion, the agency's position equating reduced premium pay costs with efficient and economical operations improperly ignore the total complex of factors encompassed with the concept of "efficiency and economy." It fails to take into account, for example, the adverse effects of employee dissatisfaction with existing assignment practices, and the very real possibility that revised practices along the lines proposed, by reason of their actual impact on the employees, might well increase rather than reduce overall efficiency and economy of operations.

In general, agency determinations as to negotiability made in relation to the concept of efficiency and economy in Section 12(b)(4) of the Order and similar language in the statutes require consideration and balancing of all the factors involved, including the well-being of employees, rather than an arbitrary determination based only on the anticipation of increased costs. Other factors such as the potential for improved performance, increased productivity, responsiveness to direction, reduced turnover, fewer grievances, contribution of money-saving ideas, improved health and safety, and the like, are valid considerations. 3/ We believe that where otherwise negotiable proposals are involved the management right in section 12(b)(4) may not properly be invoked to deny negotiations unless there is a substantial demonstration by the agency that increased costs or reduced effectiveness in operations are inescapable and significant and are not offset by compensating benefits. [Footnote omitted and emphasis supplied]

This philosophy recently was affirmed by the Council in its Supplemental Decision in American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36, where the Council noted that it had found without merit the agency's argument that a proposal which would result in overtime expenses would conflict with the agency's right to maintain efficient agency operations under Section 12(b)(4), because, in the Council's view, that section,

6/ Although FLRC No. 71A-46 involved a negotiability determination and the concept of efficiency and economy as set forth in Section 12(b)(4) of the Order, I consider such concepts relevant in considering "efficiency of agency operations" as that term is used in Section 10(b) of the Order.

...requires a balancing of all the factors involved, including not only the anticipation of increased costs, but also such factors as the well-being of employees, and the potential for improved performance, increased productivity, responsiveness to direction, reduced turnover, fewer grievances, contribution of money-saving ideas, improved health and safety and the like; and that, to invoke section 12(b)(4), there must be a substantial demonstration by the agency that increased costs or reduced effectiveness in operations are inescapable and significant and are not offset by compensating benefits. (Emphasis supplied.)

From the foregoing, it is evident that a determination of efficiency of agency operations is dependent on a complex of factors and that it has been recognized that the tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization can result in improved efficiency of agency operations despite increased cost factors. 7/ Further, it was noted that the Council indicated in FLRC No. 74A-28 that in unit determination proceedings the parties are obligated to come forward, for the use of the Assistant Secretary, with all relevant information including any contrary evidence with respect to efficiency of agency operations; that information related to efficiency of agency operations may well be within the special knowledge and possession of the agency involved; and that where agencies fail or are unable to respond to the solicitation of such information by the Assistant Secretary, the Assistant Secretary should base his decision on the information available to him, making the best informed judgment he can under the circumstances.

Based on the foregoing considerations, I find that the evidence herein establishes that the alternative proposed employee unit composed of the Headquarters, San Francisco, the five DCASO's in the San Francisco Bay Area and the Hawaii Residency Office will promote the efficiency of agency operations. Thus, such a broadly based unit would encompass the employees of the DCASR Headquarters in Burlingame as well as those in DCASO's within the same commuting area. Moreover, it would include the Hawaii Residency Office which otherwise might be fragmented within the DCASR. In my view, the establishment of such a unit could result in actual economic savings and increased productivity due to the homogeneity of its composition. In addition, it was noted that the Activity's contentions that such a unit would not promote efficiency of agency operations were based primarily on its speculative assessments of the manpower and economic costs of less than a regionwide unit, rather than on a balanced consideration of all the factors, including employee morale and well-being, which, as noted above, are relevant factors in making such an assessment. Thus, the Activity's position in this regard was reflected in the testimony of its Civilian

7/ In considering whether a particular bargaining unit will promote the efficiency of agency operations, it was noted that the Preamble to Executive Order recognizes, among other things, that "efficient administration of the Government [is] benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment."

Personnel Officer that "it was reasonable" to infer that a region-wide unit would do more to promote efficiency of agency operations (and effective dealings) than the originally petitioned for unit of the DCASR Headquarters, Burlingame, 8/ and that it would be a hardship on his office if several agreements were required because this would require expenditure of both manpower and financial resources "that might not be necessary if there were a single unit throughout the Region." I find that, standing alone, such speculation as to what might be helpful or desirable to be insufficient to establish that the proposed unit is inappropriate within the meaning of Section 10(b) of the Order.

In addition, as noted above, I find that the alternative unit sought herein will promote effective dealings. In this connection, it is noted that both the Regional Commander and the Civilian Personnel Officer, whom the Activity contends are the principal or ultimate authorities within the Region involved in the negotiation and approval of negotiated agreements and in the resolution of grievances and other personnel matters, are located at the DCASR Headquarters in Burlingame. Thus, clearly, the unit found appropriate herein would promote effective dealings to the extent that the individuals whom the Activity contends are most concerned with labor-management relations, fiscal matters and the direction of operations are located organizationally with the unit found appropriate. Moreover, in my view, a claimed unit may be appropriate and be considered to promote effective dealings as well as efficiency of agency operations even though it does not include all employees directly under the area or regional head, or other activity officials who have final or initiating authority with respect to personnel, fiscal and programmatic matters. Thus, it is clearly contemplated by the Executive Order that labor-management negotiations could properly be conducted at lower than agency, regional, or district levels, and that, therefore, units of less broad proportions could be appropriate. In this regard, Section 11(a) of the Order, as amended recently by Executive Order 11838, provides, in part, that the agency and the exclusive representative shall meet and confer with respect to personnel policies and practices and matters affecting working conditions, as may be appropriate under applicable laws and regulations and (after the establishment of criteria by the Council) "published agency policies and regulations for which a compelling need exists---which are issued at agency headquarters level or at the level of a primary national subdivision." (Emphasis supplied.) The rationale for this amendment to Executive Order 11491, is set forth on pages 31-39 of the Council's Report and Recommendations of January 1975, in which it is noted that the Study Committee in 1969, although emphasizing that agency regulatory authority must be retained, urged agencies to avoid issuance of overprescriptive regulations and to increase delegations of authority over personnel policies to local managers to permit a wider scope of negotiations. The Council noted in its 1975 Report and Recommendations, however, that its exhortation had fallen short of its objectives and for this reason meaningful negotiations at the local level had been unnecessarily constricted by higher level regulations "not critical to effective agency management or the public interest." Accordingly, the Council recommended, and the President approved, the modification of Section 11(a), which,

8/ It should be noted that the unit found to be appropriate herein encompasses the five DCASO's in the San Francisco Bay Area and the Hawaii Residency Office, as well as the DCASR Headquarters, Burlingame.

subsequent to the establishment of criteria by the Council, will bar from negotiation at the local level only those agency policies and regulations for which a compelling need has been established. When Section 11(a) is considered in conjunction with the principle set forth above in the Preamble to the Order that efficient administration of the Government is benefited by employee participation in the formulation and implementation of personnel policies and practices affecting conditions of employment, it is evident that the Order not only is intended to encourage negotiations at the local level to the maximum extent possible with respect to personnel policies and practices and matters affecting working conditions, but that such negotiations are desirable as they must perforce promote effective dealings between employees and the agency management with which the particular employees are most closely involved. Thus, in my view, the Order, while recognizing the appropriateness of broadly based units under certain circumstances, 9/ is also, as reflected by the amendment to Section 11(a), supportive of the concept that bargaining units at lower levels may in certain instances, promote effective dealings, as well as result in the increased efficiency of agency operations, I have discussed previously herein.

Based on all the considerations set forth above, I find that a unit encompassing the employees of DCASR Headquarters, Burlingame, California, the five DCASO's, and the Hawaii Residency, is appropriate for the purpose of exclusive recognition under the Order in that the employees in such unit share a clear and identifiable community of interest with each other, and such a unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall direct an election in the following unit:

All employees of the Defense Contract Administration Services Region Headquarters, Burlingame, California, the Defense Contract Administration Services Offices at the FMC corporation, Philco Corporation, Sylvania Corporation, Westinghouse Corporation and Applied Technology Division of Itek Corporation (ATD), in the San Francisco Bay area, and the Hawaii Residency Office, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

#### 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

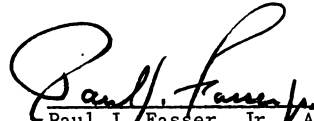
9/ In this regard, I am cognizant that Executive Order 11838, provides for the consolidation of existing units and that Section 11(a) of the Order, as amended, is intended to "complement" the changes in the Order which permit such consolidations. See Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio, and Columbus, Ohio, FLRC No. 74A-41. However, I do not find this concept to be inconsistent with the continued existence or establishment of units less comprehensive than region or district-wide, which otherwise meet the tests of appropriateness under the Order.

September 30, 1975

60 days from the date below. The appropriate Area Director 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 or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 2723.

Because the above Direction of Election is in a unit substantially different than the unit originally petitioned for by the AFGE, 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 Director, in places where notices are normally posted affecting the employees in the unit I have herein found appropriate. Such notice shall conform in all respects to the requirements of Section 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, a 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. A 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.  
September 16, 1975

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

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

U.S. MARINE CORPS AIR STATION,  
EL TORO  
A/SLMR No. 560

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1881 (AFGE) alleging essentially that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by virtue of its actions in removing one employee, a maintenance scheduler, from payroll union dues deduction without prior consultation with the AFGE, which was the exclusive representative of the Respondent's Wage Grade employees.

Noting that the maintenance scheduler involved herein was empowered with the authority to, among other things, hire and/or evaluate the performance of other employees, the Administrative Law Judge concluded that this individual was a supervisor within the meaning of Section 2(c) of the Order. Accordingly, he concluded that the Respondent had not violated Section 19(a)(1), (2) and (6) of the Order by its termination of dues withholding for the maintenance scheduler as the Respondent's obligation to meet and confer with the exclusive representative ran only to conditions and policies affecting unit employees and not supervisors.

The Assistant Secretary agreed with the Administrative Law Judge's conclusion that the maintenance scheduler involved herein was a supervisor within the meaning of the Order. Accordingly, as there was no obligation to meet and confer concerning the termination of the dues withholding, he ordered that the complaint be dismissed in its entirety.

## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. MARINE CORPS AIR STATION,  
EL TORO

Respondent

and

Case No. 72-4959

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 1881

Complainant

## DECISION AND ORDER

On June 26, 1975, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendation in the above entitled proceeding finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety.

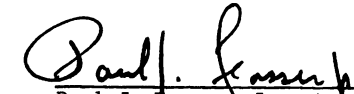
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, 1/ I hereby adopt the Administrative Law Judge's findings, conclusions, 2/ and recommendation.

1/ The Complainant filed untimely exceptions which have not been considered.

2/ The Administrative Law Judge concluded that employee Greigo was a supervisor within the meaning of Section 2(c) of the Order because, among other things, he had the authority to "hire and/or evaluate the performance of other employees." Under the circumstances herein, I agree that Greigo is a supervisor within the meaning of the Order inasmuch as the evidence establishes that he possesses the authority to hire other employees or effectively recommend such action. Moreover, it should be noted that Executive Order 11838 (issued subsequent to the filing of the complaint in the instant case) amended Executive Order 11491 to eliminate performance evaluation as a sole criterion for determining supervisory status. However, the authority to evaluate the performance of other employees may be considered in conjunction with other authority vested in an individual in determining an employee's supervisory status. See Report and Recommendation of the Federal Labor Relations Council (January 1975). See also United States Forest Service, Salmon National Forest, Salmon, Idaho, A/SLMR No. 556.

IT IS HEREBY ORDERED that the complaint in Case No. 72-4959 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
September 30, 1975

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



Assistant Regional Director for the San Francisco, California Region on March 27, 1975.

The Complaint alleges, in substance, that Respondent violated Sections 19(a)(1), (2) and (6) of the Executive Order by virtue of its actions in removing Mr. Rinaldo J. Griego from payroll union dues deduction without prior consultation with the Union which is the exclusive representative of its employees. 1/

A hearing was held in the captioned matter on April 24, 1975, in Santa Ana, California. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

The Union is the recognized exclusive representative of "Wage Board Employees of Marine Corps Air Station, El Toro, except those supervisory and management officials excluded by Section 10(b), Executive Order 11491, as amended".

The Union and the Agency are parties to a collective bargaining agreement dated February 8, 1974, and a April 2, 1974, "Memorandum Agreement" applicable to payroll deductions for union dues. This latter agreement provides in Section 4, Termination of Allotment as follows:

- (a) An employee's voluntary allotment for payment of his Union dues will be terminated with the start of the first pay period following the pay period in which any of the following occur:

\* \* \* \* \*

1/ During the course of the hearing, Complainant was, upon motion unopposed by the Respondent, allowed to amend the complaint dated 10/1/74, to include 19(a)(2) and 19(a)(6) allegations based solely on the events set forth in the original complaint.

In the Matter of

U. S. MARINE CORPS AIR STATION, EL TORO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1881

Complainant

Case No. 72-4959

Edward T. Borda, Esquire  
Department of Navy, Labor Disputes  
and Appeals Section, Office of  
Civilian Manpower Management  
Washington, D. C. 20390  
For the Respondent

Raymond J. Malloy, Esquire  
Assistant General Counsel  
American Federation of Government Employees,  
AFL-CIO  
1325 Massachusetts Avenue, N. W.  
Washington, DC 20005  
For the Complainant

Before: BURTON S. STERNBURG  
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to an amended complaint first filed on October 1, 1974, under Executive Order 11491, as amended, by Local 1881, American Federation of Government Employees, AFL-CIO, herein-after called the Union or Complainant, against the U. S. Marine Corps Air Station, El Toro, hereinafter called the Agency or Respondent, a Notice of Hearing on Complaint was issued by the

(2) When an employee leaves the Unit as a result of any type of separation, transfer, or other personnel action (except temporary promotion or detail).

The aforementioned "Memorandum of Agreement" makes no provision for "notice" to the Union in the event that an employee's voluntary allotment is terminated in accordance with Section 4(a)(2) quoted above.

On March 28, 1974, Mr. Griego, then president of Local 1881, was temporarily promoted to the position of Maintenance Scheduler (WD-7). Subsequently, on May 12, 1974, Mr. Griego's promotion was made permanent. Thereafter, in accordance with the Memorandum of Agreement concerning allotment for union dues and without any prior notice to the Union, the Respondent terminated Mr. Griego's union dues deduction on the payroll for the period beginning June 9, 1974 and ending June 22, 1974. On the same payroll, three other union members had their union dues deductions terminated because of promotions to positions outside the unit. The Union does not contest the validity of the dues deduction terminations of these latter three employees because it believes that their new positions are in fact supervisory and definitely outside the unit. 2/

According to the credited testimony of superintendent Bergstrom and Edward Post and Paul Dearth, former maintenance schedulers and Griego's predecessors, it has always been the duty and/or responsibility of the maintenance scheduler to supervise three shop planners 3/ and one clerical. In such

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2/ However, with respect to Mr. Griego, it is the Union's contention that Mr. Griego's new position is not of a supervisory character and hence not outside the unit.

3/ The shop planners are responsible for purchasing or obtaining the necessary items to complete a scheduled maintenance job. Once the necessary items are assembled, the particular department or craft is then given the green light to proceed with the job. It is the maintenance scheduler's responsibility to assign the jobs to the shop planners and decide on priorities etc.

capacity, the maintenance scheduler, among other things, appraises the four employees, approves leave requests and hires and/or sits on selection panels for replacements or promotions. Additionally, the maintenance scheduler attends bi-weekly meetings of the foremen and superintendent wherein shop policy and planning are discussed. Also, the maintenance scheduler enjoys parking privileges and membership and/or use of the officers club along with other supervisory employees of the Agency.

Mr. Griego acknowledged that subsequent to being promoted he had been informed of the above supervisory functions and that he did on one occasion hire and/or effectively recommend a warehouseman as a temporary replacement for a sick shop planner. However, Mr. Griego testified that since the shop planners and clerks have many years of experience in their respective jobs, there is very little, if any, supervision practiced by him in his job of scheduler. Further, according to Mr. Griego, he is a mere conduit for job orders and not a supervisor. In further support of this contention, Mr. Griego pointed out that his wage classification is a WD like all rank and file employees rather than the WN normally carried by supervisors. In this latter context, the record indicates that classifications are given to various jobs solely upon the basis of where the primary duties of the particular job lie and have nothing to do with any possible supervisory responsibilities included therein. Thus, according to Mr. Colgon, the Agency's principal classifier, the highest or primary skill involved in Mr. Griego's job is maintenance scheduling, hence the classification "WD".

Discussion and Conclusions

Section 2(c) of Executive Order 11491, as amended, provided as of June 22, 1974, the date of the events underlying the instant complaint, as follows:

"Supervisor" means an employee having authority in the interest of the agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

In interpreting the aforecited provision, the Federal Labor Relations Council and the Assistant Secretary of Labor for Labor Management Relations have both held that inasmuch as Section 2(c) of the Order is written in the disjunctive,

the exercise of any of the functions set forth in Section 2(c) by an employee would make the employee a supervisor within the meaning of the Order. United States Naval Weapons Center, China Lake, California, A/SLMR, No. 128, FLRC No. 72A-11: United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120. The Federal Labor Relations Council has further held in United States Naval Weapons Center, supra, that an individual need not have unqualified or unreviewed authority over the functions set forth in Section 2(c) in order to be found a supervisor.


In view of the foregoing, and since Mr. Griego in his position of maintenance scheduler is empowered with the authority to, among other things, hire and/or evaluate the performance of other employees, I find Mr. Griego to be a supervisor within the meaning of Section 2(c) of the Order. Accordingly, and since the Respondent's obligation to consult and confer with the Union runs only to conditions and policies affecting unit employees and not supervisors, no basis exists for a 19(a)(1), (2) and (6) finding predicated solely upon Respondent's action in unilaterally dropping Mr. Griego from payroll union dues deductions without prior consultation with the Union. Cf. United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky. A/SLMR No. 400. 4/

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4/ Contrary to Complainant's counsel, I find no requirement in either the Order or the Rules and Regulations issued thereunder which compels an Agency to resolve the question of an employee's supervisory status through the medium of a petition for clarification. Such petition is generally reserved for the resolution of problems and/or questions of unit determination. While I agree with complainant's counsel that prior consultation with, or notice to, the Union would lead to a more harmonious relationship, the fact remains that consultation of this nature is only required with respect to changes affecting unit personnel. Once an employee becomes a supervisor he, in accordance with the proscriptions of the Executive Order, loses the privileges and/or benefits accorded unit personnel, such as dues deductions and the right to Union representation. Accordingly, an Agency acts at its peril when it unilaterally determines supervisory status, since an erroneous determination could well support a violation of Sections 19(a) (1) and (6) of the Order. However, as noted above, such is not the case herein.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Sections 19(a)(1), (2) and (6) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.

  
 BURTON S. STERNBURG  
 Administrative Law Judge

Dated: June 26, 1975  
 Washington, D. C.



September 30, 1975

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, AS AMENDED

UNITED STATES COAST GUARD  
AIR STATION,  
NON-APPROPRIATED FUND ACTIVITY,  
CAPE COD, MASSACHUSETTS  
A/SLMR No. 561

In this case, the United States Coast Guard Air Station, Non-Appropriated Fund Activity (Coast Guard), filed an RA petition which, in effect, sought a determination by the Assistant Secretary as to the impact of the transfer of certain facilities from the Army-Air Force Exchange Service, New England Area Exchange (AAFES), to the Coast Guard on a unit of exclusive recognition represented by the National Association of Government Employees, Local R1-178 (NAGE). The NAGE filed a petition for amendment of certification (AC) to change the name of the activity designated in the Certification of Representative from the "Otis Air Force Base Exchange at the Otis Air Force Base, Mass., and North Truro AFS [Air Force Station], Mass.," to the "U.S. Coast Guard Exchange, U.S. Coast Guard Air Station, Department of Transportation, Cape Cod, Massachusetts." The NAGE also filed a petition for clarification of unit (CU) in order to clarify its existing exclusively represented unit to include certain employees of the Coast Guard's grocery annex, minimart, and package store in the unit. In both its CU and AC petitions, the NAGE also sought to exclude from the unit the employees of the North Truro Air Force Station.

The record revealed that the NAGE had been certified as the exclusive representative for certain non-appropriated fund employees of the Otis Air Force Base Exchange and that, on September 25, 1974, this Activity was deactivated and its physical facilities transferred to the Coast Guard pursuant to an agreement between the AAFES and the Coast Guard. Under this agreement, the employees who lost their positions with the AAFES due to this deactivation would be given preference over other equally suited applicants for employment at the Coast Guard, but the former employees of the AAFES would not be automatically transferred to, or hired by, the Coast Guard. The record showed that although the 48 employees who lost their positions with the AAFES were recommended by the AAFES for hiring by the Coast Guard, only 31 of these employees were subsequently hired by the Coast Guard. Further, the record revealed that some of the former AAFES employees who were hired by the Coast Guard were not employed thereafter in functions which had been performed by the AAFES; that the Coast Guard added the functions of the former AAFES facilities to the pre-existing Coast Guard organization, which thereafter employed approximately 125 persons; that the former employees of the AAFES constitute approximately only one quarter of the employee complement of the Coast Guard; that a number of employees have been transferred between different segments of the Coast Guard; that many of the supervisory personnel of the Coast Guard had not formerly been employees or supervisors of the AAFES; that higher level management of the Coast Guard is responsible for the application of personnel policies

and practices throughout the Coast Guard; and that certain managerial operations, such as accounting, are subject to centralized procedures and control. Also, at the hearing the parties stipulated that the employees at the North Truro Air Force Station continued to be employed by the AAFES after the aforementioned transfer and, therefore, these employees do not share a community of interest with the employees of the Coast Guard.

Under these circumstances, the Assistant Secretary found that the former employees of the AAFES who were hired by the Coast Guard had been integrated functionally and administratively into the Coast Guard and do not share a clear and identifiable community of interest that is separate and distinct from other employees of the Coast Guard. He found also that the NAGE's unit continued to exist to the extent that the employees at the North Truro Air Force Station remained AAFES employees. Accordingly, the Assistant Secretary ordered that the certification of the existing unit represented exclusively by the NAGE be amended so that only the employees at the North Truro Air Force Station will be included in that unit. The Assistant Secretary also ordered that the CU petition which, in effect, sought to add some of the Coast Guard employees to the NAGE unit at Otis Air Force Base, be dismissed inasmuch as the NAGE's unit at the Otis Air Force Base had ceased to exist and, therefore it followed that the Coast Guard employees may not be considered to have accreted to any existing certified unit. The Assistant Secretary further ordered that the RA petition be dismissed. In this regard, it was noted that although an RA petition is a proper vehicle for an activity (or agency) to seek a determination of the representational status of employees in a substantially changed unit, it does not follow that an election will be appropriate in each instance where, as here, some of an activity's employees had been previously employed by another activity in an exclusively recognized unit. Thus, in the Assistant Secretary's view, elections in newly established units which are not substantially identifiable with any pre-existing units, but rather essentially involve employees who have been unrepresented, should result only from petitions filed by labor organizations seeking exclusive recognition in such units.

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

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES,  
LOCAL R1-178

Petitioner

DECISION AND ORDER AMENDING CERTIFICATION

UNITED STATES COAST GUARD  
AIR STATION,  
NON-APPROPRIATED FUND ACTIVITY,  
CAPE COD, MASSACHUSETTS

Activity

and

Case No. 31-8863(AC)

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES,  
LOCAL R1-178

Petitioner

and

ARMY AND AIR FORCE EXCHANGE SERVICE  
NEW ENGLAND AREA EXCHANGE,  
FORT DEVENS, MASSACHUSETTS

Interested Party

UNITED STATES COAST GUARD  
AIR STATION,  
NON-APPROPRIATED FUND ACTIVITY,  
CAPE COD, MASSACHUSETTS

Activity-Petitioner

and

Case No. 31-8890(RA)

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES,  
LOCAL R1-178

Intervenor

UNITED STATES COAST GUARD  
AIR STATION,  
NON-APPROPRIATED FUND ACTIVITY,  
CAPE COD, MASSACHUSETTS

Activity

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

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

On June 28, 1971, the National Association of Government Employees, Local R1-178, hereinafter called NAGE, was certified as the exclusive representative of certain employees of the Otis Air Force Base Exchange at the Otis Air Force Base, Massachusetts, and at the North Truro Air Force Station, Massachusetts. 1/ The record discloses that the Otis Air Force Base Exchange was deactivated on September 25, 1974, and that the physical facilities of the Otis Air Force Base Exchange at the Otis Air Force Base subsequently were transferred to the United States Coast Guard Air Station, Non-Appropriated Fund Activity, Cape Cod, Massachusetts, hereinafter called Coast Guard. The NAGE filed the subject petition for amendment of certification (AC) [Case No. 31-8863(AC)] seeking to amend the certification so that the activity therein would be designated as the "U.S. Coast Guard Exchange, U.S. Coast Guard Air Station, Department of Transportation, Cape Cod, Massachusetts." Thereafter, the Coast Guard filed the subject RA petition [Case No. 31-8890(RA)] which, in effect, sought a determination by the Assistant Secretary as to the impact of the aforementioned deactivation and transfer on the unit exclusively represented by the NAGE. 2/ The NAGE

1/ The Certification of Representative discloses that the unit included "all regular full-time and regular part-time HPP [hourly pay plan] and CPP [commission pay plan] non-supervisory employees, including off-duty military personnel in either of the foregoing categories, employed at the Otis Air Force Base Exchange at the Otis Air Force Base, Mass., and North Truro AFS, Mass.," and excluded "Temporary full-time; temporary part-time and casual employees; managerial trainees; employees engaged in personnel work in other than a purely clerical capacity; professional employees; guards, watchmen, and military personnel assigned to the Otis Air Force Base Exchange operations as a military duty."

2/ The RA petition describes the unit claimed to be appropriate as including "All regular full-time and regular part-time non-appropriated fund employees, including off-duty military personnel employed by the U.S. Coast Guard at the U.S. Coast Guard Air Station, Cape Cod, Mass.," and as excluding "All managerial officials, supervisory employees, employees engaged in non-appropriated funds personnel work in other than a clerical capacity, and guards, as defined in E.O. 11491, as amended."

filed also a petition for clarification of unit (CU) [Case No. 31-9044(CU)] seeking to clarify its exclusively represented unit by including certain employees of the Coast Guard's grocery annex, minimart, and package store in the unit. <sup>3/</sup> Both the CU and AC petitions would exclude the employees of the North Truro Air Force Station from the unit of Coast Guard employees. The New England Area Exchange, Army-Air Force Exchange Service, hereinafter called AAFES, was permitted to participate in these proceedings because of its interest in determining which labor organization, if any, represents its employees located at the facilities at North Truro Air Force Station.

The NAGE contends that the Coast Guard is the successor-in-interest to the Otis Air Force Base Exchange at the Otis Air Force Base because a majority of the employees formerly employed by the AAFES at the facilities in question were employed at those facilities after the transfer of the AAFES's facilities to the Coast Guard; that these employees presently perform essentially the same tasks that they performed prior to the transfer; and that the particular facilities involved presently are utilized for the same mission undertaken previous to the transfer.

The Coast Guard, on the other hand, contends that it has a good faith doubt that the NAGE currently represents a majority of the employees in the unit proposed in the NAGE's AC and CU petitions, and that, moreover, such a unit is inappropriate for the purpose of exclusive recognition. In this regard, the Coast Guard asserts that the former AAFES employees who were hired by the Coast Guard after deactivation of the Otis Air Force Base Exchange, as well as those physical facilities which had been a part of the Otis Air Force Base Exchange prior to its deactivation, have become a subordinate part of a larger organization which has uniform personnel policies and practices. The Coast Guard takes the view that its various subordinate components, including those which originally were part of the Otis Air Force Base Exchange, and those which were established originally by the Coast Guard itself, are interdependent and subject to the operational decisions of common management. Thus, the Coast Guard concludes that the unit proposed in the NAGE's AC and CU petitions would not promote effective dealings and efficiency of agency operations, and that such a unit would not contain employees who share a clear and definable community of interest which would be separate and distinct from other employees of the Coast Guard. The Coast Guard also contends that the transfer of facilities in question caused the unit exclusively represented by the NAGE to become defunct, and that, as a result, the Coast Guard did not become a successor-in-interest with respect to that unit.

The AAFES contends that the employees of the North Truro Air Force Station facilities should not be included in any unit found to be appropriate at the Coast Guard inasmuch as these facilities were not transferred to the Coast Guard and the employees therein have remained employees of the

<sup>3/</sup> The record discloses that the minimart is encompassed within the grocery annex in the Coast Guard organization. The record reveals further that there was no grocery annex at the Otis Air Force Base Exchange and that the grocery annex was established by the Coast Guard. The CU petition herein refers to a "beverage store" and "after-hours" store, but the record indicates that these terms are, in fact, references to the package store and minimart, respectively.

AAFES. In this latter regard, at the hearing in this matter, the parties stipulated that the employees at the North Truro Air Force Station continued to be employed by the AAFES and, therefore, these employees do not share a community of interest with the employees of the Coast Guard.

The record reveals that prior to the aforementioned deactivation of the Otis Air Force Base Exchange on September 25, 1974, the Otis Air Force Base Exchange at the Otis Air Force Base consisted of a main retail store employing 35 to 40 persons and a service station employing approximately 10 persons. <sup>4/</sup> As of that date, the Coast Guard, which was already in operation, consisted of a small exchange which operated on a part-time basis; two officers' clubs; a child care center; a package store for beverage sales; an accounting and personnel section; and a grocery annex. The record further indicates that on October 15, 1974, the Coast Guard opened and began to operate its main exchange and gas station, and that, since that time, the Coast Guard also has added a maintenance and morale subsection and a small garden shop.

The record shows that the AAFES and the Coast Guard signed an agreement on October 25 and November 6, 1974, which described the terms and conditions under which the AAFES would transfer to the Coast Guard the assets and liabilities of the physical plant of the Otis Air Force Base Exchange at the Otis Air Force Base. The agreement did not provide for the transfer of any of the AAFES employees into the Coast Guard. However, it did provide, in part, that the former employees of the AAFES would be employed by the Coast Guard "to the extent practicable in positions related as nearly as possible to those held at transfer date." The record shows that the parties interpreted their agreement to mean that the employees of the AAFES at the Otis Air Force Base who were "RIF'd" as a result of the deactivation of the Otis Air Force Base Exchange would be given preference over other equally suited applicants for employment at the Coast Guard. In this connection, the record reveals that 48 employees lost their positions with the AAFES due to the deactivation of the facilities at the Otis Air Force Base; that all of these employees were recommended by the AAFES for hiring by the Coast Guard; but that only 31 of these employees subsequently were hired by the Coast Guard. The record indicates also that, pursuant to the aforementioned transfer agreement, the AAFES employees who were hired by the Coast Guard were not permitted to carry over to the Coast Guard any annual leave which they had accumulated while employed by the AAFES, and that, further, these employees were not assured of retaining the same positions or rates of pay which they had enjoyed while employed at the AAFES. <sup>5/</sup> In addition to the former AAFES employees hired by the Coast Guard, the latter also hired seven persons who had formerly been employed by a commissary which had been an appropriated fund activity of the Otis Air Force Base, and which also had been deactivated. The record reveals that as of April 1975, the Coast Guard

<sup>4/</sup> The AAFES facilities at the North Truro Air Force Station consisted of a small retail store and a service station, employing some five individuals.

<sup>5/</sup> The transfer agreement provided also, in part, that these employees would be allowed to transfer a maximum of 60 hours of sick leave from the AAFES to the Coast Guard, and that their seniority would be calculated by the Coast Guard based on the dates on which they began to accumulate seniority with the AAFES.

consisted of 125 employees, including the aforementioned former employees of the AAFES and the commissary, as well as employees who had been hired from other sources. Of the 31 former AAFES employees who were employed by the Coast Guard, five were employed in the grocery annex, which consisted of 37 employees; four were employed in the gas station, which consisted of nine employees; one was employed in the accounting branch, which consisted of nine employees; and 21 were employed in the main exchange, which consisted of 30 employees. 6/

The record reveals also that many of the supervisory personnel of the Coast Guard had not formerly been employees or supervisors at the AAFES. Thus, the manager of the Coast Guard main exchange, the manager of the Coast Guard grocery annex, the supervisor of the Coast Guard package store, and the supervisor of the Coast Guard service station had not been employees or supervisors at the AAFES. The record also shows that at least five employees have been transferred on a temporary or permanent basis from one segment of the Coast Guard to another, including at least one former AAFES employee. Moreover, the employees of the Coast Guard are subject to uniform personnel policies and procedures established under higher level Coast Guard guidelines for nonappropriated fund activities. Thus, it was established that the areas of consideration for reduction-in-force, hiring, and promotion include all of the Coast Guard; the same grievance, employee evaluation, and sick leave policies apply to all of the segments of the Coast Guard; all of the employees of the Coast Guard are eligible to participate in the same group insurance plan; and the head of the Coast Guard and the Commanding Officer, Coast Guard Air Station, Cape Cod, Massachusetts, share responsibility for hiring, firing and personnel actions. Further, the record shows that accounting and maintenance functions are centralized for the entire Coast Guard; that common equipment and procedures are utilized for purchasing throughout the Coast Guard; and that the transfer of employees from one segment of the Coast Guard to another is necessary in order to accommodate fluctuations in the utilization of these various segments by the customer population.

Based on all of the foregoing circumstances, I find that the former employees of the AAFES who were hired by the Coast Guard have been integrated functionally and administratively into the Coast Guard and do not now sit a clear and identifiable community of interest that is separate and distinct from other employees of the Coast Guard. Thus, the evidence establishes that the deactivation of the AAFES and the transfer of its facilities to the Coast Guard did not constitute an administrative transfer of the AAFES functions and employees to the Coast Guard. Rather, the evidence establishes that only certain of the AAFES' physical facilities were transferred pursuant to an agreement between the AAFES and the Coast Guard; that the former employees of the AAFES were not transferred by the agreement to the Coast Guard; that only some of the employees who had lost their positions with the AAFES were hired subsequently by the Coast Guard; that the former employees of the AAFES constitute approximately only one quarter of the employee complement of the Coast Guard; that the former AAFES employees were employed in a number of the Coast Guard functions, some of which had not been performed by the AAFES; that the Coast Guard added the functions of the former AAFES facilities to the pre-existing Coast Guard organization; and that a number of employees have transferred between different segments of

6/ The evidence indicates that seven persons who had formerly been employed by the commissary were hired by the Coast Guard for positions in the grocery annex.

the Coast Guard. Moreover, the evidence establishes that many of the supervisory personnel of the Coast Guard had not formerly been employees or supervisors of the AAFES; that the head of the Coast Guard facility involved herein and the Commanding Officer of the Coast Guard base are responsible for personnel policies and practices for all of the Coast Guard; that all of the employees of the Coast Guard, including former AAFES employees, are subject to the same personnel policies and practices, including such matters as grievance procedures, group insurance, reduction-in-force, sick leave, employee evaluation, and promotion; and that maintenance, accounting, and purchasing are subject to centralized procedures and control. Under these circumstances, I find that the former employees of the AAFES who were hired by the Coast Guard have been so thoroughly combined and integrated into the Coast Guard that they do not constitute a recognizable and viable unit by themselves but, rather, now share a community of interest with all the other employees of the Coast Guard. 7/

I find further that the employees of the Coast Guard, including those formerly employed by the AAFES, do not share a community of interest with the AAFES employees who have remained at the North Truro Air Force Station. The record indicates, in this regard, that the AAFES operations at the North Truro Air Force Station continue to be performed at that location, under the same supervision and direction as prior to the deactivation of the Otis Air Force Exchange at the Otis Air Force Base. Thus, I find that the unit exclusively represented by the NAGE continues to exist, albeit reduced to include only the employees at the North Truro Air Force Station. 8/ Accordingly, I shall amend the NAGE's certification to reflect this change.

Under the particular circumstances herein, I find it appropriate to dismiss both the NAGE's CU petition and the Coast Guard's RA petition. In this regard, it was noted that the NAGE by its CU petition seeks, in effect, a determination that some of the employees of the Coast Guard have been added to its existing unit at the Otis Air Force Base. Inasmuch as I have found that such a unit did not continue to exist after the deactivation of the Otis Air Force Base Exchange, it follows that the Coast Guard employees may not be considered to have accreted to any existing certified unit. Therefore, I shall dismiss the CU petition in Case No. 31-9044(CU).

With respect to the RA petition in Case No. 31-8890(RA), it was noted that, pursuant to Section 202.2(b)(1) of the Assistant Secretary's Regulations, an RA petition may be filed where an election is sought to determine whether a labor organization should cease to be the exclusive representative because it may no longer represent a majority of the employees in the existing unit, or because the unit does not continue to be appropriate due to a substantial change in its character and scope. However, neither of

7/ Cf. Naval Education and Training Center (NETC), Newport, Rhode Island, A/SILMR No. 496 and U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SILMR No. 482. There is currently no exclusive representative at the Coast Guard facility involved herein.

8/ See Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SILMR No. 160. Cf. United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, A/SILMR No. 106.

these conditions is applicable in the instant case. Thus, the instant RA petition does not represent an expression of good faith doubt as to majority representation in the existing unit, as the Coast Guard does not contend that the AAFES unit at the Otis Air Force Base has continued in existence after the deactivation of the Otis Air Force Base Exchange. Rather, the Coast Guard has expressed a good faith doubt as to whether the NAGE represents a majority of the employees in a newly created grouping of employees in which former employees of the AAFES previously represented by the NAGE constitute a minority. Further, the record reflects that a change in the character and scope of an existing exclusively recognized unit, such as would warrant an election pursuant to an RA petition, has not occurred in this case. Rather, as indicated above, the Otis Air Force Base Exchange was deactivated, its physical facilities at the Otis Air Force Base were transferred to the Coast Guard, and some of its former employees were hired by the Coast Guard. In my view, this course of events cannot serve to resurrect the unit of exclusive recognition represented by the NAGE, even in altered form, so as to warrant an election pursuant to an RA petition. Thus, although I have considered an election pursuant to an RA petition to be appropriate where one or more recognized units have been combined to form a new unit containing essentially all of the components of the recognized units, <sup>9/</sup> in my view, such an election is not appropriate to decide a question concerning representation with respect to employees of an activity who have little or no traceable connection to any prior unit of exclusive recognition.

In this regard, it should be noted that although an RA petition is an appropriate vehicle for an activity (or agency) to seek a determination of the representational status of employees in a substantially changed unit, it does not follow that an election will be appropriate in each instance where, as here, some of an activity's employees had been previously employed by another activity in an exclusively recognized unit. In my view, elections in newly established units which are not substantially identifiable with any pre-existing units but, rather, essentially involve employees who have been unrepresented, should result only from petitions filed by labor organizations seeking exclusive recognition in such units. Accordingly, while I have considered the Coast Guard's RA petition in order to determine the impact of the instant deactivation and transfer of facilities on the unit represented by the NAGE, I find that the particular circumstances herein do not warrant an election. Therefore, I shall dismiss the instant RA petition.

ORDER

IT IS HEREBY ORDERED that the petitions in Case Nos. 31-8890(RA), and 31-9044(CU) be, and they hereby are, dismissed.

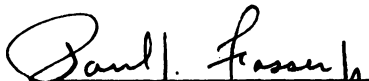
IT IS FURTHER ORDERED that the certification in Case No. 31-4306(RO), issued on June 28, 1971, to the National Association of Government Employees, Local R1-178 be, and it hereby is, amended by substituting therein as the

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<sup>9/</sup> See Idaho Panhandle National Forests, United States Department of Agriculture, A/SIMR No. 394.

designation of the Activity, Army and Air Force Exchange Service, New England Area Exchange, North Truro Air Force Station, Massachusetts.

Dated, Washington, D.C.  
September 30, 1975

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

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

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,  
 SOCIAL SECURITY ADMINISTRATION,  
 BUREAU OF FIELD OPERATIONS,  
 BOSTON REGION,  
 DISTRICT AND BRANCH OFFICES  
 A/SLMR No. 562

This case involved a petition for clarification of unit (CU) filed by the Activity-Petitioner seeking to exclude certain employee job classifications from the existing exclusively recognized unit on the grounds that, due to changes since the Certification of Representative was issued on May 19, 1970, the employees in these job classifications would now be considered to be confidential employees. Specifically, the Activity-Petitioner sought to exclude from the unit employees in the classifications of Administrative Aide or Administrative Clerk and Answering Service Aide in the Teleservice Center. Contrary to the Activity-Petitioner, the incumbent exclusive representative, the American Federation of Government Employees, AFL-CIO, Local 1164 (AFGE), contended that the employees in question were not confidential employees and should remain in the unit.

The evidence established that the Activity-Petitioner's District and Branch Offices were headed by District Managers and Branch Managers and that these officials were involved in formulating and effectuating labor relations policy with respect to their offices and the Boston Region. The evidence further established that the Administrative Aides or Administrative Clerks acted as the principal secretaries to the District Managers and Branch Managers and, in this capacity, had access to personnel records and were involved in the preparation of material in connection with personnel matters and in the preparation of confidential labor relations materials, such as the replies of District and Branch Managers to a management labor relations survey. In these circumstances, the Assistant Secretary concluded that the Administrative Aides or Administrative Clerks were confidential employees. However, he concluded that the evidence was insufficient to make a determination as to whether the one Answering Service Aide in the Teleservice Center employed by the Activity-Petitioner was a confidential employee.

Accordingly, the Assistant Secretary clarified the exclusively recognized unit by excluding from the unit an employee classified as an Administrative Aide or Administrative Clerk in each District and Branch Office.

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

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,  
 SOCIAL SECURITY ADMINISTRATION,  
 BUREAU OF FIELD OPERATIONS,  
 BOSTON REGION,  
 DISTRICT AND BRANCH OFFICES

Activity-Petitioner

and

Case No. 31-9082(CU)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, AFL-CIO, LOCAL 1164

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 Peter F. Dow. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity-Petitioner 1/, the Assistant Secretary finds:

The Activity-Petitioner filed a petition for clarification of unit (CU) seeking to exclude certain employee job classifications from the existing exclusively recognized unit of all nonsupervisory employees in the District and Branch Offices of the Social Security Administration in New England. In this regard, the Activity-Petitioner contends that, due to changes that had taken place since the Certification of Representative was issued on May 19, 1970, the employees in the job classifications of Administrative Aide or Administrative Clerk 2/ and Answering Service Aide in the Teleservice Center are now confidential

1/ The American Federation of Government Employees, AFL-CIO, Local 1164, hereinafter called AFGE, filed an untimely brief which has not been considered.

2/ The record indicates in this regard that the actual job description the Activity-Petitioner seeks to exclude from the unit is entitled "Administrative Clerk" but that, in their daily work capacity, employees in this job classification are referred to as "Administrative Aides," which was the description used throughout the hearing.

employees and should be excluded from the certified unit. The AFGE, which is the incumbent exclusive representative of the unit involved, contends that the employees in the above-noted classifications are not confidential employees and should remain in the certified unit.

The evidence indicates that the Activity-Petitioner has 48 District Offices, 26 Branch Offices and one Teleservice Center in the Boston Region, which encompasses the New England states. Each District Office or Branch Office is headed by a District Manager or Branch Manager, and the Teleservice Center is headed by a Teleservice Center Manager. The District and Branch Managers are responsible for the supervision of the employees of the District and Branch Offices, respectively, and, in this capacity, they are involved in formulating and effectuating labor relations policy with respect to their offices and the Boston Region. 3/ Thus, the record reveals that the District and Branch Managers are responsible for administering the negotiated agreement at the local level, that the negotiated agreement permits supplemental agreements to be negotiated at the District level, that District and Branch Managers act as the second stage management official in the negotiated grievance procedure, and that several District Managers serve as members of a collective bargaining council which is involved in preparing negotiating strategy on behalf of the Activity-Petitioner.

The record reveals that Administrative Aides perform a variety of administrative and secretarial duties for the District or Branch Managers, including acting as their principal secretaries. In this regard, they are responsible for assisting the management staff in personnel matters, such as initiating personnel actions and informing employees about changes that affect them; preparing or coordinating the preparation of certain personnel records; receiving visitors and telephone calls for the District or Branch Managers; and performing miscellaneous secretarial duties. The evidence also establishes that Administrative Aides generally have access to personnel records, including awards, grievances and labor relations files; that they may be required to prepare material in connection with grievances and other personnel matters in accordance with the directions of the District and Branch Managers; and that they review incoming mail of a confidential nature. Further, Administrative Aides have been involved in the preparation of confidential labor relations materials, such as the replies of the District and Branch Managers to a management labor relations survey.

Based on the foregoing, I find that the Administrative Aides or Administrative Clerks are confidential employees and, therefore, should be excluded from the exclusively recognized unit. 4/ Thus, as noted

3/ There currently is a regionwide negotiated agreement between the Activity-Petitioner and the AFGE covering the employees in the exclusively recognized unit.

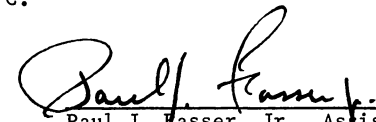
4/ Certain of the Activity's larger District and Branch Offices have more than one employee classified as an Administrative Aide or Administrative Clerk. However, the Activity does not contend, nor does the record reveal, that there is more than one Administrative Aide or Administrative Clerk in any such office serving in a confidential capacity on a permanent basis.

above, employees in this classification act as the principal secretaries to the District or Branch Managers; the District and Branch Managers are involved in the formulation and effectuation of the Activity-Petitioner's labor-management relations policies; and that, in their capacity as secretaries to the District and Branch Managers, they perform confidential duties for the Managers with respect to labor-management relations matters. 5/ Accordingly, I shall order that these employees be excluded from the exclusively recognized unit. 6/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the New England Council of Social Security Lodges, American Federation of Government Employees, AFL-CIO, was certified as of May 19, 1970, and in which the certification was amended on June 21, 1972, to change the name of the certified labor organization to American Federation of Government Employees, AFL-CIO, Local 1164, be, and herein is, clarified by excluding from said unit an employee classified as an Administrative Aide or Administrative Clerk in each of the Activity's District and Branch Offices.

Dated, Washington, D. C.  
September 30, 1975

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

5/ Cf. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D. C., A/SLMR No. 538; Department of Interior, Bureau of Land Management, District Office, A/SLMR No. 212; Internal Revenue Service, Birmingham District, A/SLMR No. 186; and Portland Area Office, Department of Housing and Urban Development, A/SLMR No. 111.

6/ As noted above, the Activity-Petitioner also sought to exclude from the exclusively recognized unit employees in the classification of Answering Service Aide in the Teleservice Center. The record indicates that there is one individual employed in this classification. However, the evidence adduced was considered insufficient to make a determination as to whether the employee involved acts in a confidential capacity to a person who formulates and effectuates management policies in the field of labor relations. Accordingly, I shall make no finding with respect to the eligibility of this employee.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

BUREAU OF DISTRICT OFFICE OPERATIONS,  
SOCIAL SECURITY ADMINISTRATION,  
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,  
BOSTON, MASSACHUSETTS  
A/SLMR No. 563

BUREAU OF DISTRICT OFFICE OPERATIONS,  
SOCIAL SECURITY ADMINISTRATION,  
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,  
BOSTON, MASSACHUSETTS

Respondent

and

Case No. 31-8850(CA)

LOCAL 1164, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by Local 1164, American Federation of Government Employees, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by failing to promote a union steward and an assistant union steward because of their membership in, and activities on behalf of, the Complainant.

On June 30, 1975, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

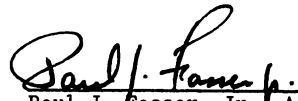
Based on certain credited testimony, the Administrative Law Judge concluded that the denied promotions were based on the employees' lack of expertise and were unrelated to their participation in union activities. The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and, accordingly, ordered that the complaint be dismissed in its entirety.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-8850(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
September 30, 1975

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

1/ I find no basis for reversing the Administrative Law Judge's credibility findings in the subject case. See, in this regard, Navy Exchange, U. S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.



U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



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In the Matter of  
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BUREAU OF DISTRICT OFFICE OPERATIONS,  
SOCIAL SECURITY ADMINISTRATION, DEPARTMENT  
OF HEALTH EDUCATION AND WELFARE, BOSTON,  
MASSACHUSETTS  
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:  
Respondent  
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and  
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LOCAL 1164, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO  
:  
:  
Complainant  
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.....

Case No. 31-8850 (CA)

Mr. Robert D. Chlup  
Social Security Administration  
Room 1109, John F. Kennedy Building  
Boston, Massachusetts  
For the Respondent  
  
Mr. William L. McGuire  
68 Lyman Street  
Waltham, Massachusetts 02154  
For the Complainant

Before: BURTON S. STERNBURG  
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to an amended complaint first filed on October 2, 1974, under Executive Order 11491, as amended, by Local 1164, American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or Complainant), against the Bureau of

District Office Operations, Social Security Administration, Department of Health Education and Welfare, Boston, Massachusetts, (hereinafter called the Respondent or Agency), a Notice of Hearing on Complaint was issued by the Regional Director for the New York City, New York Region on March 19, 1975.

The complaint alleges, in substance, that the Respondent violated Sections 19(a)(1) and (2) of the Executive Order by virtue of its actions in failing and refusing to promote two named employees because of their membership in, and activities on behalf of, the Union.

A hearing was held in the captioned matter on May 8, 1975, Boston, Massachusetts. All parties were afforded opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations:

Findings of Fact

The Union is the exclusive representative of "all non-supervisory permanent employees in the District and Branch Offices of the Social Security Administration in New England (Boston Office)" and signatory to a collective bargaining agreement with such Agency. Mr. Paul Thibault and Mrs. Opal Ward, the alleged discriminatees herein, hold the positions of union steward and assistant union steward, respectively.

At the time of the events underlying the instant complaint, Mr. Thibault and Mrs. Opal Ward were employed by the Respondent as GS-6 telephone service representatives in the Boston Teleservice Center. In such capacity, they were responsible for answering telephone inquiries relative to the various programs and benefits administered by the Respondent. In the event that the inquiries concerned subjects which they, or the other telephone service representatives similarly situated, were not versed, such inquiries would be referred to their immediate supervisor or to the Boston District Office of the Respondent. Falling into this latter category were inquiries concerning Supplemental Benefits and Black Lung, two new programs administered by Respondent.

Both Mrs. Ward and Mr. Thibault had been elected and/or selected for their respective union positions in 1973. Since being so selected, Mr. Thibault has participated in only two incidents involving his position of union steward, while Mrs. Ward, on the other hand, has never had the opportunity or occasion to utilize her position as assistant union steward. Thus, the record indicates that Mr. Thibault represented or assisted fellow employee Wiggins in a grievance in May of 1974 concerning Wiggins' job classification. Additionally, in the summer of 1973, Mr. Thibault brought to the attention of Joyce Kobryn, Manager of Teleservice Center, the fact that a recently posted memorandum showing the "line of succession of supervisors in case of emergency" was incorrect. Upon being informed of the alleged error, Ms. Kobryn became upset at Mr. Thibault and "screamed that it was her office and that no one was going to tell her what to do". Subsequently, some six or eight months later the posted memorandum was changed to reflect the suggested correction of Mr. Thibault without any further comment or discussion thereon.

According to the uncontroverted testimony of Mr. Patrick Conte, National Representative of the Union, in an informal conversation with Ms. Kobryn in the summer of 1973, Ms. Kobryn indicated that "she would tolerate unions", "was not in favor of unions in Government" but would comply with the Executive Order.

While handling the Wiggins' grievance in May of 1974, Mr. Thibault was admonished by Ms. Kobryn, Manager of the Teleservice Center, to keep track of his telephone conversations dealing with the grievance. In this connection, the collective bargaining agreement in effect provides that the steward is required to request official time before engaging in union-management activities during working hours. There was no evidence that Mr. Thibault was ever restricted in the use of his telephone or otherwise interfered with in the exercise of his duties as union steward.

On February 28, 1974, Mr. Thibault and Mrs. Ward were accorded "satisfactory" performance appraisals as GS-6 telephone service representatives.

Under letter dated June 28, 1974, Robert Bynum, Director, Bureau of District Office Operations, advised "All District, Branch and Teleservice Center Managers" that the Civil Service Commission had, pursuant to the Agency's request, upgraded the telephone service representatives' position from a GS-6 to a GS-7 on the basis of the increased work load caused by recent amendments to the Social Security Act and other new

legislation assigned to the Agency. The letter went on to state that only GS-6's who had been in grade for a full year and met new criteria enclosed with the letter would be eligible for promotion. Each addressee of the letter was cautioned to make sure that the criteria enclosed was met before according promotions to any GS-6 since the Civil Service Commission's previous "desk audits revealed that, in their opinion, a significant number of incumbent GS-6 employees were not performing at the GS-7 level". In the event any GS-6 employee did not in the opinion of the particular department managers meet the new criteria established for the new GS-7 positions, the department managers were given the responsibility of establishing an appropriate training program. The promotion of all GS-6 employees meeting the new criteria was to be effected on July 21, 1974.

As of July 21, 1974, Mr. Thibault and Mrs. Ward were the only GS-6 employees in the Boston Teleservice Center who had been in grade for more than a year. Mrs. Alma White, who was also a GS-6 telephone service representative completed her year in grade in September, 1964.

Following receipt of the June 28, 1974 letter, supervisor Steele <sup>1/</sup> and Manager Kobryn discussed the promotion of Mr. Thibault and Mrs. Ward on the basis of the new criteria for the GS-7 position. Following their conclusion that neither Mr. Thibault and Mrs. Ward met such criteria, supervisor Steele orally informed Mr. Thibault and Mrs. Ward of their decision. Written confirmation of the aforementioned decision and the deficiencies relied upon were sent to Mr. Thibault and Mrs. Ward on July 24, 1974. Subsequently, Mrs. Alma White, was also informed of her failure to meet the new GS-7 criteria. Thereafter, following a training period which included approximately 29 or 30 scheduled hours of class and on-the-job training and observation, Mr. Thibault, Mrs. Ward and Mrs. White were promoted in November, 1974 to GS-7 positions.

Mrs. White, who is not a member of the Union, testified that she considered both supervisor Steele and manager Kobryn to be fair and that she did not deem herself qualified for the GS-7 position in September due to her lack of knowledge of various new laws under the Agency's supervision.

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<sup>1/</sup> Supervisor Steele was a member of the Union prior to being promoted to a supervisor in March of 1974.

Mrs. Agnes Weyland, a GS-7 technical assistant, whose job consisted of giving training and technical assistance to the telephone service representatives, such as Mr. Thibault and Mrs. Ward, testified that based upon her work with the telephone service representatives in the Boston Teleservice Center she was of the opinion that none of the telephone service representatives met the new criteria for the GS-7. Mrs. Weyland, who is a member of the Union, conveyed her opinion as to the qualifications of the telephone service representatives to supervisor Steele and manager Kobryn shortly after she, Mrs. Weyland, read the new criteria for the GS-7 positions. It was Mrs. Weyland who set up and conducted the training program leading to the promotions of Mr. Thibault and Mrs. Ward.

The record contains two separate informal surveys made by the Union and the Agency which reveal that upwards of ninety percent of the eligible telephone service representatives throughout the country were promoted to GS-7 on the due date, i. e. July 21, 1974.

DISCUSSION AND CONCLUSIONS

Section 203.14 of the Regulations imposes upon the Complainant the burden of proving the allegations of the complaint by a preponderance of the evidence. The Complainant has failed to sustain this burden.

Complainant contends that Mr. Thibault and Mrs. Ward were denied promotions on July 21, 1974, solely because of their participation in activities protected by the Executive Order. In the case of Mr. Thibault such activities consisted of being a union steward, participating in one grievance and bringing to the attention of the Service Center manager the fact that a particular memorandum was in error. Mrs. Ward's only activity consisted of being assistant union steward, a position which she, admittedly, never utilized. Based upon such activities and the fact that manager Kobryn on one occasion, remote in time, commented that she did not see the necessity for unions in Government, and on another occasion admonished Mr. Thibault about the collective bargaining contract obligation to keep track of all working time used for union business, Complainant takes the position that the denial of immediate promotions to Mr. Thibault and Mrs. Ward were discriminatorily motivated. Complainant, however, has not offered any probative evidence to refute the contention and/or position of Respondent that they, Mr. Thibault and Mrs. Ward, as well as other similarly situated teleservice representatives in the Boston office, did not meet the new GS-7 criteria. Thus

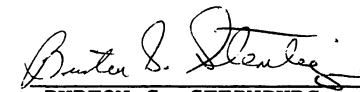
the sole evidence relied upon by Complainant in this respect consisted of the affected employees satisfactory GS-6 appraisals made several months earlier under a different job description and the fact that an informal survey indicated that upwards of ninety percent of the GS-6 employees throughout the Respondent's other installations around the country suffered no delay in attaining the new GS-7 positions.

The Respondent, on the other hand, through the testimony of a similarly situated GS-6 who was also denied an immediate promotion, technical assistant Weyland and supervisor Steele, the latter two individuals being a union and former union member, respectively, has established that the promotions were not to be automatic and that all the telephone service representatives in the Boston office fell short of meeting the new GS-7 criteria. The fact that other telephone service representatives located in other installations throughout the country were promoted forthwith does not, in my opinion, lend support to Complainant's case since the directive accompanying the new GS-7 criteria stressed the fact that the promotions were not to be automatic and that the survey leading to the reclassification indicated that a number of GS-6 employees were not qualified for immediate promotion.

Accordingly, in view of the foregoing, and based primarily on the credited testimony of Mrs. Weyland, who was closely involved in the day to day activities of the telephone representatives and subsequently established and conducted the training program leading to the promotions of Mr. Thibault and Mrs. Ward in November of 1974, I find that the denial of promotions to Mr. Thibault and Mrs. Ward on July 21, 1974, was due to their lack of expertise and unrelated to their participation in union activities protected by the Executive Order.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Section 19(a)(1) and (2) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.

  
 BURTON S. STERNBURG  
 Administrative Law Judge

Dated: June 30, 1975  
 Washington, D. C.

September 30, 1975

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

DEFENSE SUPPLY AGENCY,  
DEFENSE CONTRACT ADMINISTRATION  
SERVICES REGION (DCASR),  
SAN FRANCISCO,  
DEFENSE CONTRACT ADMINISTRATION  
SERVICES DISTRICT (DCASD),  
SEATTLE, WASHINGTON  
A/SLMR No. 564

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This case arose as the result of a petition filed by the American Federation of Government Employees, Local 3204, AFL-CIO, seeking a unit of all General Schedule (GS) and professional employees employed by the Defense Contract Administration Services District, Seattle, Washington, assigned to the Seattle headquarters. At the hearing, the petition was amended to include all eligible employees of the Seattle District. The Activity contended that the petitioned for unit was not appropriate because it excludes other employees of the Region who share a community of interest with employees in the sought unit and, further, that the petitioned for unit would not promote effective dealings or efficiency of agency operations.

Under all of the circumstances, the Assistant Secretary found that the employees in the petitioned for unit share a clear and identifiable community of interest separate and distinct from other employees of the Region. The Assistant Secretary noted in this regard that the petitioned for employees share common overall District-wide supervision, perform their duties within the assigned geographical area of the DCASD, and do not interchange or have job contact with any other employees of the Region. Moreover, he noted that any transfer to or from the District Office occurs only in situations involving promotion or reduction-in-force procedures.

Further, noting that a determination with respect to effective dealings and efficiency of agency operations is dependent on a complex of factors, including tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization, the Assistant Secretary found that the petitioned for District-wide unit will promote effective dealings and efficiency of agency operations. The Assistant Secretary found in this regard that, in fulfilling his responsibility for the day-to-day operation of the DCASD, the District Commander has the authority to discipline employees, to issue operating procedures providing there is no conflict with Regional regulations; to change workweek hours for certain locations, to redistribute the work force within his District and

to negotiate on local District-wide matters within the purview of his delegated authority as well as on other District-wide matters which are not precluded by higher level regulations. Further, he noted the lack of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in those regions of the Defense Supply Agency where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements.

Accordingly, the Assistant Secretary ordered that an election be conducted in the unit found appropriate. As the unit found appropriate differed substantially from the unit petitioned for originally, the Assistant Secretary directed that the election be held upon completion of the posting of a Notice of Unit Determination to permit possible intervention by labor organizations for the sole purpose of appearing on the ballot.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,  
DEFENSE CONTRACT ADMINISTRATION SERVICES  
REGION (DCASR),  
SAN FRANCISCO,  
DEFENSE CONTRACT ADMINISTRATION SERVICES  
DISTRICT (DCASD),  
SEATTLE, WASHINGTON 1/

Activity

and

Case No. 71-3140(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 3204, 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 Pat Hunt. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case 2/, the Assistant Secretary finds:

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

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

2/ The parties stipulated that the record and their briefs filed in Defense Supply Agency, Defense Contract Administration Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, A/SLMR No. 461, constitute the full record in the instant proceeding except for supplements and corrections updating certain items.

2. The American Federation of Government Employees, Local 3204, AFL-CIO, herein called AFGE, seeks an election in a unit of all General Schedule (GS) and professional employees of the Defense Contract Administration Services District (DCASD), Seattle, Washington, 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. 3/

The Activity contends that the unit sought is not appropriate because it excludes employees who share a community of interest together with the employees in the claimed unit and, further, that the petitioned for unit will not promote effective dealings and efficiency of agency operations. In the Activity's view, the only appropriate unit in this situation is a unit composed of all eligible employees of the Defense Contract Administration Services Region (DCASR), San Francisco.

The DCASR, San Francisco, with headquarters in Burlingame, California, is one of eleven such regions of the Defense Supply Agency (DSA) and is a primary level field activity of the DSA. It provides contract administration services and support for the Department of Defense, as well as other Federal agencies, and encompasses a geographic area which includes the States of Utah, Montana, Idaho, Washington, Oregon, Alaska, Hawaii, as well as the Mariana Islands, most of Nevada and northern California. There are two DCASD's within DCASR, San Francisco; namely, DCASD, Seattle, and DCASD, Salt Lake City. In addition, the Region includes five plant site Defense Contract Administration Services Offices (DCASO's) located at contractors' offices in northern California, and an area DCASO in Portland, Oregon, which services an assigned geographic area within the Seattle District. With the exception of the DCASO in Portland, which reports through the DCASD in Seattle, all DCASO's and DCASD's within the Region report directly to DCASR headquarters. 4/ Approximately 1,200 civilian employees are employed throughout the DCASR, San Francisco, with most of the employees located in northern California.

The DCASR, San Francisco, is headed by a Regional Commander (a military officer) whose office is located at the DCASR headquarters. Directly under the Commander, and located at the headquarters, are a number of offices and directorates which are responsible for planning and monitoring all facets of the DCASR's operations. In this regard, the offices are concerned primarily with matters regarding planning, administration, contract compliance problems and security problems at defense plants, while the directorates are concerned with matters regarding contract administration, production and quality assurance. Also under the Commander are certain staff administrative segments, including a Civilian Personnel Office which administers personnel policies and procedures for all functions of the

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3/ The claimed unit appears as amended at the hearing. Initially, the claimed unit was limited to the employees in the States of Montana and Washington and in northern Idaho assigned to the DCASD, Seattle, headquarters. At the hearing, the AFGE agreed to expand the claimed unit to include all eligible employees of the DCASD, Seattle.

4/ Also, a Resident Office in Hawaii reports directly to DCASR, San Francisco.

Region. Although there are numerous less-than-region wide recognized or certified units throughout the other DSA regions, some of which are covered by negotiated agreements, only the DCASD in Salt Lake City presently is represented by an exclusive representative in the DCASR, San Francisco. 5/

The DCASD, Seattle, headquartered in Seattle, Washington, geographically encompasses the States of Washington, Oregon, and Montana, and northern Idaho. It is under the supervision of a District Commander (a military officer) who also exercises line authority over the DCASO, Portland, which is under the supervision of a Chief (a military officer). Organizationally, the DCASD headquarters in Seattle, and the DCASO, Portland, are subdivided to correspond with the directorates of the Regional headquarters. Thus, at the DCASD there is a division of contract administration, a division of production, a division of quality assurance, and an office of planning and administration. The DCASO is subdivided into divisions of contract administration, production, and quality assurance.

The record reveals that employees assigned to the DCASD, Seattle, and the DCASO, Portland, are assigned to the divisions comprising those offices, that employees assigned to a particular division share common job classifications with other employees in the same division, and that employees so classified utilize similar skills and perform substantially similar duties. All of these employees perform their duties within the geographical area of the DCASD and submit daily reports of their activities to their first line supervisors, who then transmit these reports to branch or division chiefs. The activity reports of the DCASO, Portland, are transmitted to the District Commander and, thereafter, they are included with activity reports prepared by the employees of the District headquarters for transmittal by the District Commander to the DCASR's headquarters.

The District Commander, as head of the District, a secondary level field activity established for an assigned geographic area of a DCASR, has operational responsibility for contract administration services. In fulfilling his responsibility for the day-to-day operation of the District the District Commander can issue operating procedures for the DCASD which provide more detail, but which may not conflict with Regional regulations. Further, it appears from the record that the District Commander has the authority within his District to discipline employees (he can suspend an employee for a period of less than 30 days), to change the workweek hours from other than the normal tour of duty, to redistribute the work force within the District, and to negotiate local District-wide matters within the purview of his authority.

The record reveals that approximately 130 nonsupervisory employees are assigned to the District headquarters and approximately 50 nonsupervisory employees are assigned to the DCASO, Portland. Also, five professional employees and six student aids are employed in the District. At the hearing,

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5/ See Union Recognition In the Federal Government issued by the U.S. Civil Service Commission, Office of Labor-Management Relations (November 1974).

the parties stipulated that these student aids should be excluded from any unit found appropriate and, in this connection, the record reveals that the exclusion of these employees is warranted in that they are part-time employees who do not have career or career-conditional status, they are not entitled to any fringe benefits, and do not have any expectancy of continuing employment. 6/

The record reveals that all of the employees of the DCASD, Seattle, and DCASO, Portland, perform their duties pursuant to overall policies and procedures established by the Regional headquarters' staff and that employees throughout the Region are subject to uniform personnel policies. There is no evidence of any degree of interchange or job contact between the employees of the DCASD, Seattle, and employees of any other organizational components of the Region outside of headquarters, or between employees of the DCASD, Seattle, or the DCASO, Portland, and employees of the Regional headquarters' staff, other than the daily reports indicated above. While the evidence establishes that there is some degree of transfer of employees among the various organizational components within the Region, generally such transfers are within the context of promotion or reduction-in-force procedures. Although the record discloses that the area of consideration for promotions and reduction-in-force for all employees classified GS-7 and above is Regionwide, whereas the area of consideration for promotions and reduction-in-force for employees classified GS-6 and below is the location of the vacancy, pursuant to agency regulations, the selecting official generally is the immediate supervisor. While employees assigned to the DCASD, Seattle, headquarters and the DCASO, Portland, work out of these offices, a significant number perform their duties where contracts for particular products or services are being performed and, to this extent, the working conditions of the employees may vary from one assignment to another. Also, although training programs are prepared by the DCASR headquarters' staff personnel, generally they are administered within the District, often by District personnel.

Under all of the foregoing circumstances, I find that the employees in the petitioned for unit share a clear and identifiable community of interest separate and distinct from other employees of the Region. Particularly noted in this regard are the facts that the petitioned for employees share common overall District-wide supervision, perform their duties within the assigned geographical area of the DCASD, and do not interchange or have job contact with any other employees of the Region. Moreover, any transfer to or from the District Office occurs only in situations involving promotion or reduction-in-force procedures.

The Activity contends that the claimed unit, if approved, will neither

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6/ Further, at the hearing the parties agreed to exclude the GS-6 Secretary-Stenographer, secretary to the District Commander, and the GS-5 Secretary-Stenographer, secretary to the Chief, DCASO, Portland, on the basis that they are confidential employees. Inasmuch as there is no evidence in the record which indicates the parties' agreement was improper in this regard, I find that these employees should be excluded from any unit found appropriate.

promote effective dealings nor the efficiency of agency operations. In this regard, the Activity takes the identical position as it took in an earlier case pertaining to the DCASD, Salt Lake City, Utah, (A/SLMR No. 461), that as virtually all meaningful personnel policy decisions in the DCASR, San Francisco, are made by the Regional Commander, either directly or through actions taken under the authority delegated to the Director of Civilian Personnel, it is apparent that the authority of the District Chief would be extremely limited in terms of negotiable matters if the proposed DCASD unit were approved, and would exclude such bargaining areas as promotions, grievances, discipline and arbitration.

In my view, and as discussed in detail in Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559, a determination of effective dealings and efficiency of agency operations is dependent on a complex of factors, including the tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization which can result in improved efficiency of agency operations despite increased cost factors. Further, as discussed in A/SLMR No. 559, in my view, a claimed unit may promote effective dealings and efficiency of agency operations even though it does not include all employees directly under the area or regional head, or the activity officials who have final initiating authority with respect to personnel, fiscal and programmatic matters. Nor am I persuaded by the Activity's argument that the authority of the District Chief would be extremely limited with regard to negotiations. In this regard, it was noted particularly that, in fulfilling his responsibility for the day-to-day operation of the DCASD, the District Commander has the authority to discipline employees, to issue operating procedures providing there is no conflict with Regional regulations, to change workweek hours for certain locations, to redistribute the work force within his District, and to negotiate on local District-wide matters within the purview of his delegated authority, as well as on any other District-wide matters which are not precluded by higher level regulations. Thus, the District Commander has the authority to negotiate at the District level with respect to matters which involve personnel practices and policies affecting the conditions of employment of the DCASD employees in the claimed unit.

Under these circumstances, and noting particularly the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements, 7/ I find that the petitioned for District-wide unit will promote effective dealings and efficiency of agency operations. 8/

7/ Cf. Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, FLRC No. 74A-28 and Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Central Region, A/SLMR No. 331, FLRC No. 74A-16.

8/ See Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, cited above.

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: 9/

All professional and nonprofessional employees of the Defense Contract Administration Services District, Seattle, Washington, including the Portland, Oregon, Defense Contract Administration Services Office, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, management officials, guards, and supervisors as defined in the Order.

As stated above, the unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10(b) (4) of the Order from including professional employees in a unit with non-professional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct that separate elections be conducted in the following voting groups:

Voting Group (a): All professional employees of the Defense Contract Administration Services District, Seattle, Washington, including the Portland, Oregon, Defense Contract Administration Services Office, excluding all non-professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, management officials, guards, and supervisors as defined in the Order.

Voting Group (b): All nonprofessional employees of the Defense Contract Administration Services District, Seattle, Washington, including the Portland, Oregon, Defense Contract Administration Services Office, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, management officials, guards, and supervisors as defined in the Order.

Employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 3204, AFL-CIO.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 3204, AFL-CIO. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as non-professional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be

9/ I am advised administratively that the AFGE has submitted a showing of interest in support of its petition which is in excess of 30 percent in the unit found appropriate.

taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the appropriate Area Director indicating whether or not the American Federation of Government Employees, Local 3204, AFL-CIO, was selected by the professional employees.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

(1) If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following units are appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the Defense Contract Administration Services District, Seattle, Washington, including the Portland, Oregon, Defense Contract Administration Services Office, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, management officials, guards, and supervisors as defined in the Order.

(b) All nonprofessional employees of the Defense Contract Administration Services District, Seattle, Washington, including the Portland, Oregon, Defense Contract Administration Services Office, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, management officials, guards, and supervisors as defined in the Order.

(2) If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order.

All professional and nonprofessional employees of the Defense Contract Administration Services District, Seattle, Washington, including the Portland, Oregon, Defense Contract Administration Services Office, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, management officials, guards, and supervisors as defined in the Order.

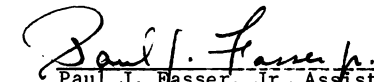
#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Director 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 or not they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, Local 3204, AFL-CIO.

Because the above Direction of Election is in a unit substantially different than the unit originally petitioned for by the AFGE, 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 Director, in places where notices are normally posted affecting the employees in the unit I have herein found appropriate. Such notice shall conform in all respects to the requirements of Section 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, a 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. A 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.  
September 30, 1975

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



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

INTERNAL REVENUE SERVICE,  
 OFFICE OF THE REGIONAL COMMISSIONER,  
 SOUTHEAST REGION  
 A/SLMR No. 565

This case arose when the National Treasury Employees Union (NTEU), filed a representation petition seeking an election in a unit of all professional and nonprofessional employees of the Activity. The Activity and the NTEU agreed that the claimed unit was appropriate, and that employees in some 21 job classifications should be excluded from the unit because such employees were management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity or supervisors. Notwithstanding the agreement of the parties, the Acting Assistant Regional Director issued a notice of hearing in the matter because, in his view, certain of the excluded classifications raised policy questions under the Order which could best be resolved on the basis of record evidence.

The Assistant Secretary concluded that a Region-wide unit of all professional and nonprofessional employees of the Activity was appropriate for the purpose of exclusive recognition. In this regard, he noted that similar regional units had been certified in other Regions of the Internal Revenue Service, and that the parties agreed that the claimed unit was appropriate.

As to the exclusions sought by the parties, the Assistant Secretary found that the employees in seven job classifications should be included in the appropriate unit as they were not management officials but highly skilled professionals who rendered resource information and/or recommendations rather than being active participants in the ultimate determination as to what policy, in fact, will be.

The Assistant Secretary found that the employees in the remaining job classifications should be excluded from the appropriate unit because they were management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity or supervisors.

In view of the Assistant Secretary's eligibility findings, he directed the appropriate Area Director to reevaluate the showing of interest before proceeding to an election.

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

INTERNAL REVENUE SERVICE,  
 OFFICE OF THE REGIONAL COMMISSIONER,  
 SOUTHEAST REGION

Activity

and

Case No. 40-5951(RO)

NATIONAL TREASURY EMPLOYEES UNION

Petitioner

DECISION AND DIRECTION OF ELECTION

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

Upon the entire record in this case, including the Activity's brief, the Assistant Secretary finds:

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

2. The Petitioner, National Treasury Employees Union, herein called NTEU, seeks an election in a unit of all professional and nonprofessional employees of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in Executive Order 11491, as amended. 1/

The record indicates that the Activity and the NTEU agreed that the claimed unit is appropriate. Moreover, both parties agreed that the 21 classifications, discussed below, are ineligible for inclusion in the unit sought because the employees in such classifications are management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity or supervisors. Notwithstanding the agreement of the parties, the Acting

1/ The unit appears as amended at the hearing.

Assistant Regional Director issued a notice of hearing in this matter because, in his view, certain of the excluded classifications raised policy questions under the Order which could best be resolved on the basis of record evidence.

#### The Unit

The Southeast Regional Office of the Regional Commissioner of the Internal Revenue Service is one of seven similar regional offices located throughout the country. The basic function and mission of a regional office is to provide a level of appeal of tax decisions from within its districts and an intermediary level between the tax court and the district audit function. It also provides staff work and develops programs and policies for the geographical area over which it has jurisdiction. With minor exception, all seven regional offices have the same administrative organizations and the identical job classifications.

The record indicates that the Assistant Secretary has issued Certifications of Representative for five of the other Internal Revenue Service Regions, including the Western, Central, Mid-Atlantic, Southwest and Midwest Regions.

Based on the foregoing, and noting particularly the agreement of the parties with respect to the appropriateness of the claimed unit and the fact that similar regional units have been certified, I find that a Region-wide unit of professional and nonprofessional employees, as sought herein by the NTEU, 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 petitioned for unit.

#### Eligibility Issues

Senior Regional Analyst, (Program) GS-345-14, and Regional Analyst (Program) GS-345-13 2/

The record reveals that there are three GS-14 Senior Regional Analysts and eight GS-13 Regional Analysts involved herein. The Senior Regional Analysts are assigned to the Regional Headquarters and the Regional Analysts are assigned to each of the seven district offices; two Regional Analysts are assigned to one of the district offices. The record indicates that the work performed by the subject classifications is basically the same, with the only distinction being that the GS-14 Senior Regional Analysts are assigned the more difficult and complex problems. The parties assert that these employees are management officials and should be excluded from the unit.

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2/ At the hearing, the parties stipulated that employees in these classifications are professionals.

The Senior Regional Analysts and Regional Analysts report directly to the Assistant Regional Commissioner for Accounts, Collection and Taxpayer Service who testified that he exercises little or no actual supervision over these employees. Essentially, the Senior Regional Analysts and the Regional Analysts are engaged in the evaluation of both operational programs and the performance of management officials. In the performance of these duties, they identify operational or performance problems and either initiate corrective action or recommend solutions. As a consequence of actions taken by these employees, changes may result in policies with respect to personnel, budget, manpower and operations within the Region. The record reveals that, in most instances, employees in the subject classifications deal directly with the various managers on a "one-to-one" basis through oral communication, and that their recommendations are put into effect without any review or approval. The more complex problems with which they are involved are subject to a written report containing recommendations submitted to the Assistant Regional Commissioner. However, the Assistant Regional Commissioner stated that their recommendations are accepted without modification in at least 90 percent of the cases, and his approval is, in the overwhelming number of cases, a mere formality.

Based on the foregoing, I find that the employees classified as Senior Regional Analyst (Program) GS-345-14 and Regional Analyst (Program) GS-345-13, are management officials within the meaning of the Executive Order, and, therefore, should be excluded from the unit found appropriate. Thus, the evidence establishes that such employees effectively influence the making of policy within the Region with respect to personnel, procedures or programs. Moreover, it is clear that the role played by such employees goes beyond that of an expert or professional rendering resource information, but, rather, consists of active participation in the ultimate determination as to what policy, in fact, will be. 3/

Regional Audit Head Analysts, GS-512-14, Audit Division; Senior Regional Analyst, GS-512-14, Audit Division; Regional Analyst, GS-512-13, Audit Division; and Senior Regional Analyst Audit, GS-526-12, Audit Division 4/

There are a total of 17 employees currently employed in the above-named job classifications. The parties assert that these employees are management officials and should be excluded from the unit. With the exception of the Regional Audit Head Analyst, the only distinction in duties between these job classifications is the complexity of the problems handled. Essentially, all of these employees are engaged in the allocation of economic resources to the various Regional components,

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3/ See United States Department of Health, Education and Welfare, Regional Office VI, A/SLMR No. 266 and Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

4/ At the hearing, the parties stipulated that employees in these classifications are professionals.

monitoring the programs which utilize these resources to insure their effective utilization, and gathering data upon which to make recommendations to make the programs more effective. The record reveals that they work closely with the program managers in deciding how best to accomplish the mission of each organizational component and, in this regard, they also monitor and evaluate the operational systems. The record indicates that the recommendations made by these analysts are only effectuated after being reviewed by higher level management officials.

The three employees currently classified as Regional Audit Head Analysts also are considered "cluster leaders" and each of them supervises up to five employees, including two clericals. They are responsible for the employees under their supervision, and, in this connection, they approve leave, evaluate the performance of their subordinates, and can effectively recommend disciplinary actions.

Based on the foregoing, I find that none of the employees in the subject classifications are management officials. Thus, while these employees are highly skilled professionals who, in performing their duties, necessarily exercise discretion and independent judgment, the evidence establishes that their role is essentially that of skilled professionals rendering resource information or recommendations, rather than actively participating in the ultimate determination as to what the ultimate policy, in fact, will be. Accordingly, I find that employees classified as Senior Regional Analyst, GS-512-14, Regional Analyst, GS-512-13 and Senior Regional Analyst Audit, GS-526-12, should be included in the unit found appropriate.

However, as the record indicates that the employees in the classification of Regional Audit Head Analyst, GS-512-14, Audit Division, approve leave, evaluate the performance and effectively recommend discipline of subordinate employees, I find that they are supervisors within the meaning of Section 2(c) of the Executive Order and on this basis should be excluded from the unit found appropriate. 5/

Industrial Engineer, GS-896-12 and 13, Administration Division, Management Staff Branch 6/

The parties contend that the two employees in these classifications are management officials and should be excluded from the unit. The record discloses that these employees are engaged in monitoring the usage of manpower and make recommendations as to the assignment of personnel in order to handle the work load more efficiently. Their recommendations are accepted only after review by higher management authority.

5/ See United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 268, FLRC No. 72A-4.

6/ At the hearing, the parties stipulated that employees in these classifications are professionals.

Based on the foregoing, I find neither of the employees in the subject classifications are management officials. Thus, while these employees are highly skilled professional employees who exercise discretion and independent judgment, the evidence establishes that they do not actively participate in the ultimate determination of what policy will be; rather, they are skilled professionals rendering resource information and recommendations. Accordingly, I find that the employees in the Industrial Engineer, GS-596-12 and 13 job classifications should be included in the unit found appropriate.

Senior Management Analyst, GS-343-12 and 13, Administration Division; Facilities Management Branch and Management Analyst, GS-343-11 and 12, Administration Division 7/

The parties assert that the nine employees in these classifications are management officials and should be excluded from the unit. The employees in the subject classifications are engaged in essentially the same duties and functions; the only distinction between the job classifications is the complexity of work performed and the amount of pay. These employees collect and analyze data to determine the efficient utilization of space and manpower within the Region and make recommendations for more efficient utilization of such resources. They also are called upon to perform special projects, such as an analysis of the efficacy of the "toll free" telephone service provided for taxpayers. The record reflects that their recommendations are accepted only after review by higher management officials.

James Tingle, a Senior Management Analyst, GS-343-13, supervises a GS-5 secretary. The record discloses that he approves her leave, evaluates her performance, counsels her when necessary, and has the authority to effectively recommend disciplinary action.

Based on the foregoing, I find that none of the employees in the subject classifications are management officials within the meaning of the Order. Although the employees in these classifications are highly skilled professionals who exercise discretion and independent judgment, the evidence establishes that they render resource information and recommendations but do not actively participate in the ultimate determination of what policy, in fact, will be. Accordingly, I find that the employees in the Senior Management Analyst GS-343-12 and 13, and Management Analyst, GS-343-11 and 12 job classifications should be included in the unit found appropriate. With regard to employee James Tingle, based on the authority he exercises with respect to his secretary, I find that he is a supervisor within the meaning of Section 2(c) of the Order and, on this basis, should be excluded from the unit found appropriate.

7/ At the hearing, the parties stipulated that employees in these classifications are professionals.

The parties contend that the seven employees in the subject classifications are management officials and should be excluded from the unit. These employees are responsible for budget planning, formulation and control. The only distinction in job duties between the various grades is the complexity of matters assigned to each and the degree of supervision required. The record reveals that they monitor the execution and operation of Regional activities under the approved operating financial plan for each fiscal year. They keep track of the manner in which money is being spent by the various Regional components and, on the basis of their studies, may recommend the transfer of funds from one program to another. The higher graded employees in the subject classifications also may be involved in manpower studies with respect to the grade structures within the Region, and their recommendations may result in certain positions being upgraded, downgraded, or eliminated. The record reveals that employees in the lower grades are under close supervision as they are in the process of gaining experience.

Based on the foregoing, I find that none of the employees in the subject job classifications are management officials. Although the record establishes that the incumbents in the above job classifications are skilled professional employees who, in performing their duties, necessarily exercise discretion and independent judgment, I find that their role is restricted to that of professionals rendering resource information or recommendations, rather than active participation in the ultimate determination of what policy, in fact, will be. Accordingly, I find that the employees in the Budget Analyst, GS-560-9, 11 and 12 job classifications should be included in the unit found appropriate.

Fiscal Analyst, GS-501-7, Administration Division, Fiscal Management Branch 9/

The parties contend that the employee in this classification is a management official and should be excluded from the unit. The employee in this job classification is, in effect, the payroll coordinator for the Region. As such, the incumbent is engaged in the correction and prevention of errors with respect to payroll matters, by coordinating and explaining the procedures and processes of the Data Center to the component organizations. In addition, the employee in the subject classification engages in studies to determine the most effective and efficient methods for the maintenance and implementation of timekeeping and payroll matters. These studies result in a written report to the Chief, Fiscal Section, with recommendations for specific changes.

8/ At the hearing, the parties stipulated that employees in these classifications are professionals.

9/ At the hearing, the parties stipulated that the employee in this classification is a professional.

Based on the foregoing, I find that the employee in the subject job classification is not a management official as, in my view, the evidence establishes that the incumbent is a professional employee rendering resource information and recommendations, rather than actively participating in the ultimate determination of what policy will, in fact, be. Accordingly, I find that the employee classified as Fiscal Analyst, GS-401-7, should be included in the unit found appropriate.

Personnel Assistant, GS-203-5, Administration Division, Personnel Branch; Clerk Typist, GS-301-4, Administration Division, Personnel Branch; Administrative Assistant, GS-301-8, Appellate Division; and Secretary Training Center Administrator, GS-318-5, Administration Division

The parties contend that the four employees assigned to the subject classifications should be excluded from the unit on the ground that they are confidential employees.

The employee classified as Personnel Assistant, GS-203-5, is the secretary to the Employee Relations Specialist in the Regional Office Personnel Branch. The record reveals the incumbent is responsible for receiving investigation conduct reports with respect to bargaining unit employees and for typing and preparing management's responses to grievances, unfair labor practice allegations and other labor-management relations documents prepared by her supervisor.

The employee classified as Clerk-Typist, GS-301-4, works for the Management Relations Specialist and the Employee Relations Specialist. She receives reports from the Regional Inspector concerning unit employees, types memoranda concerning these reports, receives reports concerning employee tax delinquencies and prepares reports to the National Office. Further, the incumbent attends meetings with her supervisor where matters involving employee labor relations are discussed.

The employee classified as Administrative Assistant, GS-301-8, works for the Executive Assistant to the Assistant Regional Commissioner (Appellate). The record reveals that the incumbent monitors telephone calls, provides clerical support in the preparation of all personnel action papers in the office, briefs her supervisor on certain matters regarding labor relations, takes minutes of meetings where labor relations matters are discussed by management, and prepares documents in regard to positions taken by management in labor-management relations matters.

The employee classified as Secretary to Training Center Administrator, GS-318-5, works for the Administrator of the Training Center. The record reveals that the incumbent takes notes at staff meetings

which often pertain to discussions concerning grievances and unfair labor practice allegations, is responsible for maintaining the files on grievance and unfair labor practice correspondence, and receives and reviews conduct reports concerning both students and instructors from the Regional Inspector, and forwards such reports to the appropriate authority.

Based on the foregoing circumstances, I find that the employees in the classification Personnel Assistant, GS-203-5, Clerk-Typist, GS-301-4, Administrative Assistant, GS-301-8, and Secretary to Training Center Administrator, GS-318-5, serve in a confidential capacity to an individual or individuals involved in the formulation and effectuation of management policies in the field of labor relations. <sup>10/</sup> Accordingly, I shall exclude the employees in these classifications from the unit found appropriate.

Administrative Intern, GS-301-5, 7 and 9, Administration Division

The parties contend that the eight employees in these classifications are either management officials and/or confidential employees and should be excluded from the unit. These employees are all given the same job assignments and training, since their grade differentiation is based solely upon the grade they had when they were recruited. During their internship, the incumbents are rotated to different organizational components within the Region for project assignments in performing the full range of managerial duties within the Region. In addition, they also "shadow" the Regional Commissioner for a two-week period to get an overall view of the various duties he performs. This involves, among other things, attending meetings conducted by the Regional Commissioner and reviewing his correspondence. When attending meetings conducted by the Regional Commissioner, discussions of confidential information involving personnel actions, labor relations and grievances often take place. The record shows that interns may replace an individual in a particular job classification, such as District Training Officer or a Branch Chief, for a period of time in order to acquaint the intern with the duties of these positions. The record further shows that, at the time of the hearing in this matter, the Personnel Staffing Specialist position was vacant and an intern had been assigned those duties. In this regard, the Intern involved was assigned the responsibility of reviewing the management proposals in preparation for negotiating a new Multi-Center Agreement and to identify those areas with which management should concern itself.

Based on all the foregoing circumstances, I find that employees in the subject job classifications as part of their training program are made privy to confidential management discussions concerning labor relations matters and the formulation of management policy. Accordingly,

<sup>10/</sup> See Pennsylvania National Guard, Department of Military Affairs, A/SLMR No. 376; The Department of the Treasury, U. S. Savings Bond Division, A/SLMR No. 185; and Virginia National Guard Headquarters, 4th Battalion, 11th Artillery, A/SLMR No. 69.

as, in effect, they serve in a confidential capacity to persons involved in the formulation and effectuation of management policies in the field of labor relations, I shall exclude the employees in the Administrative Intern, GS-301-5, 7, 9 classifications from the unit found appropriate.

Personnel Management Specialist, GS-201-7, Administration Division

The parties assert that the subject classification should be excluded from the unit because it involves Federal personnel work in other than a purely clerical capacity. The record shows that the incumbent performs a variety of personnel functions, including position classification, position management, desk audits, prepares position descriptions and vacancy announcements, and assists with rating panels. The record further shows that this employee assists her section chief in labor-management relations work. Under these circumstances, I find that the subject classification is engaged in non-clerical Federal personnel work for the Activity. As Section 10(b)(2) of the Order specifically excludes from bargaining units employees engaged in Federal personnel work in other than a purely clerical capacity, I shall exclude the Personnel Management Specialist, GS-201-7, from the unit found appropriate.

Employment Development Specialist, GS-235-12 and 13, Administration Division <sup>11/</sup>

The parties contend that the three employees in these classifications are engaged in Federal personnel work in other than a clerical capacity, and should be excluded from the unit. The record reveals that the employees in the subject classification at the GS-13 level is responsible for developing and coordinating the entire technical training program for the Region, including classroom and on-the-job training and course development. In this regard, the incumbent ensures that the programs are at their proper levels and provides course guidelines, reviews the evaluation of trainees, and occasionally evaluates the trainees.

The two employees in the subject classification at the GS-12 level work closely with the employee at the GS-13 level. They are responsible for the evaluation and counseling of trainees, including determining whether or not trainees should be terminated. They also select instructors and evaluate and counsel the instruction staff. In addition, the record reveals that they each supervise at least one permanent employee and certain "WAE's." In this regard, the record shows that they approve leave, effectively recommend promotions, and effectively recommend disciplinary action.

Based on the foregoing, and noting that the incumbent in the Employment Development Specialist, GS-235-13 job classification is responsible for planning, developing, coordinating, and implementing the Activity's

<sup>11/</sup> At the hearing, the parties stipulated that employees in these classifications are professionals.

Region-wide training program, I find that the incumbent is engaged in non-clerical Federal personnel work for the Activity. 12/ As Section 10(b)(2) of the Order specifically excludes employees engaged in Federal personnel work in other than a purely clerical capacity from bargaining units, I find that the Employment Development Specialist, GS-235-13, should be excluded from the unit found appropriate.

Further, as the record indicates that the employees in the Employment Development Specialist, GS-235-12, classification effectively recommend promotions and disciplinary action, I find that they are supervisors within the meaning of Section 2(c) of the Order and, on this basis, should be excluded from the unit found appropriate.

Head Instructor, GS-512-12 and 13, Administration Division and Head Instructor, GS-1169-12, Administration Division

The parties contend that the three employees in the subject classifications are supervisors and should be excluded from the unit. The record reveals that the duties of employees in the subject job classifications are identical except that the Head Instructors, GS-512-12 and 13, supervise and instruct revenue agents while the Head Instructor, GS-1169-12, supervises and instructs revenue officers. The incumbents are full time resident instructors and, in the course of their duties, supervise the Regional personnel assigned to teach in the training program. In this regard, they assign work to the non-resident instructors, evaluate their performance, approve leave, and discipline and counsel them when required.

Based on the foregoing circumstances, I find that employees classified as Head Instructor, GS-512-12 and 13, and Head Instructor, GS-1169-12, are supervisors within the meaning of Section 2(c) of the Order and should be excluded from the unit found appropriate.

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 professional and nonprofessional employees of the Internal Revenue Service, Offices of the Regional Commissioner, Southeast Region, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order. 13/

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12/ See United States Department of Health, Education and Welfare, Regional Office V, A/SLMR No. 266.

13/ As the Personnel Staffing Specialist, GS-212-9, Administration, position was vacant at the time of the hearing in this matter, I make no determination as to whether this classification should be included in or excluded from the unit found appropriate.

It is noted that the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with employees who are not professional, unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct separate elections in the following voting groups:

Voting Group (a): All professional employees of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding nonprofessional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

Voting Group (b): All nonprofessionals of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the National Treasury Employees Union.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the National Treasury Employees Union. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the National Treasury Employees Union was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

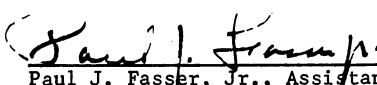
- (a) All nonprofessional employees of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.
- (b) All professional employees of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding nonprofessional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who

quit or who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Treasury Employees Union. 14/

Dated, Washington, D. C.  
September 30, 1975

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

14/ In view of the above eligibility findings, it is not clear whether the NTEU has an adequate showing of interest to warrant an election in this matter. Accordingly, before proceeding to an election in this case, the appropriate Area Director is directed to reevaluate the showing of interest. If he determines that, based on the eligibility determinations herein, the NTEU's showing of interest is inadequate, its petition should be dismissed.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL AERONAUTICS AND SPACE  
ADMINISTRATION (NASA),  
WASHINGTON, D.C.  
and  
LYNDON B. JOHNSON SPACE CENTER (NASA),  
HOUSTON, TEXAS  
A/SLMR No. 566

NATIONAL AERONAUTICS AND SPACE  
ADMINISTRATION (NASA),  
WASHINGTON, D.C.

Respondent

and

LYNDON B. JOHNSON SPACE CENTER (NASA),  
HOUSTON, TEXAS

Case No. 63-4826(CA)  
A/SLMR No. 457  
FLRC No. 74A-95

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL UNION 2284, AFL-CIO

Complainant

SUPPLEMENTAL DECISION AND ORDER

On November 26, 1974, the Assistant Secretary issued his Decision and Order in A/SLMR No. 457, in which he found that the Respondent Agency had violated Section 19(a)(1) of the Order by conducting meetings or interviews with unit employees in which their terms and conditions of employment were discussed, while refusing the request of the exclusive representative of these employees to participate in such discussions.

On September 26, 1975, the Federal Labor Relations Council (Council) issued its Decision on Appeal, FLRC No. 74A-95, in which it held that the finding of a violation of Section 19(a)(1), in the circumstances of the case, was inconsistent with the purposes of the Order. Accordingly, the Council set aside the Assistant Secretary's decision in A/SLMR No. 457, and remanded the case to him for appropriate action.

Based on the Council's holding in FLRC No. 74A-95, and the rationale contained therein, the Assistant Secretary ordered that the complaint in this case be dismissed in its entirety.

This case was transferred to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations after the parties submitted a stipulation of facts and exhibits to the Assistant Regional Director. Specifically, the complaint alleged that the Respondents violated Section 19(a)(1) and (6) by the Agency's Assistant Administrator for Equal Opportunity Programs holding official meetings with several groups of employees in bargaining units represented by the Complainant without giving notification to the exclusive representative, and by denying the Complainant the right to have observers present at such meetings. Although dismissing all allegations against the Respondent Activity and the Section 19(a)(6) allegation against the Respondent Agency, the Assistant Secretary found, among other things, that the Respondent Agency's conduct in conducting meetings or interviews with unit employees in which their terms and conditions of employment were discussed, while refusing the request of the exclusive representative of these employees to participate in such discussions; ran counter to the purposes and policies of the Order with regard to the obligation owed to an exclusive representative as the spokesman of the employees it represents and was violative of Section 19(a)(1) of the Executive Order.



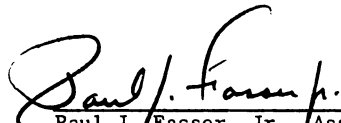
On September 26, 1975, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the subject case, finding that the Assistant Secretary's decision was, under the circumstances of this case, inconsistent with the purposes of the Order. Accordingly, pursuant to Section 2411.17(b) of its Rules, the Council set aside the Assistant Secretary's decision and remanded the case to him for appropriate action consistent with its decision.

Based on the Council's holding in the instant case, and the rationale contained therein, I shall order that the complaint herein be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-4826(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
October 24, 1975

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

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

National Aeronautics and Space  
Administration (NASA),  
Washington, D.C.

and

Lyndon B. Johnson Space Center  
(NASA), Houston, Texas

and

American Federation of Government  
Employees, Local Union 2284,  
AFL-CIO

A/SLMR No. 457  
FLRC No. 74A-95

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary who, upon complaint by the American Federation of Government Employees, Local Union 2284, AFL-CIO (Union), against the National Aeronautics and Space Administration (NASA), Washington, D.C. (Agency), and the Lyndon B. Johnson Space Center (NASA), Houston, Texas (Activity), alleging violations of section 19(a)(1) and (6) of the Order, found that the Activity did not violate section 19(a)(1) and (6), and that while the Agency did not violate section 19(a)(6) of the Order, it did commit a 19(a)(1) violation.

The pertinent facts in the case, as stipulated by the parties and found by the Assistant Secretary, are as follows:<sup>1/</sup> Shortly after appointment to his position, the Assistant Administrator for Equal Opportunity Programs of the Agency decided that it was necessary to visit various NASA Centers, including the Activity herein concerned, in order to assess the state of the Agency's Equal Employment Opportunity (EEO) program.

At his request, the Activity arranged three meetings or interviews between the Assistant Administrator and various employees or employee groups without regard as to whether they were members of bargaining units. These meetings or interviews were held with black, Spanish surname and women

<sup>1/</sup> The case was transferred to the Assistant Secretary pursuant to section 206.5(a) of his regulations after the parties submitted a stipulation of facts and exhibits to the Assistant Regional Director.

employees of the Activity. All the employees with whom meetings or interviews were arranged were in one of the bargaining units for which the union had been accorded exclusive recognition. In addition to the above meetings, separate meetings or interviews were held with members of community groups and representatives of the Union. No management official of the Activity attended these meetings, nor did the Activity exercise any supervision or control over the Assistant Administrator. At these meetings, the Assistant Administrator solicited the opinions of the employees with respect to the EEO program of the Agency and listened to their suggestions for EEO program additions and modifications. No commitments were made to the employees.

Upon learning of the scheduled meetings, the Union requested that it be allowed to have an observer present at each of the meetings of employee groups and that it be granted a separate meeting with the Administrator in order to give its "thoughts" relative to the EEO program. The Activity's Personnel Officer, pursuant to directions from the Agency, granted the Union's request to meet separately, but denied the specific request for Union participation in the meetings with the employees.

As a result of this action a complaint was filed by the Union against the Agency and the Activity alleging that they violated section 19(a)(1) and (6) by holding "official meetings" with several groups of employees represented by the Union without giving notification to their exclusive representative and denying the Union the right to have observers present at these meetings.

The Assistant Secretary found that the Union's rights as exclusive representative were based on the exclusive recognition accorded it by the Activity, and that under these circumstances, the Agency was not obligated to meet and confer with the Union pursuant to section 11(a) of the Order. Thus, according to the Assistant Secretary, the obligation to meet and confer under the Order applies only in the context of the exclusive bargaining relationship between the exclusive representative and the activity or agency which has accorded exclusive recognition. Further, he concluded that the Activity did not act in derogation of its bargaining obligations under the Order. In this regard, he noted that the evidence established that no management official of the Activity exercised any supervision or control over the Agency's representative who conducted the meetings in question and, further, that there was no evidence that the Activity had refused to meet and confer with the Union concerning any matters involving personnel policies or practices under its control or direction including matters relating to the EEO program. Based on these considerations, the Assistant Secretary found that the Activity did not violate section 19(a)(1) and (6) of the Order. Moreover, he found that, because the Agency was not a party to a bargaining relationship with the Union, it could not be in violation of section 19(a)(6) of the Order, based upon the Assistant Administrator's meetings with employees.

However, the Assistant Secretary concluded that while the Agency could not be found to be in violation of section 19(a)(6), this circumstance did not preclude his finding of an independent 19(a)(1) violation by the Agency

which was not premised on the existence of a bargaining relationship between the Agency and the Union. Thus, the Assistant Secretary found that the Agency's action in conducting meetings or interviews with unit employees in which their "terms and conditions of employment" were discussed, while refusing the request of the exclusive representative of these employees to participate in such "discussions," ran counter to the purposes and policies of the Order with regard to the obligation owed to an exclusive representative as the spokesman of the employees it represents. Further, the Assistant Secretary found such conduct to be inconsistent with the policy set forth in section 1(a) of the Order concerning an agency head's obligation to assure that employees' rights are protected.

Under all the circumstances, the Assistant Secretary found that the Agency's conduct constituted an undermining of the status of the exclusive representative selected by the employees of the Activity. Accordingly, he concluded that the Agency's conduct resulted in improper interference with, restraint, or coercion of unit employees in the exercise of rights assured by the Order in violation of section 19(a)(1).

Thereafter, the Assistant Secretary's decision was appealed to the Council both by the Agency and the Union. Upon consideration of the petitions for review, the Council determined that major policy issues were presented by the decision of the Assistant Secretary,<sup>2/</sup> namely:

- I. Whether agency headquarters-level representatives conducting meetings or interviews with activity-level employees for the purpose of soliciting opinions with respect to such matters as the EEO program of the agency are required by the Order to permit the exclusive representative of such employees, upon request, to participate in such discussions or interviews; and
- II. Whether the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of section 19(a) of the Order by lower level management in the same agency who have a bargaining relationship with an exclusive representative.

Briefs were filed by the Agency (on behalf of the Activity, as well as itself) and by the Union. Additionally, the Department of the Treasury and the Department of Health, Education, and Welfare were permitted to file briefs as amici curiae.

#### Opinion

#### ISSUE I

The nature and scope of management's obligation with regard to the participation of an exclusive representative in management's discussions or interviews

<sup>2/</sup> The Council earlier approved the Agency's request for a stay of the Assistant Secretary's decision.

with unit employees are set out in section 10(e) of the Order. That is, an exclusive representative --

. . . shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. [Emphasis supplied.]

The question, therefore, as to the right of the exclusive representative to have an opportunity to participate in discussions or interviews between agency headquarters-level representatives conducting meetings or interviews with activity-level employees for the purpose of soliciting opinions with respect to such matters as the EEO program of the Agency necessarily turns on whether such discussions or interviews are "formal discussions between management and employees . . . concerning grievances, personnel policies and practices, or other matters affecting general working conditions. . . ." In the Council's view, the meetings at issue in the instant case were not "formal discussions" between management and employees as that phrase is used in section 10(e). Therefore, management was not required to give the exclusive representative an opportunity to participate in the meetings or interviews involved herein.

The language of the pertinent portion of section 10(e) quoted above makes clear that it is not the intent of the Order to grant to an exclusive representative a right to be represented in every discussion between agency management and employees. Rather, such a right exists only when the discussions are determined to be formal discussions and concern grievances, personnel policies and practices, or other matters affecting the general working conditions of unit employees.<sup>3/</sup> In the situation at issue in the instant case, agency headquarters-level representatives met with activity-level employees for the purpose of soliciting opinions with respect to the EEO program of the Agency. More particularly, as stipulated by the parties, the Assistant Administrator merely:

. . . solicited the opinions of the employees with respect to the EEO Program of the . . . Agency and listened to their suggestions for EEO Program additions and modifications. No commitments were made to the employees. [Emphasis supplied.]

Further, the stipulated record contains no indication that the Assistant Administrator attempted to resolve the issues raised at the meetings through

<sup>3/</sup> See, for example, Department of Defense, National Guard Bureau, Texas Air National Guard, A/SILMR No. 336, FLRC No. 74A-11 (June 18, 1974), Report No. 54, and Internal Revenue Service, Washington, D.C., Assistant Secretary Case No. 22-4056 (CA), FLRC No. 74A-23 (October 22, 1974), Report No. 58, wherein the Council denied review of the Assistant Secretary's determinations that certain discussions between management and employees were not "formal discussions" within the meaning of section 10(e) of the Order.

agreement with assembled employees, individually or collectively, nor did he make "counterproposals" to the suggestions offered. There is no indication that the Assistant Administrator either expressly or impliedly suggested to the employees during such solicitations that their opinions and criticisms would govern future modifications of the Agency's (or the Activity's) conduct and/or regulations concerning the operation of its EEO program, or that he indicated that their answers would have an effect on the employees' status. Similarly, there was no evidence adduced that the discussions dealt with specific employee grievances or other matters cognizable under an existing agreement between the Activity and the local Union, or that the Assistant Administrator was gathering the information for the purpose of using it subsequently to persuade the Union to abandon a position taken during negotiations regarding the operation of the EEO program.

In our view, discussions such as those described herein were not "formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." Rather, they were a mechanism whereby agency headquarters-level management sought to evaluate the effectiveness of an agencywide program which existed totally apart from the collective bargaining relationship at the level of the exclusive recognition. Indeed, without the benefit of such information-gathering mechanisms, agency management would be seriously impeded in effectively carrying out its responsibility--often mandated by statute, as in the instant case--to conduct periodic evaluations of the effectiveness of such agencywide programs. (While mechanisms of this sort are not discussions wherein management is obligated to give the exclusive representative the opportunity to be represented, management may well consider it desirable to give the exclusive representative the opportunity to be present at meetings such as those conducted by the Agency in the instant case. Clearly such representation is not prohibited by the Order.)

We must emphasize that our views, as expressed above, pertain only to information-gathering devices such as the meetings involved in this case. That is, they apply only in circumstances such as those mentioned above where management does not, in the course of information gathering: seek to make commitments or counterproposals regarding employee opinions or complaints solicited by means of such devices; indicate that the employees' comments on such matters might have an effect on the employees' status; deal with specific employee grievances or other matters cognizable under an existing agreement; or gather information regarding employee sentiments for the purpose of using it subsequently to persuade the union to abandon a position taken during negotiations regarding the personnel policies or practices concerned.

Turning to the reasoning of the Assistant Secretary, his finding of a violation in the instant case was based on the conclusion that the Agency's conduct undermined the status of the exclusive representative selected by

the employees and that such conduct resulted in improper interference with, restraint, or coercion of unit employees by the Agency in the exercise of their rights assured under the Order in violation of section 19(a)(1). If the Council were to sustain the Assistant Secretary's conclusions in this regard, we would, in effect, be construing the Order so as to find that any meeting between agency management and unit employees wherein discussions of personnel policies and practices, or other matters affecting general working conditions took place would be a per se violation of the Order, regardless of the circumstances involved, the content of the discussion, or the actual conduct of agency management. We do not believe that the Order requires such a result. As stated above, the critical issue was the right of the exclusive representative to be represented at the meeting pursuant to the provisions of section 10(e). Since, as we have concluded, the Union had no right to be represented at the meeting, the Union's status as bargaining representative could not be undermined by denying its request to participate at such meetings.<sup>4/</sup>

We conclude, therefore, as to Issue I, that agency headquarters-level representatives conducting meetings or interviews with activity-level employees merely for the purpose of soliciting opinions with respect to such matters as the EEO program of the agency are not required by the Order to permit the exclusive representative of such employees, either on the agency's own initiative or upon request, to participate in such discussions or interviews. More particularly in this case, we find that the conduct of the Agency in evaluating the effectiveness of an agency-wide program which existed totally apart from the collective bargaining relationship did not violate section 19(a)(1) of the Order.<sup>5/</sup>

<sup>4/</sup> The right of the union to be represented at a meeting with employees must, of course, be distinguished from the right of employees to union representation under certain circumstances. The Council is currently considering, pursuant to section 4(b) of the Order and section 2410.3 of its rules, as a major policy issue which has general application to the Federal labor-management relations program, the following question:

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

<sup>5/</sup> As we have concluded that the acts and conduct at issue do not violate the Order, it is unnecessary to pass upon the Assistant Secretary's finding that:

. . . the Respondent Agency, which was not a party to a bargaining relationship with the [Union], could not be in violation of Section 19(a)(6) of the Order based on Dr. McConnell's meetings with such employees.

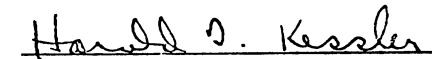
ISSUE II

Having concluded above that the acts and conduct of Agency management were not violative of the Order, it is unnecessary for the resolution of this case to determine whether acts and conduct of agency management at a higher level of an agency's organization (the Assistant Administrator in this case), if violative of the Order, would have been a basis for finding a violation of section 19(a) of the Order by lower-level management who had a bargaining relationship with the Union. Accordingly, we do not pass upon that issue.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's decision that the Agency violated section 19(a)(1) is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.17(d) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for appropriate action consistent with our decision.

By the Council.



Harold D. Kessler  
Acting Executive Director

Issued: September 26, 1975

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

UNITED STATES DEPARTMENT OF AGRICULTURE,  
 FOREST SERVICE, WOLF CREEK JOB CORPS CIVILIAN  
 CONSERVATION CENTER AND UNITED STATES DEPARTMENT  
 OF AGRICULTURE, FOREST SERVICE, UMPQUA NATIONAL  
 FOREST, ROSEBURG, OREGON  
A/SLMR No. 567

This case arose as a result of representation petitions filed by the National Federation of Federal Employees, Local 1743, (NFFE) seeking to represent the professional and nonprofessional employees at the Umpqua National Forest (Forest) and the professional and nonprofessional employees of the Wolf Creek Job Corps Civilian Conservation Center (Center), in separate units. The NFFE originally sought a forest-wide unit of professional and nonprofessional employees at the Forest, including the Center, but withdrew its petition even though it continued to assert that a single overall unit was appropriate.

Under the circumstances of this case, and noting particularly the agreement of the NFFE and the Activities that an overall unit comprising all professional and nonprofessional employees of both the Forest and the Center constituted an appropriate unit and that such a unit would promote effective dealings and efficiency of agency operations, the Assistant Secretary concluded that an overall unit was appropriate for the purpose of exclusive recognition under the Order. In this regard, the Assistant Secretary noted, among other things, that the employees of the Forest and the Center enjoy common supervision and common personnel policies and practices, including labor relations policies; have similar skills, education and job classifications; are subject to the same conditions of hire regardless of their duty stations; and have a common grievance procedure. He noted also that there was evidence of interchange and transfer among both Forest and Center employees and that the Forest Supervisor was authorized to conduct labor relations programs for both Forest and Center employees.

Accordingly, the Assistant Secretary directed that elections be conducted in the unit found appropriate.

UNITED STATES DEPARTMENT OF AGRICULTURE,  
 FOREST SERVICE, WOLF CREEK JOB CORPS  
 CIVILIAN CONSERVATION CENTER 1/

Activity

and

Case No. 71-3304(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,  
 LOCAL 1743

Petitioner

UNITED STATES DEPARTMENT OF AGRICULTURE,  
 FOREST SERVICE, UMPQUA NATIONAL FOREST,  
 ROSEBURG, OREGON

Activity

and

Case No. 71-3305(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,  
 LOCAL 1743

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 Patricia A. Hunt. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, including a joint brief filed by the National Federation of Federal Employees, Local 1743, herein called NFFE, and the Forest Service, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activities.
2. In Case No. 71-3304(RO), the NFFE seeks an election in a unit of all professional and nonprofessional employees assigned to the Wolf Creek

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

Job Corps Civilian Conservation Center with appointments of 30 days or more, excluding management officials, supervisors as defined in the Order, all employees with duty stations other than the Wolf Creek Job Corps Civilian Conservation Center, employees engaged in Federal personnel work in other than a purely clerical capacity, and all temporary, intermittent and casual employees. 2/

In Case No. 71-3305(RO), the NFFE seeks an election in a unit of all professional and nonprofessional employees assigned to the Umpqua National Forest with appointments of 30 days or more, excluding management officials, supervisors as defined in the Order, all employees with duty stations other than the Umpqua National Forest, employees engaged in Federal personnel work in other than a purely clerical capacity, and all temporary, intermittent and casual employees. 3/

The Activities take the position that the appropriate unit herein should include the professional and nonprofessional employees of both the Wolf Creek Job Corps Civilian Conservation Center (Center) and the Umpqua National Forest (Forest) as, in the Activities' view, the petitioned for units would result in an unreasonable fragmentation of employees who share a clear and identifiable community of interest. Further, the Activities object to the petitioned for units on the ground that separate units for the Center and the Forest would impair effective dealings and efficiency of agency operations.

The NFFE, in essential agreement with the Activities, originally sought a single unit of all professional and nonprofessional employees at the Forest and Center, but subsequently withdrew its petition and filed the instant petitions. Throughout the proceedings, however, it is clear that the NFFE supported an overall forest-wide unit, including the Center, despite the fact that it filed petitions for two separate units.

The mission of the Forest Service, an agency of the U.S. Department of Agriculture, is to provide national leadership in forest management and protection. The Forest involved herein is one of 19 forests in the Pacific Northwest Region of the Forest Service and, as the record reveals, is the site for a variety of Federal and State of Oregon manpower programs to assist minorities, the aged, and low to middle income groups. These programs include: Operation Mainstream; high school and college work study programs; Operation Green Thumb; Action; Title I and Title 2 of the Comprehensive Employment and Training Act; and Volunteers of the Forest.

The Forest is administratively divided into a Forest Supervisor's Office, the Wolf Creek Job Corps Civilian Conservation Center, and five Ranger Districts. The Administrative head of the Forest is the Forest Supervisor who exercises administrative control over the five Ranger Districts and the Center, and has authority to administer labor relations

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2/ The unit appears as amended at the hearing.

3/ The unit appears as amended at the hearing.

for the Forest, including the Center. Reporting to the Forest Supervisor are the Deputy Forest Supervisor, the five District Rangers and the Center Director. All participate on a "Forest Management Team" and regularly meet to decide all policy matters regarding land-use, financial planning, and human resources development for the Forest, as well as the Center's operations, capital and vocational plans.

The record reveals that the Forest has a centralized personnel system servicing both Forest and Center employees. In this connection, the evidence establishes that the Personnel Office is located in the Forest Supervisor's Office and, because it is the site for payroll, budgeting, travel, contracting, property and purchasing operations, it is the center of considerable day-to-day contact between Forest and Center employees. The record shows also that Forest and Center employees have a common grievance procedure, have essentially the same skills, education and job classifications, and that employees of the Forest and the Center have identical areas of consideration for promotions, reductions-in-force, and job postings appear on both Forest and Center bulletin boards. The evidence further reveals that there have been a considerable number of transfers among Forest and Center employees. Thus, it was established that over 30 percent of the Center's present work force had prior Forest Service experience, and that the number of Forest employees who had previously worked for the Job Corps was above the national average. The record shows also that both Forest and Center employees utilize each other's equipment in the day-to-day performance of their jobs, and that Forest and Center employees are subject to the same conditions of hire regardless of their duty stations, often work in close proximity to each other, and have personal contact on and off the job. In this latter connection, record testimony discloses that Forest and Center employees arrange for joint transportation to and from work and participate in common social activities sponsored by the Forest. The record shows also that the Center is geographically located in the Forest, and often serves as a meeting place for employee training programs for both the Forest and the Center. Additionally, there is a high degree of interchange among both Forest and Center employees during emergencies and conservation projects.

Under all of the foregoing circumstances, and noting particularly that the NFFE and the Activities are in essential agreement that an overall unit comprising all professional and nonprofessional employees of both the Forest and the Center constitutes an appropriate unit which would promote effective dealings and efficiency of agency operations, I find that such an overall unit is appropriate for the purpose of exclusive recognition under the Order. Thus, the record reveals that the employees of the Forest and Center enjoy common supervision and common personnel policies and practices, including labor relations policies; have identical areas of consideration for promotions and reductions-in-force; are subject to centralized formulation of policy and program direction; have similar skills, education and job classifications; are subject to the same conditions of hire regardless of their duty stations; have a common grievance procedure;

and there is evidence of interchange and transfer among both Forest and Center employees. <sup>4/</sup> Moreover, noting the agreement of the parties with respect to the scope of the unit, as well as the fact that the Forest Supervisor is authorized to conduct labor relations programs for both Forest and Center employees, I find that such a unit will promote effective dealings and efficiency of agency operations.

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

All professional and nonprofessional employees assigned to the Umpqua National Forest, including the Wolf Creek Job Corps Civilian Conservation Center, with appointments of 30 days or more, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, all temporary, intermittent, and casual employees, and supervisors as defined in the Order.

It is noted that the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in the unit with employees who are not professionals unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in the unit with nonprofessional employees must be ascertained. I shall, therefore, direct separate elections in the following groups:

Voting group (a): All professional employees assigned to the Umpqua National Forest, including the Wolf Creek Corps Civilian Conservation Center, with appointments of 30 days or more, excluding nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, all temporary, intermittent, and casual employees, and supervisors as defined in the Order.

Voting group (b): All nonprofessional employees assigned to the Umpqua National Forest, including the Wolf Creek Job Corps Civilian Conservation Center, with appointments of 30 days or more, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, all temporary, intermittent, and casual employees, and supervisors as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the National Federation of Federal Employees, Local 1743.

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 1743. In the event that the majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as the nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the National Federation of Federal Employees, Local 1743, was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees assigned to Umpqua National Forest, including the Wolf Creek Job Corps Civilian Conservation Center, with appointments of 30 days or more, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, all temporary, intermittent, and casual employees, and supervisors as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees assigned to the Umpqua National Forest, including the Wolf Creek Job Corps Civilian Conservation Center, with appointments of 30 days or more,

<sup>4/</sup> Compare United States Department of Agriculture, Black Hills National Forest, A/SLMR No. 58.

excluding nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, all temporary, intermittent, and casual employees, and supervisors as defined in the Order.

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

- (b) All nonprofessional employees assigned to the Umpqua National Forest, including the Wolf Creek Job Corps Civilian Conservation Center, with appointments of 30 days or more, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, all temporary, intermittent and casual employees, and supervisors as defined in the Order.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,  
 PUBLIC HEALTH SERVICE INDIAN HOSPITAL,  
 CLAREMORE; OKLAHOMA  
 A/SLMR No. 568

DIRECTION OF ELECTIONS

Elections 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 Director shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were 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 1743. 5/

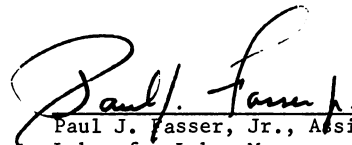
This case arose as a result of a representation petition filed by the American Federation of Government Employees, Local 3601, AFL-CIO, (AFGE) seeking an election in a unit of all professional and nonprofessional employees of the Claremore Indian Hospital, Claremore, Oklahoma. The Activity and the incumbent Intervenor, the National Federation of Federal Employees, Local 1748, (NFFE) contended that they were parties to a negotiated agreement covering the employees sought which constituted a bar at the time the AFGE filed its petition. The AFGE, on the other hand, asserted, in substance, that the agreement could not act as a bar because it was negotiated and signed by a supervisor who also was the NFFE Local's President and chief negotiator.

The Assistant Secretary noted that in previous cases it had been found that: (1) attacks would not be appropriate on an existing bargaining relationship based on an alleged impropriety which occurred more than six months prior to the raising of such issue; and (2) unfair labor practice issues, such as those raised by the AFGE, are raised more appropriately in the context of an unfair labor practice proceeding.

The Assistant Secretary found NFFE Local 1748 not to be defunct, noting, among other things, that the NFFE National Representative, a signatory to the parties' negotiated agreement, appointed Local 1748's Secretary/Treasurer to be Acting President of the Local. With respect to the Local President's attempted disclaimer of interest in representing the unit employees, the Assistant Secretary noted that Local 1748's President conceded at the hearing that the purpose of the disclaimer of interest was to "clear the decks" for an AFGE petition. In this connection, the Assistant Secretary stated that such a stratagem, which would permit unit employee members of an incumbent labor organization to facilitate "a raid" by another labor organization during the period of a negotiated agreement, would create unnecessary instability and uncertainty and would, therefore, be inconsistent with the purposes and policies of the Order where the evidence does not establish that the incumbent labor organization is, in fact, defunct.

Under all of the circumstances, the Assistant Secretary found that the negotiated agreement herein constituted a bar to the AFGE's petition. Accordingly, he ordered that the petition be dismissed.

Dated, Washington, D.C.  
 October 24, 1975

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

5/ Under all the circumstances, including the fact that the unit found appropriate herein was substantially the same as that sought originally by the NFFE, no additional posting of a notice of unit determination was deemed warranted.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,  
PUBLIC HEALTH SERVICE INDIAN HOSPITAL,  
CLAREMORE, OKLAHOMA

Activity

and

Case No. 63-5452(RO)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
LOCAL 3601, AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,  
LOCAL 1748

Intervenor

DECISION AND ORDER

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

Upon the entire record in this case, including a brief filed by the Intervenor, National Federation of Federal Employees, Local 1748, herein called NFFE, 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 3601, AFL-CIO, herein called AFGE, seeks an election in the following unit:

All professional and nonprofessional employees of the Claremore Indian Hospital, Claremore, Oklahoma, excluding management officials,

employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order. 1/

The Activity and the NFFE contend that they were parties to a negotiated agreement covering the employees sought which constituted a bar at the time the AFGE filed the petition in the instant case. 2/ The AFGE, on the other hand, asserts, in substance, that because the negotiated agreement between the Activity and the NFFE was negotiated and signed by a supervisor who also was NFFE Local 1748's President and chief negotiator, it cannot constitute a bar to its petition herein.

The record reveals that on May 15, 1974, a negotiated agreement between the Activity and the NFFE was signed by Mrs. Billie M. Liber, (the Chairman of the Activity's negotiating committee and the Activity's Administrative Officer), Mr. Thomas B. Talamini (the Activity's Service Unit Director), Mr. Quannah Blackwood (the Chairman of the NFFE's negotiating committee and President of NFFE Local 1748), and Mr. Tom G. Clark (a NFFE National Representative).

With respect to the AFGE's contention that the negotiated agreement herein cannot constitute a bar because it was negotiated and signed by a supervisor who also was NFFE Local 1748's President and chief negotiator, the evidence establishes that such alleged conduct occurred more than six months prior to the filing of the petition in this matter. In this regard, it has been found previously that an attack on the propriety of the granting of exclusive recognition based on events which occurred more than six months prior to the raising of such issue was not appropriate in that the raising of such an issue based on events which occurred more than six months before would not serve to promote effective and meaningful labor-management relations and, therefore, would not be consistent with the purposes and policies of the Order. 3/ Similarly, I find that the AFGE's attempt in the instant case to attack the existing negotiated agreement between the Activity and the NFFE based on alleged events which occurred more than six months prior to the filing of the subject petition would be inconsistent with the concept of stable labor-management relations resulting

1/ On October 21, 1970, the NFFE was certified as the exclusive representative of all professional and nonprofessional General Service and Wage Board employees of Claremore Indian Hospital, excluding management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, temporary part-time and casual employees and commissioned officers.

2/ The AFGE filed the subject petition on February 27, 1975. The Activity and the NFFE are parties to a negotiated agreement which became effective on July 24, 1974, for a term of three years with automatic renewal on a yearly basis thereafter.

3/ See Department of Housing and Urban Development, Region II, A/SLMR No.270.

from the execution of negotiated agreements. Accordingly, and noting that the negotiated agreement involved herein is otherwise valid on its face, I reject the AFGE's attempt to attack such agreement on the basis of alleged supervisory involvement in its negotiation and execution occurring more than six months prior to the filing of the instant petition. Moreover, in my view, an allegation of improper Activity assistance, such as that raised by the AFGE herein, is more appropriately raised in an unfair labor practice forum rather than, as here, in the context of a representation proceeding. 4/

The record shows also that NFFE Local 1748's President, Quannah Blackwood, sent a letter, dated February 18, 1975, to the Activity's Administrative Officer, Mrs. Billie M. Liber, advising that NFFE Local 1748 "wishes to relinquish its exclusive recognition status" and citing Section 2.1 of the parties' negotiated agreement. 5/ In this connection, there was no evidence that the Activity took any action in response to Blackwood's letter.

In my view, the evidence does not support a finding that the NFFE does not desire to continue to represent the unit employees involved herein or that the NFFE is defunct. It has been held previously that it will effectuate the purposes and policies of the Order to permit employees, who are covered by an otherwise valid negotiated agreement, to express their desires for representation in an election resulting from a petition filed by another labor organization if their exclusively recognized or certified representative is, in fact, defunct. 6/ Considering all of the circumstances in the instant case, I find that NFFE Local 1748 is not, in fact, defunct inasmuch as record evidence does not establish that it is either unwilling or unable to represent the employees in the unit for which it was certified as the exclusive representative. In this regard, it was noted particularly that Tom G. Clark, a NFFE National Representative and a

4/ See Veterans Administration Center, Togus, Maine, A/SLMR No. 317, at footnote 1; U.S. Army Engineer District, Philadelphia, Corps of Engineers, A/SLMR No. 80, at footnote 7; and Department of the Navy, Naval Air Rework Facility, Naval Air Station Alameda, California, A/SLMR No. 61, at footnote 2.

5/ Section 2.1 reads in pertinent part: "This Agreement shall terminate immediately should the union relinquish its recognition in writing or the Union's exclusive recognition be withdrawn."

6/ See Federal Aviation Administration, Department of Transportation, A/SLMR No. 173, where it was held that an exclusive representative is defunct when it is unwilling or unable to represent the employees in its exclusively recognized or certified unit.

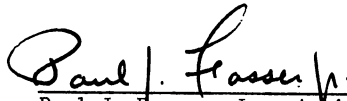
signatory to the parties' negotiated agreement, appointed NFFE Local 1748's Secretary/Treasurer, Mrs. Nancy Washington, as Acting President of the Local shortly after February 18, 1975. 7/ Further, it was noted that Mrs. Washington testified that she continued to receive NFFE mail and to have possession and control over NFFE Local 1748's funds. Moreover, with respect to the attempted disclaimer of interest, it was noted that, at the hearing, Blackwood conceded that employee members' resignations from the NFFE and his attempt to relinquish the NFFE's recognition were motivated by a desire to "clear the decks" for an AFGE petition.

In my view, a strategem, such as that involved in the instant case, which would permit unit employee members of an incumbent labor organization to facilitate "a raid" by another labor organization during the period of a negotiated agreement would create unnecessary instability and uncertainty and would, therefore, be inconsistent with the purposes and policies of the Order where the evidence does not establish that the incumbent labor organization is, in fact, defunct. Accordingly, under all of the foregoing circumstances, I conclude that the negotiated agreement involved herein constituted a bar to the AFGE's petition and, therefore, I shall order that such petition be dismissed. 8/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 63-5452(RO), be, and it hereby is, dismissed.

Dated, Washington, D.C.  
October 24, 1975

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

7/ Clark also sent a letter dated February 24, 1975, to Talamini, the Activity's Service Unit Director, referencing Blackwood's February 18th letter and asserting that, due to a promotion, Blackwood was no longer qualified to act for or represent the Local under the Executive Order. The letter advised that Mrs. Washington would be the Acting President of the Local until such time as there could be nomination and election of officers.

8/ In view of the disposition herein, I find it unnecessary to rule specifically on the Activity's motion, made at the hearing, to dismiss the AFGE's petition; nor do I find it necessary to rule on Blackwood's alleged supervisory status.

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

DEFENSE MAPPING AGENCY AEROSPACE CENTER,  
 ST. LOUIS, MISSOURI  
 A/SLMR No. 569

This case involved a petition filed by the National Federation of Federal Employees, Independent, Local 1827 (NFFE) seeking an election in a unit of all the Activity's nonprofessional employees. The Activity agreed with the level of recognition sought, i.e., Activity-wide. However, it contended that the claimed Activity-wide unit should include professional employees as such employees share a community of interest with the nonprofessional employees sought by the NFFE, and that the exclusion of the professional employees will not promote effective dealings and efficiency of agency operations.

The Assistant Secretary found the petitioned for unit to be appropriate for the purpose of exclusive recognition. In this regard, he noted that all of the Activity's employees are under the direction of the Center Director; have a common mission; are subject to similar personnel policies and working conditions; and work in close proximity in a highly integrated operation in which frequent interaction and job related contacts occur. With respect to the Activity's contention that professional employees also should be included in the claimed unit, the Assistant Secretary noted that Section 10(b)(4) of the Order gives professional employees the right of self-determination whenever, as here, a mixed unit of professional and non-professional employees is considered appropriate. Therefore, separate findings of appropriateness must be made with respect to the professional employees and the nonprofessional employees in the event that a majority of the professional employees does not vote for inclusion in a unit with nonprofessional employees. It follows, therefore, that where a mixed unit is appropriate, by definition the separate units of professional and non-professional employees which comprise the mixed unit also are appropriate. Accordingly, because the NFFE in the instant case had petitioned only for a unit of nonprofessional employees, and the employees in such unit share a clear and identifiable community of interest at a level of recognition which will promote effective dealings and efficiency of agency operations, the Assistant Secretary ordered an election to be conducted in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE MAPPING AGENCY AEROSPACE CENTER,  
 ST. LOUIS, MISSOURI

Activity

and

Case No. 62-4279(RO)

NATIONAL FEDERATION OF FEDERAL  
 EMPLOYEES, INDEPENDENT, LOCAL 1827

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 Kristine K. Sneeringer. 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 both parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The NFFE seeks an election in a unit consisting of all permanent full-time General Schedule and Wage Grade employees of the Defense Mapping Agency Aerospace Center (Center) who work at the latter's St. Louis Air Force facility and South Annex in St. Louis, Missouri, excluding all professionals, management officials, confidential

1/ Upon an objection by the Petitioner, the National Federation of Federal Employees, Independent, Local 1827, herein called NFFE, on the basis of irrelevancy, the Hearing Officer rejected the Activity's attempt to introduce into evidence two interdepartmental memoranda which, in the Activity's view, purported to show work related contacts between the various departments of the Activity. In my view, the interdepartmental memoranda in question are relevant to the issues involved herein. Accordingly, I hereby reverse the Hearing Officer's ruling and receive this exhibit into the record. Because, in reaching the decision in this case, I have considered the entire record, including the exhibit in question, the Hearing Officer's rejection of such exhibit at the hearing was not considered to constitute prejudicial error.

employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order. 2/ The Activity agrees with the level of recognition sought by the NFFE in this matter, i.e., Activity-wide in St. Louis. However, it contends that such unit should include the professional employees of the Activity as such employees share a community of interest with the nonprofessional employees sought by the NFFE and their exclusion from the claimed Activity-wide unit will not promote effective dealings or efficiency of agency operations.

The Center is one of five organizational elements of the Defense Mapping Agency which was created in 1971 to consolidate all military mapping, charting, and geodesy under a single Department of Defense directorate. It is charged with meeting the aerospace mapping, charting, and geodetic requirements of the military organizations of the Department of Defense. Its end products include navigation and planning charts, flight information publications, air targets materials, and special products such as cartographic film strips used by military pilots. The Center also houses special data files available to all of the Department of Defense directorates; has provided charting and cartographic service to the National Aeronautics and Space Administration; and works directly with the military to insure that cartographic and geodetic products are available to support technological advances. In accomplishing its mission, the Center utilizes a highly integrated operation in which the great portion of its work is performed at two locations in the St. Louis area which locations are approximately six miles apart. 3/

The Center employs over 3000 employees in the St. Louis area, all under the Center Director who has ultimate responsibility for all personnel matters affecting the Center employees. In this regard, he is assisted by a Civilian Personnel Office which retains personnel files of all of the Center employees located in St. Louis. The employees of the Center located in St. Louis are subject to common working conditions, fringe benefits, grievance procedures, incentive award programs, and training programs. In addition, the areas of consideration for both promotions and reductions in force generally are Center-wide. Because of the proximity of the employees of the Center in St. Louis and the highly integrated nature of its operation, the employees of various organizational levels of the Center interact frequently. Thus, the record reveals that they have substantial job related contacts and they participate on the numerous committees which are responsible for insuring the coordination of the Center's operations.

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2/ The unit appears essentially as amended at the hearing.

3/ In addition to its Headquarters in St. Louis, the Center has Flight Information Offices in Germany and Alaska, a Depot in Hawaii, a Geodetic Squadron in Wyoming, and a Cartographic Technical Squadron in California. The majority of the employees at these locations are either military or presently are part of base-wide units which include them as employees of tenant activities.

The Activity contends that the Center's professional employees, who constitute approximately one-half of the work force, and its nonprofessional employees are subject to the same terms and conditions of employment. It contends further that its professional employees work both directly and indirectly with its nonprofessional employees in performing their assigned functions and that excluding the professional employees from the unit will place an arbitrary and artificial barrier between two groups of its employees who share a community of interest and necessarily will decrease effective dealings. Also, it asserts that separating the two groups of employees will create the likelihood of different standards having to be applied to its employees which will, in the Activity's view, fragment and lead to decreased efficiency of its operations.

Based on the foregoing, I find that the petitioned for unit of the Activity's nonprofessional employees is appropriate for the purpose of exclusive recognition. In this regard, it was noted particularly that all of the employees of the Center in St. Louis are under the direction of the Center Director, have a common mission and are subject to similar personnel policies and terms and conditions of employment. Additionally, all of the claimed employees work in close proximity in a highly integrated operation in which frequent interaction and job related contacts occur. Under these circumstances, I find that the claimed employees share a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations.

With respect to the inclusion of professional employees sought by the Activity, it was noted that, in effect, Section 10(b)(4) of the Order affords professional employees the right of self-determination whenever a mixed unit of professional and nonprofessional employees is found appropriate. Therefore, in cases where a mixed unit is found appropriate, separate findings of appropriateness also must be made with respect to the nonprofessional employees and professional employees who comprise such unit in the event that a majority of the professional employees does not vote for inclusion in the unit with nonprofessional employees. In the instant case, only the nonprofessional employees have been sought at a level of recognition which the Activity agrees is appropriate. In this regard, the Activity takes the position that a mixed Center-wide unit of professional and nonprofessional employees would constitute an appropriate unit and it is clear that if such a mixed unit were sought, it would be found to be appropriate under the circumstances described above. It follows, therefore, that if the mixed unit is appropriate, by definition so also are the separate units of nonprofessional and professional employees which comprise the mixed unit. Accordingly, as the NFFE in the instant case has petitioned only for a unit of nonprofessional employees, and such unit, standing alone, constitutes an appropriate unit, I shall direct an election among nonprofessional employees as described below:

- 3 -

- 2 -

All General Schedule and Wage Grade employees of the Defense Mapping Agency Aerospace Center in the St. Louis, Missouri, area, excluding all professionals, 4/ management officials, confidential employees, 5/ employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order. 6/

#### DIRECTION OF ELECTION

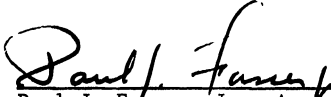
An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees

- 4/ The parties stipulated that employees classified as geographer, 150 series; financial manager, 505 series; accountant, 510 series; nurse, 610 series; general engineer, 801 series; civil engineer, 810 series; electrical engineer, 850 series; industrial engineer, 896 series; general attorney, 805 series; general physical scientist, 1301 series; geophysicist, 1313 series; chemist, 1320 series; navigational information specialist, 1361 series; cartographer, 1370 series; geodesist, 1372 series; photographic technologist, 1386 series; librarian, 1410 series; technical information specialist, 1412 series; operations researchist, 1512 series; and mathematician, 1520 series are professionals within the meaning of the Order. As there is no evidence in the record which indicates that the parties' stipulation in this regard was improper, I find that the employees in these classifications are professionals within the meaning of the Order and, therefore, should be excluded from the unit found appropriate.
- 5/ The parties stipulated that the secretaries to the Director, Technical Director, department heads, directorate heads, the staff office heads, and the labor relations specialist are confidential employees who should be excluded from any unit found appropriate. As there is no evidence in the record which indicates that the parties' stipulation in this regard was improper, I find that the above noted employees also should be excluded from the unit found appropriate.
- 6/ While the parties stipulated that employees classified as other than permanent full-time should be excluded from any unit found appropriate, I find that the evidence supporting such stipulation is insufficient to make an eligibility determination in this regard.

- 4 -

who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they wish to be represented by the National Federation of Federal Employees, Independent, Local 1827.

Dated, Washington, D. C.  
October 24, 1975

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

- 5 -

October 31, 1975

A/SLMR No. 570

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
MARE ISLAND NAVAL SHIPYARD,  
VALLEJO, CALIFORNIA  
A/SLMR No. 570

DEPARTMENT OF THE NAVY,  
MARE ISLAND NAVAL SHIPYARD,  
VALLEJO, CALIFORNIA

This case involved an unfair labor practice complaint filed by the Federal Employees Metal Trades Council of Vallejo, AFL-CIO, Vallejo, California, (Complainant) alleging essentially that the Respondent violated Section 19(a) (1), (2) and (4) of the Order based on a shop supervisor's refusal to select a subordinate to work overtime who: (1) was the only steward in his crew; and (2) had filed a complaint against the supervisor. It was alleged also that other employees, who were present when the shop supervisor refused to ask the steward to work overtime, were discouraged from membership in a labor organization.

Respondent

and

Case No. 70-4455

FEDERAL EMPLOYEES METAL TRADES  
COUNCIL OF VALLEJO, AFL-CIO,  
VALLEJO, CALIFORNIA

Complainant

Finding that the issue raised in the unfair labor practice complaint had been raised previously in a negotiated grievance procedure, the Administrative Law Judge concluded that Section 19(d) of the Order precluded the Complainant from raising the issue herein and, accordingly, he recommended that the instant complaint be dismissed in its entirety.

DECISION AND ORDER

Noting particularly the absence of exceptions and that there was insufficient evidence of discriminatory motivation, the Assistant Secretary ordered that the instant complaint be dismissed in its entirety.

On August 15, 1975, Administrative Law Judge William Naimark issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

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

Finding that the issue raised in the instant unfair labor practice complaint had been raised previously under a negotiated grievance procedure, the Administrative Law Judge determined that Section 19(d) of the Order precluded the Complainant from raising the issue herein and, accordingly, he recommended that the instant complaint be dismissed in its entirety. In addition to the above, noting the Administrative Law Judge's credibility findings, I conclude that the evidence herein was insufficient to establish that the failure to assign overtime to employee Robinson on August 23, 1974, was motivated by anti-union considerations or was based on his filing a

complaint or giving testimony under the Order. Accordingly, I shall order that the instant complaint be dismissed in its entirety.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

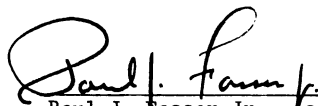
WASHINGTON, D.C. 20210



ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-4455 be, and it hereby is, dismissed.

Dated, Washington, D. C.  
October 31, 1975

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

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In the Matter of

DEPARTMENT OF THE NAVY  
MARE ISLAND NAVAL SHIPYARD  
VALLEJO, CALIFORNIA

Respondent

and

FEDERAL EMPLOYEES METAL  
TRADES COUNCIL OF VALLEJO, AFL-CIO  
VALLEJO, CALIFORNIA

Complainant

.....

CASE NO. 70-4455

Richard C. Wells  
Labor Relations Advisor  
Department of the Navy  
Regional Office - Civilian Manpower Management  
760 Market Street  
San Francisco, California 94102

For Respondent

John C. Robinson  
Secretary for the Federal Employees  
Metal Trader Council  
P.O. Box 2195  
Vallejo, California 94592

For Complainant

BEFORE: WILLIAM NAIMARK  
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on January 23, 1975 by the Assistant Regional Director for Labor-Management Services Administration of the U.S. Department of

Labor, San Francisco Region, a hearing was held in the above captioned case before the undersigned on March 11, 1975 at San Francisco, California.

The proceeding herein was initiated under Executive Order 11491, as amended, (herein called the Order) by the filing of a complaint on October 18, 1974 by Federal Employees Metal Trades Council, Metal Trades Department, AFL-CIO (herein called the Complainant) against the Department of the Navy, Mare Island Naval Shipyard (herein called the Respondent). Thereafter, on December 16, 1974, Complainant filed an amended complaint against Respondent which is the basis of this proceeding. It was alleged therein that Respondent violated Sections 19(a)(1)(2) and (4) of the Order as a result of the refusal by shop supervisor Morse on August 23, 1974 to select John C. Robinson to work overtime on August 24 and 25, 1974 - and that such discrimination was due to (a) Robinson's being the only union steward in Morse's crew, and (b) the fact that Robinson filed a complaint against Morse. It was also alleged that other employees, who were present when Morse refused to ask Robinson to work overtime, were discouraged from membership in a labor organization - all in violation of 19(a)(2) and (4) of the Order.

Respondent filed a response to these complaint allegation which denied the commissions of any unfair labor practices.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered.

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

Findings of Fact

1. At all times material herein Complainant was the collective bargaining representative of the wage board employees, including career personnel, at Mare Island Naval Shipyard.

2. Both complainant and Respondent are and have been, at all times herein, parties to a collective bargaining agreement which provides, in Article IX, that in assigning employees to overtime work, the employer would give the first consideration to those employees currently assigned to the job and second consideration to those having the skills required by overtime assignments. The said article further recites that, otherwise, overtime would be distributed fairly among qualified employees.

3. The aforementioned collective bargaining agreement between Complainant union and Respondent also contains a grievance procedure for employees (Article XXX11), whose declared purpose is to settle grievance of individuals arising out of the interpretation and application of the agreement, or involving policies established by the employer, or a violation thereof. The negotiated grievance procedure provided for various steps to be taken in the processing of a grievance and an appeal to the department head when a decision is unsatisfactory.

4. Since about 1967 Ralph L. Morse has been a supervisor of the pipecover insulators section in shop 64. In and during August 1974 Morse and four other individuals supervised about 55 employees in that section. About 20 employees were under Morse's supervision as mechanics or limited mechanics.

5. John C. Robinson has been employed as a pipecover insulator with Respondent for two years. Since about March 1974, he has been working under Morse's supervision. In and during 1974 Robinson was the union steward 1/ in Morse's crew representing the pipecover insulators.

6. On August 1, 1974 2/ the union herein, on behalf of Robinson, filed an unfair labor practice charge against the shipyard alleging Morse informed Robinson that he was told to control Robinson's movements as chief steward, and that the latter was not to be permitted to go on "fishing expedition". As a result of subsequent meetings involving all the parties concerned the matter was settled informally.

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1/ Three other employees were stewards of Complainant union but represented different crews.

2/ All dates herein after mentioned are in 1974 unless otherwise indicated.



7. On August 6, the union herein, on behalf of Robinson filed another such charge against the shipyard alleging that Morse refused to allow Robinson necessary time to take care of union activities. Specifically, it was claimed that Robinson desired to go to the union office on August 5 to work on an arbitration case, and Morse refused to give the steward a pass to do so. The record reflects that no disposition was made of this charge.

8. In the course of working on boats the employees were, at times, requested to work overtime. The policy at the shipyard, and as adopted by Morse, called for selecting individuals who worked on the job or boat to work the required overtime. Further, the supervisor would request the number he desired for such overtime work, and thereafter management decided how many employees should be designated therefor.

9. On August 23, Morse, who had been allotted four men to work overtime on August 24 and 25, sought to obtain the help required. By about 4:00 p.m. he had asked six men in his crew to work overtime and all had refused. The employees were asked to repair non-nuclear deficiencies on the boat "Thomas Edison" on the following two days, Saturday and Sunday.

10. The record further reflects that on August 23, Morse did not ask certain other members of his crew to work overtime on the 24th and 25th. Thus, he did not ask Luis Munoz, Tom Fisaga, Mont Eton, Perez, and Alphonso Montiel because none of these individuals had clearance to do this work on the "Thomas Edison". Morse avers he did not ask Myron James because the employee was in training school. Since Reed was on sick leave that day, and David Van Meter does not choose to work overtime, he did not ask either of these men to work overtime. Although Morse did not speak to James Langford re overtime work, no reason appears as to why he failed to do so.

11. Record facts show that in the afternoon of August 23 Morse spoke to Cecchini, Cleter Huweiler, and Richard Sanders, he asked these employees to work overtime over the weekend on the "Thomas Edison", and all agreed to do so. Further, Morse told Sanders to call his father-in-law, Bill Shrum <sup>3/</sup>, and ask him to work overtime also. Three of the four employees had worked on the Edison boat previously.

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<sup>3/</sup> Shrum was contacted that evening by Sanders and reported for work on the weekend along with Cecchini, Huweiler and Sanders.

12. Morse testified that by 4:00 p.m. on August 23, he had obtained three men to work overtime as heretofore indicated; that he was in need of a fourth and proceeded to approach employee Pappadakis, a member of his crew, to request his services for the weekend. According to the supervisor, Pappadakis was talking to Bernie Rapacon, and as Morse approached them, Robinson passed going in the opposite direction. Morse avers he asked Pappadakis to work overtime but the employee refused, and he did not ask Rapacon to do so; that it was then about 4:10 p.m., the whistle had blown for the end of the shift, and neither Robinson nor any other employee was around at the time. The supervisor states he did not ask Robinson to work overtime because the latter was not present and had left the premises, but he would have asked him if Robinson were available.

Robinson testified that at 4:00 p.m. on August 23 he was standing at the upper end of the shop, next to some lockers, talking to Rapacon; that Morse came over and asked Rapacon to work overtime on the 24th and 25th, but the latter refused the request; that Morse looked at Robinson but did not ask this employee to work overtime; that the supervisor left and the two employees continued to talk thereafter. On the following Monday morning Robinson asked Morse why he didn't request him to work overtime. The supervisor said "don't you remember me asking you to work?", and Robinson replied "No, cause you didn't ask".

Rapacon testified that on August 23, at 4:00 p.m. he was talking with and standing next to Robinson at the main doors when Morse approached them; that the supervisor asked Rapacon if he wanted to work overtime on Saturday and Sunday, the next two days, and Rapacon answered that he did not want to do so.

The above versions of what occurred on August 23 at 4:00 p.m. present a sharp conflict in testimony. However, several factors lead me to credit the version as related by Robinson and Rapacon rather than that testified to by Morse. The testimony presented by Robinson, in addition to reciting details of the event, was corroborated by Rapacon, who worked in a different crew, and no effort was made by Respondent to present Pappadakis as a witness to rebut said testimony. Moreover, since the supervisor stated he would have asked Robinson to work overtime if present, it strains credulity that Morse would not have stopped him if they had in fact passed each other.

Accordingly, I find that Morse asked Rapacon to work overtime, in the presence of Robinson, as related by these two employees and I accept their versions of what occurred at 4:00 p.m. on August 23.

13. On August 28 Robinson filed a grievance with management against Morse alleging that he was not distributing the overtime equally among his crew. It was alleged that Morse brought in a man from another crew, and he did not consider the amount of overtime an employee had worked in a year. At the second step of the grievance procedure the group superintendent concluded that in the future overtime would be distributed equally to all employees regardless of whether they were nuclear qualified or in which crew they worked. 4/

14. No other mechanic filed charges against Respondent alleging discrimination under the Order herein.

15. No overtime work was performed by Morse's crew between July 13 and August 25, but Robinson did work overtime on July 13. The employee also worked overtime on September 1 and 8, but refused overtime on September 15. The record reflects that, except for August 23, Morse had always asked Robinson to work overtime when he was available.

#### Conclusions

Complainant contends that, under the Order herein, Respondent discriminatorily denied overtime to Robinson in violation of 19(a)(1)(2) and (4) thereof. It adverts to the fact that the alleged discriminations occurred shortly after charges on Robinson's behalf were filed against the employer.

These are, however, certain instances where an unfair labor practice proceeding is barred from consideration. Thus, Section 19(d) of the Order provides in part:

"... Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures," (underscoring supplied).

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4/ The record does not reflect details re the handling and disposition of the grievance, or to what extent Robinson's complaint was considered. However, it does appear, and I find that the grievance stemmed from the failure by Morse to assign overtime on August 23 to Robinson.


It seems clear from the language alone that an aggrieved party, who has an available grievance procedure, must elect whether to pursue that avenue or the unfair labor practice proceeding. An election to file a grievance will necessarily bar a complaint alleging an unfair labor practice as to the same conduct which is deemed grievous.

In the case at bar Robinson filed a grievance on August 28 in respect to the assignment of overtime work for August 24 and 25 by supervisor Morse. This grievance went through step 2 of the negotiated grievance procedure and resulted in a determination by the superintendent that overtime would henceforth be distributed fairly. While the record is not clear that the grievance referred specifically to the failure by Morse to ask Robinson to work on August 24 and 25, the testimony by Robinson warrants the inference that the grievance stemmed from the refusal to ask him on August 23 to work overtime on that weekend. Moreover, that precise issue could have been raised during the grievance proceeding and was embraced within the allegation made by Robinson against Morse in regard to overtime. Thus, even if the grievance filed by Robinson was not explicit in respect to naming Robinson as being discriminatorily denied overtime by Morse on August 23, it would not make 19(d) inoperative. See U.S. Army Tank Automotive Command, Warren, Michigan. A/SLMR No. 447.

The utilization by Robinson of the grievance procedure, in respect to the overtime assignment on August 23, convinces me that this issue may not properly be brought before the Assistant Secretary in an unfair labor practice complaint. Having sought to proceed under the negotiated grievance procedure re the overtime issue, Robinson is, as I view Section 19(d) of the Order, precluded from raising this issue herein. Accordingly, I would find no violation by Respondent of Sections 19(a)(1)(2) or (4) of the Order.

#### Recommendation

Upon the basis of the foregoing findings and conclusions. The undersigned recommends that the complaint herein against Department of the Navy, Mare Island Shipyard, be dismissed in its entirety.

  
WILLIAM NAIMARK  
Administrative Law Judge

DATED: August 15, 1975  
Washington, D.C.

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

UNITED STATES AIR FORCE ELECTRONICS  
 SYSTEMS DIVISION (AFSC), HANSCOM  
 AIR FORCE BASE  
 A/SLMR No. 571

This case involved an unfair labor practice complaint filed by Local 975, National Federation of Federal Employees (NFFE) alleging that the United States Air Force Electronics Systems Division (AFSC), Hanscom Air Force Base (Respondent) violated Section 19(a)(6) of the Order by virtue of its action in deciding to relocate a particular facility without prior consultation with the NFFE regarding the impact of the relocation on unit employees.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In this regard, he found that no final decision had been made to remove the facility, and that subsequent actions taken thereon by the Respondent were concerned solely with the planning and feasibility of the relocation. The date for the move, he found, was merely a target date for completing the plans for a possible relocation and was not to be the effective date of the move or relocation. He concluded, therefore, that as the decision to move or relocate was not finalized, there was no obligation imposed upon the Respondent under Section 11(b) of the Order to meet and confer with respect to the impact of the relocation. Moreover, he found that, even if it were assumed that the decision to move was final, the Complainant had notice some twelve days prior to the contemplated relocation and it had made no request for bargaining on either the procedures to be utilized or the impact on the unit employees.

The Assistant Secretary, noting particularly that no exceptions were filed, adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed. In arriving at his decision, the Assistant Secretary noted the bargaining responsibility of an agency or activity with respect to matters within the ambit of Section 11(b) of the Order.

## UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE ELECTRONICS  
 SYSTEMS DIVISION (AFSC), HANSCOM  
 AIR FORCE BASE

Respondent

and

Case No. 31-8872(CA)

LOCAL 975, NATIONAL FEDERATION OF  
 FEDERAL EMPLOYEES

Complainant

## DECISION AND ORDER

On July 17, 1975, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

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

In this regard, it was noted that on page four of his Report and Recommendations the Administrative Law Judge referred to the subject matters set forth in Section 11(b) of the Order as "management prerogatives," and that, with respect to such matters, an agency or activity is obligated to meet and confer on the impact of any "initial decision or action on unit personnel." I agree with the Administrative Law Judge that agencies and activities are obliged to afford exclusive representatives a reasonable opportunity to meet and confer concerning the impact and implementation of decisions taken with respect to subjects within the ambit of Section 11(b) of the Order. Moreover, it was noted that, although agencies or activities are not obligated to negotiate concerning matters within the ambit of Section 11(b), it has been held by the Federal Labor Relations Council

that they may negotiate on such subjects and reach binding agreements thereon. 1/

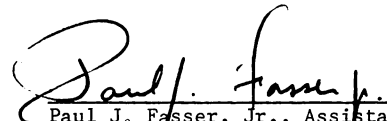
U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-8872(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
October 31, 1975

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

..... :  
In the Matter of :  
 :  
UNITED STATES AIR FORCE :  
ELECTRONICS SYSTEMS DIVISION (AFSC) :  
HANSCOM AIR FORCE BASE :  
 :  
Respondent :  
 :  
and : Case No. 31-8872 (CA)  
 :  
LOCAL 975, NATIONAL FEDERATION :  
OF FEDERAL EMPLOYEES :  
 :  
Complainant :  
 :  
..... :

John C. Abizaid, Esquire  
ESD/JA, L. G. Hanscom Air Force Base  
Bedford, Massachusetts  
For the Respondent

George Tilton, Esquire  
Associate General Counsel  
National Federation of Federal Employees  
1737 H St., N. W.  
Washington, DC  
For the Complainant

Before: BURTON S. STERNBURG  
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a complaint filed on November 12, 1974, under Executive Order 11491, as amended, by Local 975, National Federation of Federal Employees (hereinafter called the Union or Complainant), against the Electronics System Division, AFSC, United States Air Force, Hanscom Air Force Base (hereinafter called the Respondent or Agency), a Notice of Hearing on Complaint was issued by

1/ See AFGE Council of Local 1497 and 2165, and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48.

the Assistant Regional Director for the New York Region on April 9, 1975.

The complaint alleges, in substance, that the Respondent violated Sections 19(a)(5) and (6) of the Executive Order by virtue of its actions in determining to relocate a particular facility without prior consultation with the Union regarding the impact of the relocation on unit personnel. 1/

A hearing was held in the captioned matter on June 10, 1975, in Cambridge, Massachusetts. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following conclusions and recommendations:

Findings of Fact

The Union is the exclusive representative of all professionals employed in the Electronics Systems Division, United States Air Force, Hanscom Air Force Base, Bedford, Massachusetts. The Electronic Systems Division which is composed of a number of branches and/or subdivisions, including the Deputate of the Command and Management Systems, hereinafter called the MC Unit. The MC Unit's component parts or branches are located in various buildings in and around Hanscom Air Force Base. As of August 1, 1974, MACIMS (Military Airlift Command Integrated Management System), a component part or subdivision of the MC Unit, was located in the MITRE complex some five to seven miles from Hanscom Air Force Base. The Assistant Deputy for the MC Unit was Colonel Melvin B. Emmons.

On or about August 1, 1974, Chief of Staff, Colonel James, who was Colonel Emmons' superior officer, advised Colonel Emmons that "due to mission requirements, there was a necessity to consider relocation of some of the Electronic Systems Division resources, of which one was MACIMS..." Colonel James further informed Colonel Emmons "that initial planning efforts should be undertaken to complete and finalize as soon as possible the plans and all the actions necessary in the event that a decision was made to relocate the MACIMS office to" Hanscom Air

1/ During the course of the hearing Complainant withdrew the 19(a)(5) allegation.

Force Base. The target date for the relocation was September 1, 1974.

Following the discussion with Colonel James, Colonel Emmons contacted the appropriate agency officials and commenced planning the contemplated relocation. On or about August 6, 1974, Colonel Emmons held a staff meeting and informed them of Colonel James' instructions and the need to initiate planning immediately. On August 7, 1974, Colonel Emmons addressed a memorandum to his staff confirming the discussions held at the weekly staff meeting the day before. The memorandum stressed the fact that it was imperative that plans for the move be initiated and finalized as soon as possible and gave approval for the survey of certain facilities located on the base.

On August 7, 1974, Mr. Turgis, Acting Deputy of MACIMS, informed Chief Union Steward John B. O'Gorman of the discussions held at the weekly staff meeting of August 6, concerning the contemplated or proposed move of the MACIMS unit to the Air Force Base. Mr. O'Gorman in turn advised Mr. William Smith, president of the union of the contemplated move.

On August 11, 1974, after hearing reports of the contemplated relocation from Chief Union Steward O'Gorman and other employees, Union President Smith visited Acting Deputy Turgis and inquired about the rumors or stories concerning a possible move of MACIMS. Turgis confirmed the story and upon request gave Mr. Smith a copy of Colonel Emmons August 7, 1974 memorandum concerning the contemplated move. By letter dated August 12, 1974, Union President Smith requested the Deputy Director of MC to advise as to whether the information given him by Mr. Turgis was correct and if so, why "Management has failed to observe the provisions of the Executive Order". By letter dated August 19, 1974, Colonel Emmons informed Union President Smith that "initial plans have been made for the relocation of the MACIMS Program Office to Hanscom Air Force Base". Colonel Emmons further advised that the "initial plans have not been finalized to date" and that the tentative date for relocation was September 1, 1974. Subsequent to receiving Colonel Emmons August 19, 1974 letter, Union President Smith, other than making some informal mention of the relocation to the Respondent's retiring labor relations officer while discussing other subjects, made no formal demand to Respondent for bargaining and/or consultation concerning the impact of the contemplated relocation upon unit personnel.

The record further reveals that the contemplated move or relocation of MACIMS was abandoned sometime in September 1974, due to the fact that another branch or division of the Electronics System Division with higher priority was selected for relocation.

In or around January 1975, the MACIMS unit was relocated. However, according to the credited and uncontroverted testimony of Colonel Emmons, the relocation occurred only after all professionals had either been transferred, reassigned or voluntarily left the MACIMS unit. At the time of the relocation the only employees in the MACIMS unit were of a clerical nature.

Discussion and Conclusions

The Complainant charges that the Respondent violated Section 19(a)(6) of the Executive Order by virtue of its actions in determining to relocate the MACIMS facility without consulting, conferring or negotiating with the exclusive representative with respect to the impact of the relocation on unit personnel.

Section 11(a) of Executive Order 11491, as amended, imposes upon an Agency the obligation to meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions of unit employees. Section 11(b) of the Order, however, makes it clear that "the obligation to meet and confer (imposed by Section 11(a)) does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology or performing its work; or its internal security practices".

The above quoted exception contained in Section 11(b) with respect to those subjects normally categorized as "management prerogatives" is applicable only to the initial decision or action of an agency. Thus, as noted in the last sentence of Section 11(b) and as interpreted by the Assistant Secretary and Federal Labor Relations Council, the agency or activity is obligated, however, to consult and confer with respect to the impact of any such "initial decision" or action on unit personnel. 2/

On the basis of the record before me, particularly the credited testimony of Colonel Emmons who was a most sincere and cooperative

witness, I find that no final decision had been made to move or relocate the MACIMS facility to a new location. According to Colonel Emmons, the instructions from Colonel James and the subsequent actions taken thereon were concerned solely with the planning and feasibility of the relocation. While it is true that a date certain was set forth in both the instruction and written communications originating from Colonel Emmons, this date was merely a target date for completing the plans for a possible relocation and was not to be the effective date of the move or relocation. Inasmuch as the decision, which I find to fall within the exception contained in Section 11(b) of the Order, was not finalized, no obligation was imposed upon the Respondent to consult and confer with respect to the impact of the relocation. Moreover, and even assuming that the decision to relocate was of a final nature, I find that in the circumstances here disclosed Respondent did not refuse to bargain in violation of Section 19(a)(6) of the Order. Thus, the record indicates that as early as August 7, 1974, Respondent conveyed information about a possible relocation to its employees, including Chief Union Steward O'Gorman. Thereafter, in response to a letter, Colonel Emmons informed Union President Smith on August 19, 1974, of the proposed move, some twelve days prior to the contemplated relocation. Despite the aforementioned notice, no request for bargaining, on either the procedures to be utilized or the impact on unit employees was ever made by responsible union officials. In the absence of such a request, insufficient basis exists for a 19(a)(6) finding. 3/

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Footnote 2/ carried over from page 4.

2/ Immigration and Naturalization Service, FLRC No. 70-A-10 (April 15, 1971), Plum Island Animal Disease Laboratory, FLRC No. 71A-11 (July 9, 1971); Griffiss Air Force Base, FLRC No. 71A-30 (April 19, 1973); Norton Air Force Base, A/SLMR No. 261 (April 30, 1973); U. S. Department of Interior, Bureau of Indian Affairs, A/SLMR No. 341 (January 9, 1974); New Mexico Air National Guard, A/SLMR No. 362 (February 28, 1974); Army and Air Force exchange service, A/SLMR No. 451 (October 31, 1974). Federal Railroad Administration, A/SLMR NO. 418 (July 31, 1974).

3/ U. S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261 (April 30, 1973) Cf. Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No. 508 (April 29, 1975)

RECOMMENDATION

Upon the basis of the foregoing findings and conclusions, I hereby recommend to the Assistant Secretary that the complaint herein against Respondent be dismissed in its entirety.

  
BURTON S. STERNBURG  
Administrative Law Judge

Dated: July 17, 1975  
Washington, D. C.

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

U.S. DEPARTMENT OF NAVY,  
SUPERVISOR OF SHIPBUILDING,  
CONVERSION AND REPAIR,  
8th NAVAL DISTRICT,  
NEW ORLEANS, LOUISIANA  
A/SLMR No. 572

This case involved a petition for amendment of certification (AC) filed by Local 3513, American Federation of Government Employees, AFL-CIO (AFGE Local 3513) seeking to amend the designation of the labor organization (AFGE Local 3203) named in the certification of representative issued in April 1971. The Activity took the position that the petition should be dismissed because the certified labor organization, AFGE Local 3203, was "defunct" and, further, that the petition failed to meet standards established by the Assistant Secretary for a change in affiliation. AFGE Local 3203 did not intervene in the proceeding or appear at the hearing.

The Assistant Secretary concluded that the evidence did not establish that there was an effective change of affiliation from AFGE Local 3203 to AFGE Local 3513. He noted in this regard that the officers of AFGE Local 3203 were opposed to the "merger" between the two locals; that there had been no meeting of the membership of AFGE Local 3203 to consider the issue of a change in affiliation; and that no vote of the members of AFGE Local 3203 was taken on the affiliation question. 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 NAVY,  
SUPERVISOR OF SHIPBUILDING,  
CONVERSION AND REPAIR,  
8th NAVAL DISTRICT,  
NEW ORLEANS, LOUISIANA

Activity

and

Case No. 64-2667(AC)

LOCAL 3513, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

## DECISION AND ORDER

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

Upon the entire record in this case, including briefs filed by the Activity and the Petitioner, Local 3513, American Federation of Government Employees, AFL-CIO, herein called AFGE Local 3513, the Assistant Secretary finds:

AFGE Local 3513 filed the subject petition for amendment of certification seeking to amend the designation of AFGE Local 3203, named in the certification of representative issued on April 30, 1971, to AFGE Local 3513. 1/ The Activity took the position that the petition should be dismissed because the certified labor organization, AFGE Local 3203, was "defunct" and, further, that the instant petition failed to meet the standards established by the Assistant Secretary for a change in affiliation.

As indicated above, the record indicates that on April 20, 1971, AFGE Local 3203 was certified as the exclusive representative of a unit of all employees of the Activity employed in the Quality Assurance Department (Code 300), located at the Avondale Shipyard. On August 2, 1971, AFGE Local 3203 and the Activity entered into a dues withholding

1/ AFGE Local 3203 did not intervene in this proceeding or appear at the hearing.

agreement. No additional agreement was executed by the parties; however, the record reveals that proposals for an agreement were exchanged between the parties in 1971 and the spring of 1972. Thereafter, the evidence establishes that there was limited contact between the Activity and AFGE Local 3203 although it appears that dues deductions continued. There was no evidence that the membership of AFGE Local 3203 held any meetings. Nor was there any evidence that following an election of officers in 1971, any further elections were conducted. 2/

The record reveals that the President of AFGE Local 3203 was approached by the National Representative of the AFGE for the New Orleans, Louisiana area, apparently sometime in the early part of 1974, with regard to a merger of AFGE Local 3203 with AFGE Local 3513, which the record indicates is an "interdepartmental" AFGE local. The President of AFGE Local 3203 indicated his opposition to such a merger. Thereafter, on May 31, 1974, a letter was sent to the Activity by the AFGE National Representative indicating that AFGE Local 3203 had been "disbanded" and had been "merged" with AFGE Local 3513. In this connection, he requested that the Activity remit checks for dues withholding to the treasurer of AFGE Local 3513. 3/ On June 7, 1974, the Activity communicated with the President of AFGE Local 3203 to ascertain that Local's desires with regard to the "merger," and was informed that while the President was opposed to a merger, he wished to discuss the matter with two other officers of the Local. On June 17, 1974, the Activity was informed by the President of AFGE Local 3203 that all officials of Local 3203 had agreed to "disband" the Local, but that they did not approve or consent to a merger with AFGE Local 3513. Thereafter, on June 24, 1974, the Secretary-Treasurer of AFGE Local 3203 sent a memorandum to the Activity in which he stated that "Local 3203 has been disbanded and no longer exists."

Under the circumstances outlined above, I find that the evidence does not establish that there was an effective change of affiliation from AFGE Local 3203 to AFGE Local 3513. Thus, the evidence establishes that officers of AFGE Local 3203 were opposed to the "merger" between AFGE Local 3203 and AFGE Local 3513; there was no meeting of the membership of AFGE Local 3203 to consider the issue of a change in affiliation; and no vote of the members of AFGE Local 3203 was taken on the affiliation question. 4/ Accordingly, I shall order that the petition in the instant case be dismissed. 5/

2/ The record indicates that the unit contained between 80 and 94 employees in early 1971, but included only some 8 employees in July 1975.

3/ The Activity remitted such dues withholding until sometime in October 1974, at which time the practice was terminated.

4/ See Veterans Administration Hospital, Montrose, New York, A/SLMR No. 470.

5/ It was considered unnecessary for the purpose of this decision to decide whether AFGE Local 3203 was, in fact, defunct.



IT IS HEREBY ORDERED that the petition in Case No. 64-2667(AC) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
October 31, 1975

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

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

UNITED STATES DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE,  
PACIFIC SOUTHWEST AND RANGE  
EXPERIMENT STATION,  
BERKELEY, CALIFORNIA  
A/SLMR No. 573

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3217 (AFGE), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by denying the request for the promotion evaluation records used by the Respondent in selecting an employee to fill a vacant position. The Respondent contended that the evaluation records sought by the AFGE were both confidential and private and that to have provided the records would have been in violation of the provisions of the Federal Personnel Manual (FPM) and the parties' negotiated agreement. In addition, it noted that the request was not made in the context of a specific grievance and that the AFGE refused to attend a meeting to discuss the matter.

The Administrative Law Judge cited the decision of the Federal Labor Relations Council in Department of Defense, State of New Jersey, A/SLMR No. 323, FLRC No. 73A-59, in rejecting the defense of the Respondent that the FPM prohibits production of the documents sought by the Complainant. He noted, in this connection, that the Council concluded that such documents could be produced as long as they were "sanitized" to protect the privacy and confidentiality of the employees whose records were involved. With respect to the Respondent's use of the negotiated agreement as a defense, the Administrative Law Judge noted that the specific agreement language alleged to be a defense tracked the FPM language specifically rejected by the Council in the above-noted case as prohibiting access to promotion evaluation records. The Administrative Law Judge concluded also that the fact no grievance was filed was not determinative. In this regard, he construed the language of the Council's decision in the above-noted case, to include an incipient grievance. In addition, he noted that the Assistant Secretary held in Department of Health, Education and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411, that the refusal of an activity to make available relevant and necessary information in connection with determining whether or not to initiate grievances was violative of the Order. However, the Administrative Law Judge found that the request for evaluation records made by the AFGE in the

instant case was substantially broader than that which the Respondent had the obligation to produce. Therefore, the Administrative Law Judge concluded that the burden shifted back to the AFGE, once the Respondent denied the evaluation records based on confidentiality and privacy, to request specifically what it was seeking and willing to accept. In addition, the Administrative Law Judge considered the AFGE's refusal to attend a meeting to discuss the matter to be an indication of an inclination not to modify its original request.

The Assistant Secretary agreed with the Administrative Law Judge's recommendation that the complaint be dismissed. In this regard, the Assistant Secretary noted that he had been advised administratively that the AFGE was decertified as the exclusive representative of the Respondent's employees on July 31, 1975, pursuant to a decertification petition and an agreement for a consent election. Therefore, he found that the issues raised in the complaint were rendered moot. However, the Assistant Secretary did not adopt the rationale of the Administrative Law Judge that the AFGE's request for evaluation records was substantially broader than that which the Council, in the above-noted case, held an activity would be required to produce. In the Assistant Secretary's view, the AFGE's request was sufficiently specific and it sought relevant and necessary information which, under normal circumstances, the Respondent would have been required to produce. Moreover, the fact that the information was not requested in "sanitized" form did not warrant a denial of the request in toto and did not shift the burden to the exclusive representative to make a second request concerning what it is seeking or willing to accept.

Accordingly, the Assistant Secretary ordered that the unfair labor practice complaint be dismissed.

A/SLMR No. 573

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE,  
PACIFIC SOUTHWEST AND RANGE  
EXPERIMENT STATION,  
BERKELEY, CALIFORNIA

Respondent

and

Case No. 70-4160

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 3217

Complainant

DECISION AND ORDER

On August 14, 1975, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

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

The instant complaint alleged essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by denying the Complainant's request for the promotion evaluation records used by the Respondent in selecting an employee to fill a vacant position. In this regard, the Complainant contended that it was denied information necessary for it to act intelligently on behalf of an employee it was responsible for representing under Section 10(e) of the Order.

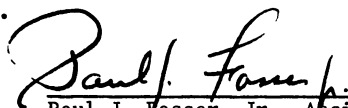
I have been advised administratively that subsequent to the filing of the unfair labor practice complaint in the subject case, a decertification petition was filed by an employee in Case No. 70-4580 and that, pursuant to the decertification petition and an agreement for a

consent election, the Complainant was decertified on July 31, 1975, as the exclusive representative of the unit involved in the instant case. Under these circumstances, I find that the issues raised by the instant unfair labor practice complaint concerning the obligation of the Respondent to supply certain data to its employees' exclusive representative have been rendered moot. Accordingly, I shall order that the complaint in the instant case be dismissed. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-4160 be, and it hereby is, dismissed.

Dated, Washington, D. C.  
October 31, 1975

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

1/ While I agree with the Administrative Law Judge, for the reason stated above, that dismissal of the complaint in this matter is warranted, I do not adopt his rationale that, in the circumstances of this case, the Complainant's "request for evaluation information herein was substantially broader than that which the Council held an activity would be required to produce." Nor do I adopt his conclusion "that it was the obligation of the Union after the documents were denied on the basis of confidentiality or privacy to specifically request what it was they were seeking or willing to accept." In my view, the Complainant's request herein for evaluation information was sufficiently specific and it sought relevant and necessary information which, under normal circumstances, the Respondent would be required to produce. Thus, where there is a specific request for relevant and necessary information, in my judgment, the fact that such information may have to be "sanitized" prior to its being made available to the employees' exclusive representative, does not warrant a denial of the request in toto, and does not shift the burden to the exclusive representative to make a second request concerning what it is seeking or is willing to accept. See Department of Defense, State of New Jersey, A/SLMR No. 539.

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



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In the Matter of :  
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United States Department of :  
Agriculture Forest Service, :  
Pacific Southwest and Range :  
Experiment Station, :  
Berkeley, California :  
Respondent : Case No. 70-4160  
 :  
and :  
 :  
American Federation of Government :  
Employees, AFL-CIO, Local 3217 :  
Complainant :  
.....

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Before: SALVATORE J. ARRIGO  
Administrative Law Judge

REPORT AND RECOMMENDATION

Preliminary Statement

This proceeding heard in Los Angeles, California on August 20, 1974, arises under Executive Order 11491, as amended (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereafter called the Assistant Secretary),

a Notice of Hearing on Complaint issued on July 26, 1974, with reference to an alleged violation of Sections 19(a) (1) and (6) of the Order. The amended complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3217 (hereafter called the Union or Complainant) alleged that the United States Department of Agriculture Forest Service, Pacific Southwest and Range Experiment Station, Berkeley, California, (hereafter called the Activity or Respondent) violated the Order by denying the Union's request for all promotion evaluation records used by the Activity in its selection of an employee to fill a vacant secretarial position.

At the hearing the parties were represented and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both parties.

Upon the entire record in this matter, from my reading of the briefs 1/ and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

At all times material herein the Union has been the exclusive collective bargaining representative of various professional and non-professional employees employed by the Activity. The parties are signators to a two year collective bargaining agreement dated February 6, 1973.

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1/ At the hearing I set September 24, 1974, as the date by which briefs were to be received by me. Although timely briefs were received from both parties, on September 27, 1974, I received a brief supplemental to Complainant's brief from Gene Bernardi who filed the complaint on behalf of the Union at a time when she was its president. Complainant's original brief was filed by Curtis Turner who represented the Union at the hearing. A request for an extension of time for filing the supplemental brief was never submitted nor was such permission granted. Further, the supplemental brief, in part, referred to matters and had attached to it documents not offered into evidence at the hearing. Accordingly, the supplemental brief is rejected and was not considered in reaching the decision herein.

In August 1973, Mrs. Marjorie Hustead, an employee and member of the collective bargaining unit requested that she be considered for promotion to a GS-6 secretarial position for which a vacancy had been announced by the Activity. In late September 1973, Mrs. Hustead met with a Dr. Lynch, the individual for whom the person selected for the secretarial position would be working, and was informed that she was one of three candidates being considered for the job. However, since all three applicants were rated equal in ability an additional evaluation statement was being requested from each of the candidates' supervisors. On October 15, 1973, Dr. Lynch notified Mrs. Hustead that she was not selected for the position.

On the following day, October 16, Mrs. Hustead telephoned the Union's president Gene Bernardi and expressed dissatisfaction that she had not been picked for the job. Mrs. Hustead complained that the person who had been selected for the position (Irene Althaus) had actually been "preselected". Hustead came to this conclusion since Althaus had received "sensitivity training" prior to her selection. Hustead also conveyed to Bernardi her feeling that Althaus had been selected over her because Althaus was approximately twenty years her junior, an irrelevant consideration. Moreover, Hustead was of the opinion that she was actually better qualified than either of the two candidates especially when her agency experience was compared with the other candidates' agency experience. Bernardi told Hustead she would look into the matter. 2/

Having concluded that the candidates for the vacancy must not have been properly ranked, on October 16, 1973, Bernardi, as Union president, wrote the Activity the following letter:

"In accord with the decision of Labor Department Administrative Law Judge in Case No. 32-2833 (CA) (July 13, 1973) AFGE Local 3217 requests that it be provided for examination all promotion evaluation records in connection with the filing of the Secretary (Stenography)

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2/ Hustead did not at this time or at any other time indicate that she wished to file a grievance on the matter. Indeed the evidence discloses that she wished to avoid personally filing a grievance over the selection.

GS-318-06 position at the Fire Lab in Riverside.

"The Local requests that all records in the evaluation of candidates for the above same position be submitted for examination. This includes the point scores or any other types of ratings or evaluation statements for each candidate made by the evaluation panel or any other persons involved in the evaluation of the candidates. Please also submit for the Local's examination the supervisory appraisals for all of the candidates, and rankings of the candidates made at any and all stages of the selection procedures."

By memo dated October 24, 1973, the Activity responded to the Union's request as follows:

"Based on our understanding of the Forest Service regulations and the Labor-Management Agreement between Local 3217 and PSW Station, we have no basis on which to grant your request.

"The Forest Service Merit Promotion Plan, and Section 8, Article 8, of our Labor-Management Agreement are specific as to what information concerning a specific promotion action an employee or his or her designated representative are entitled to receive. The Forest Service Merit Promotion plan is also clear in establishing that an employee is not entitled to see an appraisal of another employee.

"As a matter of information, the case you cite has not been ruled on by the Assistant Secretary for Labor-Management Relations. As you no doubt know, the findings and recommendations made by a Labor Department Administrative

Law Judge must be reviewed by the AS/LMR. As of this date no decision has been made and therefore, the case is not binding.

"We note that your letter does not give any indication that you believe an error was made in making this selection."

By letter dated October 28, 1973, the Union took issue with the Activity's refusal and charged the Activity with having violated the Order. The Union alleged that the refusal "... constituted a denial of information to the Local necessary to intelligently act on behalf of an employee it is entitled to represent", in violation of Section 10(e) of the Order.

The Activity responded to the Union on November 16, 1973, contending inter alia, that evaluation records and appraisals were confidential "to ensure employee privacy" and pointing out to the Union that the July 13, 1973, decision of the Administrative Law Judge in Case No. 32-2833(CA) 3/ involved "a grievance of the rating procedure filed by an employee not selected during a promotion action." The Activity also contended and the Union subsequently denied that the charge of an unfair labor practice "lacks specificity." Thereafter, on January 10, 1974, the Union filed the complaint herein. The only oral communication between the parties on this matter occurred when on some undisclosed date prior to April 8, 1974, management proposed a meeting with the Union suggesting there could be an informal resolution of the matter. At that time Bernardi asked if at such a meeting the Activity would produce "the promotion evaluation records". When she was told "no", Bernardi, without flatly refusing to meet, stated she thought it would be a waste of time to meet under those circumstances and no meeting occurred.

Positions of the Parties

The Union contends that the Activity's conduct herein deprived it of information necessary to intelligently carry out its legitimate function as the employees' collective bargaining representative. By letter to the Activity dated March 7, 1974, the Union summarized its position to that date and stated, inter alia:

"Your October 24, 1973 memo notes that our October 16, 1973 letter does not

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3/ Department of Defense, State of New Jersey, A/SLMR No. 323, issued November 16, 1973.

indicate we believe an error was made in selection. Obviously, the Local believes an error was made in selection or it would not be asking for the promotion evaluation records. However, the Local did not file a grievance over this matter because: (1) It was denied the information it needs in order to determine whether the belief is correct, (2) if correct, denied the documentation needed to support the case for the employees it represents, and (3) because E.O. 11491 (as amended) clearly forbids an issue raised under that Order's complaint procedure in Section 19 from also being raised under a grievance procedure."

Essentially the Activity finds support for its refusal to give the Union the requested information in the Federal Personnel Manual (FPM), the terms of which are incorporated in its collective bargaining agreement, 6/ and the U.S. Department of Agriculture Forest Service Merit Promotion Plan. Respondent, also contends that Complainant failed to show any compelling need or give any compelling reasons for the records it has requested. Moreover, Respondent asserts that the terms of the parties' current collective bargaining agreement supports its refusal.

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6/ Article 3, Section 3 of the agreement provides:

"Section 3. 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."

Conclusions of Law

The defense that the FPM prohibits the disclosure of evaluation records similar to those sought herein has been treated in Department of Defense, State of New Jersey, A/SLMR No. 323, FLRC No. 73A-59, reported in the Federal Labor Relations Council Report of Case Decisions No. 71, June 11, 1975. In that case the Assistant Secretary held "... under Section 10(e) of the Order, a labor organization is given the responsibility for representing the interests of all employees in the unit. Clearly, it cannot meet this responsibility if it is prevented from obtaining relevant and necessary information in connection with the processing of grievances." However, since the respondent therein raised the FPM as a defense to the production of the documents in question the Assistant Secretary concluded that a major policy issue was raised and referred the issue to the Federal Labor Relations Council (the Council or FLRC) for decision.

Thereafter, the FLRC sought an interpretation from the Civil Service Commission. Based upon the interpretation it received from the Commission the FLRC found that Commission instructions as set forth in the FPM did not specifically prohibit nor authorize access on the part of a grievant or his representative to the materials at issue. The Council in its treatment of the case stated, inter alia; 7/

"The Commission's primary interest, as can be seen in the FPM's prohibition on casual access and in the distinction between an employee's access to his own records and to those of others, is to safeguard the privacy of Federal employees. It has never been the Commission's intention that information necessary to the processing of an employee grievance be withheld absolutely from the grievant or his representative. The agencies' responsibility to protect employees from invasion of privacy by limiting access to their personnel records is a very serious one. In the great majority of cases, however, we believe this responsibility is fully compatible with

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7/ The Council in its reply to the Assistant Secretary noted the Commission's reference to another case wherein it gave advice on a similar issue. [National Labor Relations Board, Region 17, and National Labor Relations Board and David A. Nixon, FLRC No. 73A-53 (October 31, 1974), Report No. 59].

disclosure of sufficient information to the grievant or his representative to enable him to decide whether to proceed with his grievance and to develop his case. The methods of "sanitizing" records, such as blocking out identifying marks, and abstracting or summarizing the contents of documents, discussed in connection with the preparation of an official grievance file in our August 29 letter, are equally relevant to the case at hand.

"In summary, since we find no specific prohibition in law or Commission instructions concerning access to the materials in question on the part of the grievant or his representative, and in view of the availability of methods for protecting the privacy of employees while divulging relevant information from their records, we believe the agency can make available the requested materials (including "sanitized" performance appraisals) to the grievant or his representative without any violation of law, rule, or Commission directive."

Thus the Council held that applicable laws and regulations, including the FPM, do not specifically preclude disclosure to the grievant or his representative, "... in the context of a grievance proceeding certain relevant and necessary information used by the evaluation panel in assessing the qualifications of the ... candidates for appointment." The Council concluded that disclosure to the grievant of such "relevant" materials, after "sanitizing", effectuates the purposes of the Order in that "... disclosure of the materials may enable the grievant to decide whether or not to proceed with his grievance, while the requisite anonymity protects the privacy of the Federal employee as required by law and regulations."

Accordingly, in view of the above, I find that information of the general nature sought by Complainant herein was not precluded from disclosure to the Union by the Federal Personnel Manual as contended by Respondent. The same is true of Respondent's reliance upon provisions in

its Merit Promotion Plan 8/ in that the Merit Promotion Plan is nothing more than an embodiment of the applicable provisions of FPM Chapter 335, subchapter 5-2.

In my opinion the fact that no grievance was ever filed herein is not determinative of the disposition of this case. Thus the Council in discussing the Department of Defense, State of New Jersey case, supra, recognized the necessity for the "... disclosure of sufficient information to the grievant or his representative to enable him to decide to proceed with his grievance and develop his case," (emphasis supplied), the very reasons why the Union herein sought the

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8/ The sections of the Merit Promotion Plan relied on by Respondent provide:

"C. Promotion roster appraisals will be discussed with the employee who will initial the 6100-10 to indicate that this has been done. Changes made by reviewers will also be discussed with him. An employee does not have the right to see the ranking of another employee other than for official purposes.

"D. Upon request, supervisors will discuss with the employee the following information about specific promotion actions:

- (1) Whether he was considered, whether he was eligible, and whether he was in the group from which selection was made.
- (2) Who was selected for the position.
- (3) How the employee may better prepare himself to qualify for similar positions."

evaluation information. 9/ I construe the Council's language to embrace an incipient grievance and not merely one where an actual "filing" under a formal grievance procedure has occurred. Indeed, in Department of Health, Education and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411, it was held that the refusal of an activity to make available relevant and necessary information in connection with determining whether or not to initiate grievances 10/ constitutes a violation of Sections 19(a)(1) and (6) of the Order. Further, the Union responsibilities under Section 10(e) of the Order to represent the interest of all employees in the unit, in my view, marks the Union as a party who has more than merely a "casual" interest in unit promotions and the criteria used and carries with it the right to police such promotional actions by the Activity especially where, as here, a complaint from a unit employee about the action is received by the Union. Moreover, it is noted that in its letter to the Activity dated October 28, 1973, the Union informed the Activity that the Union needed the information "... to intelligently act on behalf of an employee it is entitled to represent."

I also find and conclude that the parties' collective bargaining agreement does not support Respondent's refusal to provide evaluation information. Respondent relies on the language of Article 8, Section 8 of the agreement which provides:

"Section 8. An employee or his or her designated representative may

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9/ I find the relevancy and necessity of such information to the Union to be inherent in the Union's status as the exclusive collective bargaining representative. Accordingly the Union was under no obligation to tell the Activity its particular need for such information in order to give rise to the Activity's obligation to produce the data.

10/ The collective bargaining agreement herein accords the Union the right to file a grievance. Article 20 of the agreement provides in relevant part: "A grievance is defined as a complaint of dissatisfaction and request for personal relief or the adjustment of a decision subject to the control of agency management or the Local relating to an interpretation or application of a negotiated agreement whether filed by an employee, or group of employees, or the parties to this agreement."

inquire through his immediate supervisor the following:

1) Whether the applicant was considered, whether he or she was eligible, and whether he or she was in the group from which selection was made.

2) Who was selected for the position.

3) How the employee may better prepare himself to qualify for similar positions."

This section of the agreement closely tracks the language of Subchapter 5 of FPM Chapter 335, Section 5-2 which the Council in the Department of Defense, State of New Jersey case, supra, specifically considered and rejected as prohibiting access to promotion evaluation materials.

However, the Council in its decision in the Department of Defense, State of New Jersey case held that evaluation information as requested in the case herein can be made available without violation of laws, rules or Commission directives "provided the manner in which the information is made available protects the privacy of the employees involved by maintaining the confidentiality of the record. ..." Accordingly, there is no absolute right to the documents sought by the Union. Rather, as I construe the Council's decision the Union has the right to receive, and the Activity the obligation to produce, only evaluation records which have been properly "sanitized" 11/ to provide the requisite anonymity of the Federal employees involved. But the Union's request for evaluation information herein was substantially broader than that which the Council held an activity would be required to produce. While the Respondent never indicated a willingness to provide even a "sanitized" version of the evaluation materials, neither did the Union make such a request or indicate such would be acceptable. I find that it was the obligation of the Union after the documents were denied on the basis of confidentiality or privacy to specifically request what it was they were seeking or willing to

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11/ E.g., concealing identifying information or if not possible, providing extracts, etc. (See National Labor Relations Board, supra.)




accept. Having done so the Activity could be expected to evaluate that request and decide whether it was obligated to reject or comply with it under the Order and existing regulations.

Moreover, it is apparent that the Union was not inclined to modify its demand for "all records" involved in the candidates' evaluation and ultimate selection for the vacancy. Indeed the Union foreclosed any discussion on the matter when it rejected an offer to meet with the Activity to explore the possibility of informally adjusting the dispute. It preferred instead to stand on its demand for "all records" and when it was informed that the Activity would not accede to this demand it precluded discussion which might have produced either an offer of something less than what was requested or perhaps an indication that the Activity would not give the requested material in any form or degree whatsoever.

In all circumstances herein I find and conclude that inasmuch as the Union's request for "all records" without limitation or further delineation was substantially broader than that which the Activity was obligated to produce and the Union demonstrated a disinclination to modify its demand, the Activity was privileged to refuse the request without violating the Order. 12/

RECOMMENDATION

I recommend that the complaint herein be dismissed.

  
SALVATORE J. ARRIGO  
Administrative Law Judge

Dated: **AUG 14 1975**  
Washington, D.C.

12/ This is not to say however that in all situations a request for information can be refused under the Order merely because the information is not available or producible in the precise form in which the request was made. See NLRB v. Western Wirebound Box Co., 356 F.2d 88.

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

DEPARTMENT OF THE AIR FORCE,  
HEADQUARTERS, 31st COMBAT SUPPORT GROUP,  
HOMESTEAD AIR FORCE BASE,  
HOMESTEAD, FLORIDA  
A/SLMR No. 574

This case, which was before the Assistant Secretary based on a stipulation of facts, accompanying exhibits and briefs submitted by the parties, involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1167 (NFFE) against the Department of the Air Force, Headquarters, 31st Combat Support Group, Homestead Air Force Base, Homestead, Florida (Respondent). The complaint alleged that the Respondent had violated Section 19(a)(1), (5) and (6) of the Order by refusing to enter into negotiations for a new collective bargaining agreement with the NFFE. The Respondent contended, in essence, that the complaint should be dismissed as it was precluded from negotiating a new agreement with the NFFE due to a pending question concerning representation.

The record revealed that in July 1967 the NFFE was granted exclusive recognition for a unit of, "...All Air Force civilian employees serviced by the Central Civilian Personnel Office at Homestead AFB, Florida..." Thereafter, the Respondent and the NFFE entered into a negotiated agreement which became effective on April 4, 1972, and was for a term of two years, with provision for automatic renewal on a year-to-year basis if neither party sought to renegotiate the agreement. Upon the expiration of the agreement in April 1974, it was renewed for an additional year inasmuch as neither party had sought to renegotiate. On August 23, 1974, Local F-182, International Association of Firefighters (IAFF) filed a petition seeking a unit of firefighters employed by the Respondent. The Respondent moved to dismiss the IAFF's petition on the basis it was filed untimely. A notice of hearing was issued in this matter by the Assistant Regional Director of the Labor-Management Services Administration (LMSA) on October 9, 1974, and a hearing was conducted on May 20, 1975, resulting in a determination by the Assistant Secretary (A/SLMR No. 549), issued on August 28, 1975, that the firefighters were part of the existing NFFE unit and that, therefore, the petition filed by the IAFF was untimely.

On January 6, 1975, the President of NFFE Local 1167 had sent a letter to the Respondent's Civilian Personnel Officer stating that it wished to enter into negotiations for a new agreement for its exclusively recognized unit. The Respondent refused to negotiate a new agreement stating that it could not enter into negotiations with the NFFE because it was obligated to maintain a neutral posture pending resolution of the

representation question raised by the IAFF's petition. However, its offer to extend the existing agreement for a period not to exceed 90 days after a final decision on the representation petition was agreed to by the NFFE on March 3, 1975, subsequent to the filing of the unfair labor practice charge in the instant case on February 3, 1975.

The Assistant Secretary concluded that the complaint filed by the NFFE should be dismissed. Thus, it was noted that it was held in Department of the Navy, Naval Air Rework Facility, Jacksonville, Florida, A/SLMR No. 155, that while it was reasonable and would promote desired stability for an activity to continue to administer an existing negotiated agreement with a labor organization while a question concerning representation is pending, an activity would breach its obligation of neutrality by entering into negotiations for a new agreement with an incumbent labor organization under such circumstances. In accordance with these principles, the Assistant Secretary held that in the instant case where a question concerning representation had been raised with respect to a portion of the NFFE's unit, the Respondent could extend the terms of the existing agreement but was not obligated to negotiate a new agreement. In this regard, the Assistant Secretary noted that the record indicated that the Respondent did not use the pendency of the representation question as a pretext to avoid its obligations owed to the NFFE as the incumbent exclusive representative but, rather, acted in good faith in its dealings with the NFFE. Thus, the Respondent filed a motion to dismiss the IAFF's petition with the Assistant Regional Director; offered to extend its existing negotiated agreement with the NFFE pending the resolution of the representation question; and the evidence established that, prior to the Respondent's refusal to negotiate, the Assistant Regional Director had issued a notice of hearing with respect to the IAFF's petition. Under these circumstances, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,  
HEADQUARTERS, 31st COMBAT SUPPORT GROUP,  
HOMESTEAD AIR FORCE BASE,  
HOMESTEAD, FLORIDA

Respondent

and

Case No. 42-2781(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,  
LOCAL 1167

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Acting Assistant Regional Director William D. Sexton's June 19, 1975, Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(a) of the Assistant Secretary's Regulations. Upon consideration of the entire record in the subject case, which includes the parties' stipulation of facts and accompanying exhibits, and briefs filed by both parties, I find as follows:

The Complainant, National Federation of Federal Employees, Local 1167, hereinafter called the NFFE, was granted exclusive recognition in July 1967 for a unit of, "...All Air Force civilian employees serviced by the Central Civilian Personnel Office at Homestead AFB, Florida..." Thereafter, the Respondent Activity and the NFFE entered into a negotiated agreement which became effective on April 4, 1972, and was for a term of two years, with provision for automatic renewal on a year-to-year basis. It provided also that a party wishing to terminate or renegotiate the agreement should notify the other party, in writing, of its intent to terminate or renegotiate not more than 90 and not less than 60 days prior to the expiration of the agreement. Inasmuch as neither party served notice on the other of its desire to renegotiate the agreement during the prescribed period, the agreement automatically was renewed in 1974, with a new expiration date of April 3, 1975.

On August 23, 1974, Local F-182, International Association of Firefighters, hereinafter called IAFF, filed a petition seeking an election in a unit of all nonsupervisory firefighters, crew chiefs and fire inspectors employed by the Respondent. The IAFF asserted, in substance, that the firefighter classifications covered by the petition were

not part of the NFFE's existing unit but were, in effect, new employee classifications which were unrepresented. On the other hand, both the Respondent and the NFFE took the position that the claimed employees were part of the existing unit represented by the NFFE and, thus, the negotiated agreement between the Respondent and the NFFE constituted a bar to the IAFF's petition. In this connection, the Respondent filed a motion to dismiss the IAFF's petition with the Assistant Regional Director of the Labor-Management Services Administration (LMSA) in Atlanta, Georgia, on the basis that such petition was filed untimely. The Respondent subsequently sent a letter to the LMSA Area Director in Miami, Florida, asserting that the unit sought was inappropriate and reiterating its contention that the claimed employees were part of the NFFE's unit and, thus, the IAFF's petition was barred by an existing negotiated agreement.

The LMSA Assistant Regional Director determined that there were factual issues involved which could best be resolved on the basis of record testimony and, accordingly, he issued a notice of hearing on October 9, 1974, which hearing subsequently was held on May 20, 1975. 1/

On January 6, 1975, the President of NFFE Local 1167 sent a letter to the Respondent's Civilian Personnel Officer stating that the NFFE wished to enter into negotiations for a new agreement. The request to renegotiate was filed within the 90 to 60 day period preceding the expiration date of the parties' renewed agreement. The Respondent replied to the NFFE's request on January 23, 1975, stating that it could not enter into negotiations with the NFFE because it was obligated to maintain a neutral posture pending resolution of the representation question raised by the IAFF's petition. However, the Respondent offered to extend the then current negotiated agreement for a period not to exceed 90 days after a final decision was rendered in the representation proceeding. Subsequently, by letter dated March 3, 1975, the NFFE agreed to the Respondent's proposal to extend the then current negotiated agreement. Nevertheless, between January 23, 1975, and its letter of March 3, 1975, the NFFE filed the unfair labor practice charge and complaint in this matter. Thus, on February 3, 1975, the NFFE filed a charge with the Respondent alleging that the latter had violated Section 19(a)(1), (5) and (6) of the Order by refusing to enter into negotiations for a new agreement. In this regard, it contended that the possible diminution the scope of the bargaining unit did not lessen the Respondent's obligation to bargain; that an agency or activity is obligated only to maintain a neutral stance in a situation where a rival labor organization has filed a timely and valid challenge; and that the challenge filed by the IAFF in the representation matter was neither timely nor valid. Further, the NFFE contended, in substance, that the resolution of the representation question would render the Respondent's position meaningless, i.e., that if the Assistant Secretary determined that the firefighters

1/ On August 28, 1975, the Assistant Secretary issued his Decision and Order in the representation proceeding. See Department of the Air Force, 31st Combat Support Group, Homestead Air Force Base, Homestead, Florida, A/SLMR No. 549. It was found that the evidence established that the employees sought by the IAFF were part of the existing unit covered by a negotiated agreement and that the IAFF's petition, therefore, was filed untimely. Accordingly, the IAFF's petition was dismissed.

were part of the NFFE's unit, then the IAFF's petition would be dismissed as untimely, and if the Assistant Secretary concluded that the firefighters were not part of the existing unit, then the Respondent's refusal to negotiate on the basis of the pending representation question was groundless. On February 14, 1975, the NFFE filed the complaint in the instant case reiterating the arguments made in its pre-complaint charge.


In its motion to the LMSA Area Office and in its brief filed with the Assistant Secretary, the Respondent asserted that the NFFE's unfair labor practice complaint should be dismissed. In this regard, it argued, among other things, that it was obligated to remain neutral during the pendency of a representation petition which raised a valid question concerning representation. The Respondent noted that in Department of the Navy, Naval Air Rework Facility, Jacksonville, Florida, A/SLMR No. 155, the Assistant Secretary had concluded that while it was reasonable, and promoted desirable stability, for an activity to continue to administer an existing negotiated agreement with an incumbent labor organization while a question concerning representation was pending, an activity would breach its obligation of neutrality by entering into negotiations with an incumbent labor organization for a new agreement under such circumstances.

In my view, and consistent with the holding in A/SLMR No. 155, in the instant case, when a question concerning representation clearly had been raised with respect to a portion of the NFFE's exclusively recognized unit, while the Respondent was obligated to continue to honor its existing agreement with the NFFE throughout its duration and could properly extend the terms of the existing agreement while awaiting resolution of the representation matter, it was not obligated to negotiate a new agreement with the NFFE covering employees in the exclusively recognized unit until the representation question was resolved with respect to those employees sought by the IAFF and alleged by the NFFE and the Respondent to be included in the unit. In this regard, it was noted that the record indicates that the Respondent did not use the pendency of the representation question as a pretext to avoid its obligations owed to the NFFE as the incumbent exclusive representative but, rather, clearly acted in good faith in its dealings with the NFFE. Thus, it filed a motion to dismiss the IAFF's petition with the Assistant Regional Director; offered to extend its existing negotiated agreement with the NFFE pending the resolution of the representation question; and the evidence establishes that prior to the NFFE's request to negotiate, the Assistant Regional Director had issued a notice of hearing with respect to the IAFF's petition.

Under these circumstances, I find that the Respondent did not violate Section 19(a)(1), (5) and (6) of the Order by refusing to negotiate a new agreement with the NFFE as there existed a valid question concerning representation with respect to a portion of the unit represented exclusively by the NFFE. Accordingly, I shall order that the complaint herein be dismissed.

IT IS HEREBY ORDERED that the complaint in Case No. 42-2781(CA) be,  
and it hereby is, dismissed.

Dated, Washington, D.C.  
October 31, 1975

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

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

GENERAL SERVICES ADMINISTRATION,  
REGIONAL OFFICE, REGION 4  
A/SLMR No. 575

This case arose as the result of a petition filed by the American Federation of Government Employees, Local 2067, AFL-CIO, seeking a unit of all professional and nonprofessional employees at the Regional Office, General Services Administration, Region 4, located at Atlanta, Georgia. The Activity contended that the petitioned for unit was not appropriate because it excluded other employees of the Region who share a community of interest with employees in the petitioned for unit and, further, that the petitioned for unit would not promote effective dealings or efficiency of agency operations.

Under all of the circumstances, the Assistant Secretary found that the employees in the petitioned for unit share a clear and identifiable community of interest separate and distinct from other employees of the Region. In this regard, the Assistant Secretary noted, among other things, that the petitioned for unit is comprised primarily of GS employees in specialist occupations, headquartered together in one building in Atlanta, while other Regional employees are mostly in Wage Grade classifications, dispersed in numerous field locations over an eight state area.

Also, the Assistant Secretary found that the petitioned for unit would promote effective dealings and efficiency of agency operations. In this connection, he noted the absence of evidence adduced regarding the impact of the claimed Regional Office unit on effective dealings and efficiency of agency operations and the lack of any specific countervailing evidence submitted by the Activity as to the lack of effective dealings and efficiency of operations experienced in Region 4 as well as those regions of the Agency where less than regionwide units have been recognized or certified and where there currently exist negotiated agreements.

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

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,  
REGIONAL OFFICE, REGION 4

Activity

and

Case No. 40-6038(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2067, 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 Renee B. Rux. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

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

2. The Petitioner, American Federation of Government Employees, Local 2067, AFL-CIO, herein called AFGE, seeks an election in a unit of all professional and nonprofessional employees of the Regional Office, General Services Administration, Region 4, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order. 1/ At the hearing, the AFGE indicated that, in the alternative, it would be willing to proceed to an election in a unit which would include all General Services Administration employees in the Atlanta metropolitan area, excluding employees currently in exclusively recognized units. 2/

The Activity contends that both the petitioned for unit and the alternative unit are inappropriate because the employees in the proposed units do not have a community of interest separate and distinct from other employees in Region 4, and because the proposed units would not promote effective dealings and efficiency of agency operations.

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

2/ The record indicates that currently there are 17 exclusively recognized units in Region 4.

The General Services Administration, herein called GSA, has its central office in Washington, D.C., and has ten regional offices, each under the direction of a Regional Administrator. Atlanta, Georgia, the headquarters for Region 4, encompasses the states of North Carolina, South Carolina, Kentucky, Tennessee, Georgia, Alabama, Mississippi and Florida and employs some 2200 individuals in the Atlanta Regional Office and in numerous field locations. There are four program services in Region 4: the Automated Data and Telecommunications Service (ADTS), which provides telecommunications and data services for Federal agencies; the Federal Supply Service (FSS), which purchases supplies for Federal agencies and operates a fleet of vehicles; the National Archives and Records Service (NARS), which stores and maintains government records and documents and items of historical interest; and the Public Buildings Service (PBS), which constructs, purchases, leases, and maintains property for Federal agencies. In addition, GSA provides various support functions, such as payroll services and legal counsel for each of its four services. Each of the GSA's four services in Region 4 is headed by a Regional Administrator. The evidence establishes that administration of the Region is centralized in the Regional Office with field supervisors having limited discretion in the implementation of programs and directives.

The parties stipulated that program functions, job duties and job descriptions are uniform throughout the Region. In this regard, the record revealed that all employees of the Region are subject to common personnel policies and regulations, with personnel actions being processed through the Regional Personnel Office and labor relations matters handled by the Regional Labor Relations Officer and the Office of the Regional Counsel. Job vacancies may be posted locally, regionally, or nationally, but in reductions-in-force, the record reveals that the area of consideration is the commuting area involved.

The claimed unit in the Regional Office consists of approximately 435 employees. 3/ All Regional Office employees are headquartered in the same building in Atlanta while field employees are dispersed in some 99 field locations over an eight state area. With respect to the job classifications employed in Region 4, the record shows that except for some 15 employees in the printing plant, all Regional Office employees are in GS classifications consisting primarily of specialist occupations together with clerical employees. By contrast, the majority of Region 4 employees in field locations are in Wage Grade classifications together with telephone operators and clerical employees. Regarding the program services in the field, the ADTS employees are mostly telephone operators; FSS is comprised primarily of classifications engaged in automotive services; and the largest service, PBS, consists mainly of custodial laborers. None of these foregoing occupational classifications are present in the Regional Office.

3/ Region 4 has approximately 900 eligible employees.

Although all Region 4 employees share the same overall mission, the record reflects that contact between the field locations and the Regional Office generally is through supervisory personnel and that there is minimal interaction among the employees of the various field locations in the four programs services and those of the Regional Office. While there is some contact between these two employee groups through job training programs, this usually is limited to managerial and clerical employees. Further, the record reflects that transfers between the headquarters and the field usually involve supervisory personnel and that, for the most part, field and Regional Office employees do not share common immediate supervision.

Under all of these circumstances, and noting particularly the lack of common supervision, the limited interaction between Regional Office and field employees and the commonality of location and job classifications possessed by Regional Office employees, I find that employees in the petitioned for unit share a community of interest separate and distinct from the field employees of Region 4. Moreover, I find that such a homogeneous unit will promote effective dealings and efficiency of agency operations and that the Activity's contentions to the contrary are, at best, speculative and conjectural. 4/ In this connection, it was noted that, in considering the question of effective dealings and efficiency of agency operations, the Activity addressed itself primarily to alleged problems resulting from a proliferation of units in Region 4, rather than adducing evidence specifically related to the impact of the claimed Regional Office unit on effective dealings and efficiency of agency operations. Moreover, it did not adduce specific countervailing evidence as to a lack of effective dealings and efficiency of agency operations experienced in Region 4 as well as those other regions of GSA where less than nationwide units have been recognized or certified and where there currently exist negotiated agreements. 5/

Under all of these circumstances, I find that the petitioned for unit is appropriate for the purpose of exclusive recognition and I shall direct an election in such unit.

The parties stipulated that employees classified as Architect, Mechanical Engineer, Construction Engineer, Electrical Engineer, Safety Engineer and General Engineer were professional employees within the meaning of the Order. They also agreed to exclude from any unit found appropriate employees classified as Equal Opportunity Officer and Equal Opportunity Specialist involved with equal opportunity programs as they applied to employees of the Activity, employees in the Office of the Regional Counsel, a Legal Administrative Assistant and an Administrative Officer. The parties further stipulated

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4/ Cf. Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559.

5/ Cf. Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564.

that employees classified as Building Fund Coordinator, Transportation Management Specialist, Quality Assurance Specialist, Budget Analyst, Traffic Manager, Management Assistant, Building Management Specialist, Financial Management Specialist and Management Analyst should be included in any unit found appropriate.

In the absence of any evidence that the above stipulations were improper, I find that such stipulations should be accepted. 6/

Based on the foregoing circumstances, I hereby direct an election in the following unit: 7/

All professional and nonprofessional employees of the Regional Office, General Services Administration, Region 4, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees and supervisors as defined in the Order.

It is noted that the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in the unit with employees who are not professional unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in the unit with nonprofessional employees must be ascertained. I shall, therefore, direct separate elections in the following groups:

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6/ The parties stipulated as to the exclusion of an employee temporarily serving as a Management Intern in the Personnel Office pending permanent assignment to that Office. In the absence of any evidence that such stipulation was improper, I find that the employee in question should be excluded from the unit found appropriate as an employee engaged in Federal personnel work in other than a purely clerical capacity. It should be noted, however, that the record does not support a finding that all employees of the Activity in the classification Management Intern should necessarily be excluded from the unit found appropriate. With respect to the parties' attempt to exclude an employee classified as a Criminal Investigator under Section 3(b)(4) of the Order, the record indicated that, while the employee involved was engaged in the investigation of alleged crimes committed on GSA property, he was not employed in either of the two offices which were referred to by the GSA Administrator in a memorandum submitted by the parties in support of their stipulation. Accordingly, and noting that guards are no longer precluded from being included in units with nonguard employees, I find insufficient grounds for excluding the employee classified as a Criminal Investigator from the unit found appropriate.

7/ In view of the disposition herein, I find it unnecessary to decide whether the alternative unit sought by the AFGE also was appropriate.

Voting group (a): All professional employees of the Regional Office, General Services Administration, Region 4, excluding nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees and supervisors as defined in the Order.

Voting group (b): All nonprofessional employees of the Regional Office, General Services Administration, Region 4, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees and supervisors as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the American Federation of Government Employees, Local 2067, AFL-CIO.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 2067, AFL-CIO. In the event that the majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as the nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes in voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the American Federation of Government Employees, Local 2067, AFL-CIO, was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Regional Office, General Services Administration, Region 4, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees and supervisors as defined in the Order.

-5-

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

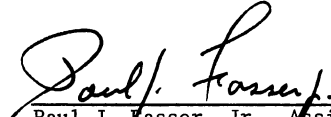
(a) All nonprofessional employees of the Regional Office, General Services Administration, Region 4, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees and supervisors as defined in the Order.

(b) All professional employees of the Regional Office, General Services Administration, Region 4, excluding nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees and supervisors as defined in the Order.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Director 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 employee who quit or who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 2067, AFL-CIO.

Dated, Washington, D.C.  
October 31, 1975

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

-6-

October 31, 1975

A/SLMR No. 576

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

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

DEPARTMENT OF NAVY,  
MILITARY SEALIFT COMMAND  
A/SLMR No. 576

Activity

and

Case No. 22-5395(NCR)

NATIONAL MARITIME UNION OF AMERICA,  
AFL-CIO

Petitioner

This case involved a petition filed by the National Maritime Union of America, AFL-CIO (NMU) seeking national consultation rights (NCR) with respect to the Military Sealift Command (MSC). The NMU contended that the MSC is a primary national subdivision of the Department of the Navy (Navy) which it alleged was an "Agency" within the meaning of Executive Order 11491, as amended.

DECISION AND ORDER ON NATIONAL CONSULTATION RIGHTS

The Administrative Law Judge found that the Department of the Navy was not an "Agency" within the meaning of the Order. Accordingly, he concluded that the MSC, which is a component of the Department of the Navy, is neither an agency nor a primary national subdivision of an agency within the meaning of Section 2(a) of Executive Order 11491, as amended, and Part 2412 of the Federal Labor Relations Council's Rules and Regulations. Therefore, the NMU could not be granted NCR with respect to the MSC. In reaching this conclusion, the Administrative Law Judge found that the Department of Defense (DOD), as an "executive department," is an "Agency" within the meaning of Section 2(a) of the Order, and that the Department of the Navy, a first level of organization within the DOD, is a primary national subdivision thereof.

On July 8, 1975, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, concluding that the Military Sealift Command is neither an agency nor a primary national subdivision of an agency within the meaning of Section 2(a) of Executive Order 11491, as amended, and Part 2412 of the Federal Labor Relations Council's Rules and Regulations. Accordingly, he recommended that the instant petition of the National Maritime Union of America, AFL-CIO, seeking national consultation rights, be dismissed.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the matter, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, and ordered that the petition be dismissed.

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

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-5395(NCR) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
October 31, 1975

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



U.S. DEPARTMENT OF LABOR  
 OFFICE OF ADMINISTRATIVE LAW JUDGES  
 WASHINGTON, D.C. 20210



..... :  
 In the Matter of :  
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 DEPARTMENT OF NAVY :  
 MILITARY SEALIFT COMMAND :  
 :  
 Respondent :  
 :  
 and :  
 :  
 22-5395 (NCR) :  
 :  
 NATIONAL MARITIME UNION OF AMERICA :  
 AFL-CIO :  
 :  
 Complainant :  
 :  
 .....

JOHN J. CONNERTON, ESQ.  
 Labor Disputes and Appeals Branch  
 Labor and Employee Relations Division  
 Office of Civilian Manpower  
 Management, Department of the Navy  
 Washington, D.C. 20390  
 For the Respondent

STANLEY B. GRUBER, ESQ.  
 Abraham E. Freedman  
 346 West Seventeenth Street  
 New York, New York 10011  
 For the Complainant

Before: SAMUEL A. CHAITOVITZ  
 Administrative Law Judge  
 Report and Recommendations  
 Statement of Case

This is a proceeding under Executive Order 11491, as amended (hereafter called the Order). A Notice of Representation Hearing was issued on November 11, 1974 by the Assistant Regional Director for Labor Management Services Administration, Philadelphia Region, based upon a petition for National Consultation Rights filed by the National Maritime Union of America, AFL-CIO (hereafter called NMU or Petitioner). The Petition was filed seeking National Consultation Rights with respect

to the Military Sealift Command (hereafter called MSC) contending MSC is a "primary national subdivision" of the Department of the Navy, (hereafter called Navy or Department of the Navy) alleged to be an "Agency".

A hearing was held before the undersigned in Washington, D. C. All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. 1/ Opportunity was also afforded the parties to argue orally and to file briefs. NMU and MSC and Navy filed extensive briefs, which have been duly considered by the undersigned.

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

Findings of Fact

The Department of Defense (hereinafter called DOD) was organized under the National Security Act of 1947 as amended, 50 USC §401. The Act provides for the separate organization of each military department under its own Secretary and functioning under the direction, authority and control of the Secretary of Defense. Directly under the Secretary is the Deputy Secretary of Defense. There are nine Assistant Secretaries. In addition to the nine Assistant Secretaries, there are, on essentially the same organization level the Director of Defense Research and Engineering, General Counsel, Director, Defense Telecommunications Command and Control Systems and the Assistant to the Secretary Atomic Energy. All of these are part of the Secretariat.

Directly under the Secretary and Deputy Secretary are three military departments, the Department of the Army, the Department of the Air Force and the Department of the Navy. 2/

1/ The transcript is hereby corrected to reflect the changes set forth in Appendix "A" attached hereto.

2/ In addition to the three Military Departments, there are six separate Defense Agencies reportable directly to the Secretary/Deputy Secretary of Defense.

The Department of the Navy is headed by a Secretary of the Navy. Directly under the Secretary of the Navy is the Under Secretary of the Navy.

There are a number of organizational elements which report directly to the Secretary of the Navy. They are the Office of the General Counsel, Office of Information, Office of Legislative Affairs, Office of the Judge Advocate General and the Office of Program Appraisal. There are four Assistant Secretaries of the Navy, they are the Assistant Secretary for Manpower and Reserve Affairs, the Assistant Secretary for Research and Development, the Assistant Secretary for Financial Management and Installations and the Assistant Secretary for Logistics. Directly below and reportable to the Secretary/Under Secretary is the Office of the Chief of Naval Operations (hereinafter referred to as CNO).

The CNO is the central reporting point for a number of Navy Commands, bureaus and directorates. MSC is one of these commands, other such commands and bureaus are the Bureau of Naval Personnel, the Bureau of Medicine and Surgery, Office of the Oceanographer of the Navy, Naval Telecommunications Command, Naval Security Group Command, Naval Intelligence Command, Naval Weather Service Command and the Naval Material Command. Directorates, under CNO, include Navy Program Planning, Command Support Programs, Anti-Submarine Warfare (ASW) and Ocean Surveillance Programs, Research Development, Training and Evaluation (RADT & E) and Naval Education and Training.

The MSC is a ship operating command and a component of the United States Navy. This one of 15 major organizational entities which report to the Chief of Naval Operations. Its mission is to provide:

- (1) Rapid - response strategic sealift
- (2) Base for sealift mobilization expansion
- (3) General sealift support for defense activities
- (4) Sea transportation for special projects

In performing its mission, MSC, organizationally consists of a headquarters element in Washington, D. C.; a European Area Command, headquartered in Bremerhaven, Germany; an Atlantic Area Command, headquartered in New York, New York; a Pacific Area Command, headquartered in Oakland, California and a Far East Command, headquartered in Yokohama, Japan. Only the Atlantic Area Command and the Pacific Area Command are engaged in the operation of ships.

As of November 1974, MSC had a total of 5293 employees. In its two major commands. It had an allowed ceiling of 2033 ship board employees in its Atlantic Command and an allowed ceiling of 1972 ship board employees in its Pacific Command. 2a/

The Petitioner, has exclusive recognition for non-licensed seamen in the Atlantic Area Command. Approximately 70 percent of the ship board employees would be in the NMU unit. Therefore, NMU would have recognition for some 1450 ship board employees in the Atlantic Area Command above. 3/

There is no dispute that NMU holds exclusive recognition for more than 10% of the employees of MSC but NMU does not represent either 5,000 or 10% of the employees of the Department of the Navy. 4/

The seamen or civilian marine employees employed on board MSC vessels have unique personnel and pay requirements. By statute their pay is fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry (5 U.S.C. §5348). MSC makes the initial determination as to whether a particular pay practice exists in the maritime industry and/or is "consistent with the public interest". Their particular personnel rules and regulations are contained in a document issued by direction of the Secretary of Navy entitled Civilian Marine Personnel Instructions ("CMPI"). The CMPI's are originated by the Commander, MSC, as are changes in those instructions, consistent with the needs of the Service.

After their initial preparation at MSC Headquarters, CMPI's are transmitted to the Navy's Office of Civilian Manpower Management ("OCMM") for review for conformity with the policies of the Navy's civilian manpower management program and for approval. All requests for interpretation and recommendations for change to the CMPI's are required to be directed to the Commander, MSC.

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2a/Its on-board number of ship board employees in the Pacific Command was 2142 ship board employees due, in part, to a merger of the Far East Command into the Pacific Command.

3/ The NMU had exclusive recognition in the Far East Area Command. A question concerning representation, still pending, was raised when the Far East Area Command was merged into the Pacific Command. The Military Sea Transport Union, affiliated with the Seafarers' International Union, AFL-CIO has exclusive recognition for unlicensed seamen and stewards in the Pacific Area Command.

4/DOD employs approximately 950,000 civil service employees and 300,000 non-appropriated fund personnel, while Navy employs approximately 300,000 civilian employees.

With respect to Section 3(b)(3) of the Order, the Secretary of the Navy, and not the Secretary of Defense, has made determinations that the Order could not be applied to certain units within the structure of the Department of Navy because of national security requirements.

With respect to Section 15 of the Order, contracts negotiated between NMU and MSC, Atlantic Area, are submitted to the Navy, and not DOD, for approval. The DOD Directive dealing with collective bargaining, DOD Directive 1426.1 does not designate the head of Navy as an official authorized to approve such agreements. Instead, it authorizes the head of DOD components to delegate authority to approve contracts to heads of subordinate commands.

When a contract is negotiated between an MSC subordinate command and a labor organization it is initially forwarded to MSC headquarters to assure that the contract conforms with the CMPI's. MSC will return the contract to its command if it determines the contract contains portions which are violative of important MSC principles. The contract is also reviewed by OCMM at Navy to assure conformity with Navy principles.

DOD Directive 1426.1 provides, in part:

"When an issue develops in connection with negotiations as to whether a particular published policy or regulation of the DOD Component concerned is in violation of a provision of applicable law, regulation of appropriate authority outside DOD, or Executive Order 11491, the labor organization may submit its position on the matter in writing to the head of the DOD Component via the headquarters of the national or international labor organization with which it is affiliated. The head of the DOD Component shall issue, within 15 days, his interpretation of the provision in question. The national president of the labor organization or his designee may appeal this interpretation to the Council in accordance with Part 2411 of the council's regulations (subchapter S1, reference (c)). The DOD Component shall promptly notify the DASD (CPP) upon learning that such an appeal has been filed."

In March, 1970, in accordance with Section 23 of the Order, DOD issued its Directive on Labor-Management Relations in the Department of Defense. The Directive, designated as DOD Directive 1426.1 was revised pursuant to changes in the Order and other matters requiring updates. The most recent update was issued on October 9, 1974.

On February 23, 1971, the Department of Defense issued a memorandum implementing the regulations issued by the Federal Labor Relations Council dealing with national consultation rights. In the memorandum it stated, inter alia:

"The head of each DOD component is authorized, by Section VI. B of DOD Directive 1426.1, to extend national consultation rights to labor organizations requesting such rights which meet the criteria established by the Federal Labor Relations Council. These criteria... are set forth in Section 2412.2(b) of the attached regulations. Within the Department of Defense, the following are "primary national subdivisions" as defined in Section 2412.1 of the regulations:

The Office of the Secretary of Defense:

- Department of the Army
- Department of the Navy
- Department of the Air Force
- Defense Atomic Support Agency
- Defense Communications Agency
- Defense Contract Audit Agency
- Defense Supply Agency
- Army and Air Force Exchange Service

Subsequent thereto, on March 31, 1971, the Department of the Navy issued SECNAVNOTICE 12721 to all Naval and Marine Corps Activities employing Civilians. The subject of the Notice was "national consultation rights and the termination of formal recognition under Executive Order 11491." The purpose of the Notice, as stated therein, was to publish the policy and procedures for granting of national consultation rights and for the termination of existing grants of formal recognition to labor organizations. In Section 3 of the NOTICE, it stated:

"National consultation rights may be granted at the primary national subdivision level of an agency. Within the Department of Defense, the Department of the Navy has been designated as a primary National subdivision as defined in Part 2412 of the Council's regulations. Accordingly, national consultation rights will be granted to a labor organization when it request such rights and its meets the requirements of the Council's regulations."

On May 22, 1974, NMU wrote MSC requesting a grant of National Consultation Rights. Its request was forwarded to OCMM which replied to NMU on June 21, 1974, indicating it would not grant National Consultation Rights to NMU because MSC was not, in its view, a "primary national subdivision" of an "agency" within the meaning of the Order or the Federal Labor Relations Council's Regulations.

Positions of the Parties

NMU contends that the Department of the Navy is an Agency within the meaning of Section 9 of the Order and that MSC is a primary national subdivision of the Department of Navy within the meaning of Section 2412.2 of the Regulations of the Federal Labor Relations Council. Therefore petitioner contends it qualifies for national consultation rights because it represents at least 10% of MSC's employees.

Department of Navy and MSC assert that within the meaning of the Order and FLRC's regulations DOD is the agency and Navy is a primary national subdivision of DOD. MSC therefore cannot be a primary national subdivision and NMU, cannot qualify for national consultation rights since it does not represent either 5,000 or 10% of the employees of Navy.

Conclusions of Law

The basic issue presented is whether MSC is a "primary national subdivision of an agency" within the meaning of FLRC's Rules and Regulations pertaining to national consultation rights (5 CFR §2412.1 and §2412.2).

Section 9(a) of the Order provides, inter alia, that "An agency shall accord national consultation rights to a labor organization 5/ which qualifies under criteria established by the Federal Labor Relations Council as the representative of a substantial number of employees of the agency." This section evolved because there was dissatisfaction with the prior Executive Order 10988, which provided

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5/ No question has been raised that NMU is a labor organization.

for an apparently unsatisfactory process called "national formal recognition". In order to provide a more satisfactory procedure the "Report and Recommendation on Labor-Management Relations in the Federal Service, August, 1969" issued by the Interagency Committee on Federal Labor Relations, 6/ recommended that the process called "national consultation rights" include:

- " - Notification to the labor organization by the agency of proposed substantive changes in personnel policies that are of concern to employees it represents;
- Opportunity for the labor organization to comment on such proposals;
- 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".

Section 2(a) of the Order provides:

"(a) 'Agency means an executive department, a government corporation, and an independent establishment as defined in Section 104 of Title 5, United States Code, except the General Accounting Office."

The FLRC, in accordance with its mandate under Section 9(a) of the Order formulated the criteria under which an "Agency" should accord national consultation rights (5 CFR §2412.2(a)). The FLRC went on and provided in 5 CFR §2412.2 (b) the criteria under which "An Agency's primary national subdivision which has authority to formulate substantive personnel policy" shall accord NCR. In the latter situation §2412.2(b) provides that the "primary national subdivision" shall accord NCR to a labor that requests NCR at that level and holds exclusive recognition for either 5,000 or 10% of the employees of the primary national subdivision. The FLRC

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6/ Labor-Management Relations in the Federal Service, Report and Recommendation, Executive Order 11491, October 29, 1969. U. S. Government Printing Office, 1969. 368-816; and Government Employee Relations Report, Reference File (GERR RF), published by BNA, GERR RF-1, 21:1011.

Rules and Regulations defines a primary national subdivision of an agency as "a first-level organization segment which has functions national in scope that are implemented in field activities" (5 CFR §2412.1). The FLRC went on and defined substantive personnel policy as:

"... a standard or rule which (a) creates and defines rights of employees or labor organizations, including conditions relating to such rights; (b) sets a definite course or method of action to guide and determine procedures and decisions of subordinate organizational units on a personnel or labor relations matter; and (c) is formulated within the discretionary authority of the issuing organization and is not merely a restatement of a course or method of action prescribed by higher authority."

It is clear that NCR, as viewed in both the Order and FLRC's Regulations, is a procedure that was set up in order to permit a labor organization that has substantial representational interest to consult and have some opportunity for input with respect to changes in personnel policies on a national level, in those situations where the labor organization would not otherwise have such an opportunity. However, the rights granted by NCR as actually formulated are somewhat more limited. Such consultation rights are not apparently available with respect to every government organization that may formulate substantive personnel policies on the national level; rather they are available only with respect to an agency or a primary national subdivision of an agency.

It is clear, and no party contends to the contrary, that MSC is not an agency within the meaning of Sections 2 and 9 of the Order. However the first question presented is whether DOD or Navy is such an agency. Petitioner contends that the Department of Navy is such an agency relying in part at least on how the term "agency" was defined in various portions of the U. S. Code (e. g. 5 USC §5721). However, the term itself is defined in Section 2(a) of the Order and therefore the definitions in the U. S. Code, are not controlling or very persuasive. Section 2(a) of the Order defines agency as an "executive department" or a "government corporation" or "an independent establishment" as defined in 5 USC § 104. Neither Navy nor DOD is either a government corporation or independent establishment as set forth in Section 2(a) of the Order. It seems clear, however, that DOD is an executive department and therefore is an agency, within the meaning of Section 2(a) of the Order. The question is, is Navy an executive department, and therefore, an agency. Although

the U. S. Code is not controlling with respect to the definition of agency, since agency is defined in the Order; the term, "executive department" is not defined in the Order, and therefore the U. S. Code is relevant in seeking to define this term. In this regard 5 USC § 101 lists the Executive Departments as:

- "The Department of State
- The Department of the Treasury
- The Department of the Defense
- The Department of Justice
- The Department of Interior
- The Department of Agriculture
- The Department of Commerce
- The Department of Labor
- The Department of Health, Education, and Welfare
- The Department of Housing and Urban Development
- The Department of Transportation"
- (emphasis added)

One of the sections referred to by NMU speaks in terms of the "head of an Executive department or military department". (emphasis added) 7/ thereby drawing a distinction between an executive department and a military department. In light of all the foregoing it is concluded that Navy is not an executive department and therefore is not an agency as defined by Section 2(a) of the Order.

NMU points to a number of instances where in the Secretary of the Navy has acted in areas where the Order provides that the head of an agency may Act. 8/ However, there is no showing that there was no delegation of authority in these areas and, in any event, because there may be some confusion in the application of the Order in other areas, does not mean such confusion should be applied to Section 9. 9/

7/ 5 USC § 301.

8/ Some examples are determinations made by the Secretary of the Navy relating to exemptions of intelligence units under Section 3(b)(3) of the Order and the fact that NMU-MSC contracts are referred to Navy for approved under Section 15 of the Order, and not to DOD.

9/ Similarly there may be some confusion as to whether the Section 2(a) definition of agency applies to the entire Order. In the NASA Case, A/SILMR No. 457, it was held that NASA, the agency, did not have a bargaining obligation, but a subdivision of NASA did, although Sections 10, 11, 12, 13, 15, and 19(a) 5 and (6) all refer to an agency's obligation to recognize and bargain with a labor organization.

Therefore, absent a specific ruling to the contrary I am constrained to conclude that the definition of agency as set forth in Section 2(a) of the Order does apply to Section 9 of the Order and under that definition Navy is not an agency. Navy is however the next real level of organization within the DOD and it is therefore concluded that Navy is a primary national subdivision of the agency. 10/ In these circumstances MSC, although national in scope, is not a primary national subdivision of an agency, but is rather at the second level or organization below and within DOD. 11/

In this regard it is recognized that MSC does make personnel policies on a national level and that the holding herein, may foreclose NMU from requiring consultation from MSC with respect to such policies. This may be unfortunate, but it has been recognized that problems in this area have existed in the past and the "Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, as amended" 12/ recognized such problems. As a result FLRC recommended, supra, page 35-37, with respect to Section 11(a) of the Order that only regulations issued at the agency headquarters level or at the primary national subdivision level bar negotiations at the local level and that the meaning of primary national subdivision should be consistent with §2412 of the Rules and Regulations pertaining to National Consultation Rights. FLRC's recommended changes were made in the Order.

Based on all of the foregoing it is concluded that MSC is neither an Agency nor a primary national subdivision of an agency within the meaning of the Order of FLRC's Rules and Regulations and that therefore NMU does not qualify for National Consultation Rights.

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10/ In this regard organizational charts, as such, are not being relied on, but the charts and the testimony as to how the organizations actually function are.

11/ If it were concluded that Navy is an agency, then it would be determined that MSC is a primary national subdivision of an agency.

12/ Labor-Management Relations in the Federal Service, U.S. Federal Labor Relations Council, 1975.

Recommendation

In view of all of the foregoing, it is recommended that the petition herein be dismissed.

  
SAMUEL A. CHAITOVITZ  
Administrative Law Judge

Dated: July 8, 1975  
Washington, D.C.

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

DEPARTMENT OF THE NAVY,  
 NAVAL WEAPONS STATION,  
 CONCORD, CALIFORNIA  
 A/SLMR No. 577

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1931, AFL-CIO (AFGE), alleging that the Respondent violated Section 19(a)(1) and (6) of the Executive Order by suspending the publication of the Plan of the Day (POD) without meeting and conferring with the exclusive representative. The Complainant contended, in this regard, that the POD contained matters which constituted working conditions which could not unilaterally be changed.

The Administrative Law Judge concluded that no violation of the Order had occurred and, therefore, he recommended dismissal of the unfair labor practice complaint. In this regard, the Administrative Law Judge considered the POD to be a management newsletter and he concluded that no evidence had been presented that it had been used by the Respondent to bypass the exclusive representative. He noted also that the Respondent had bargained with respect to announcements made in the POD concerning working conditions prior to their publication and that the Respondent had met its obligation with respect to vacancy announcements by extending the listing of those which would have appeared in the POD while its publication was suspended. Under the circumstances, the Administrative Law Judge concluded that the Complainant had no vested rights with respect to the POD and, therefore, could not object the suspension of its publication. Moreover, the revision of the POD, in his view, did not constitute a unilateral change in working conditions.

Noting particularly that no exceptions were filed and that publication of the POD was resumed shortly after its suspension without substantial change, the Assistant Secretary adopted the Administrative Law Judge's recommendation that the unfair labor practice complaint in this matter be dismissed in its entirety.

## UNITED STATES DEPARTMENT OF LABOR

## BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
 NAVAL WEAPONS STATION,  
 CONCORD, CALIFORNIA

Respondent

and

Case No. 70-4518

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, LOCAL 1931, AFL-CIO,  
 CONCORD, CALIFORNIA

Complainant

## DECISION AND ORDER

On August 25, 1975, Administrative Law Judge William Naimark issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge. 1/

1/ In reaching the above disposition, it was noted additionally that the Administrative Law Judge found that publication by the Respondent of the Plan of the Day, the suspension of which on August 13, 1974, was the basis of the instant complaint, was resumed on August 21, 1974, without substantial change. Cf. Vandenberg Air Force Base, 4392d Aerospace Group, Vandenberg Air Force Base, California, FIRC No. 74A-77.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-4518 be, and it hereby is, dismissed.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



Dated, Washington, D.C.  
October 31, 1975

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

.....  
In the Matter of

DEPARTMENT OF THE NAVY  
NAVAL WEAPONS STATION  
CONCORD, CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, LOCAL 1931,  
AFL-CIO, CONCORD, CALIFORNIA

Complainant  
.....

Case No. 70-4518

ERRATA

The undersigned issued a Decision on August 25, 1975 on the above-entitled case.

Paragraph 10 on page 4 thereof mistakenly stated: "Gedrich informed the union representative there was no plan to cancel the "Plan"; that the commanding officer was not happy re some items, and publication would be suspended pending revision of the POD."

The said sentence is hereby corrected to read: "Campaglia informed the union representative there was no plan to cancel the "Plan"; that the commanding officer was not happy re some items, and publication would be suspended pending revision of the POD."

*William Naimark*  
WILLIAM NAIMARK  
Administrative Law Judge

DATED: September 3, 1975  
Washington, D.C.



U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



In the Matter of

DEPARTMENT OF THE NAVY  
NAVAL WEAPONS STATION  
CONCORD, CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, LOCAL 1931,  
AFL-CIO, CONCORD, CALIFORNIA

Complainant

CASE NO. 70-4518

A.S. Calcagno

Labor Relations Advisor  
Regional Office - Civilian Manpower Management  
Department of the Navy  
760 Market Street  
San Francisco, California 94102  
For Respondent

Curtis Turner

National Representative  
American Federation of Government  
Employees AFL-CIO  
For Complainant

Before: WILLIAM NAIMARK  
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to a Notice of Hearing on complaint issued on January 28, 1975 by the Assistant Regional Director for Labor-Management Services Administration of the U.S. Department of Labor, San Francisco Region, a hearing in the above captioned case was held before the undersigned on March 13, 1975 at San Francisco, California.

This proceeding was initiated under Executive Order 11491, as amended, by the filing of a complaint on January 13, 1975 by American Federation of Government Employees, Local 1931, AFL-CIO, Concord, California, (herein called the Complainant) against Department of the Navy, Naval Weapons Station, Concord, California (herein called the Respondent). It was alleged in the complaint that on August 13, 1974 Respondent published a notice to the effect that the publication of the "Plan of the Day" was being held in abeyance; that Respondent failed to consult with Complainant, the exclusive bargaining representative, regarding such action - all in violation of Sections 19(a)(1) and (6) of the Order. A response was filed by Respondent on December 9, 1974 admitting it held the plan in abeyance for revision purposes. However, the employer denied it violated the Order, contending it had no obligation to consult on this matter.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered.

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

Findings of Fact

1. At all times material herein Complainant has been, and still is, the collective bargaining representative of all career, career-conditional, TAPER and TERM employees, including graded as well as ungraded employees and fire-fighters of Respondent.
2. Both Complainant and Respondent have been parties to a collective bargaining agreement 1/ which is effective, by its terms, from March 19, 1974 until March 19, 1977.
3. Article VII, Section 2, of the aforesaid agreement provides, in substance, that the employer herein agrees to post "vacancy announcements" on official bulletin boards so that interested employees have an opportunity to apply and that a listing of such announcements will appear twice weekly in the Plan of the Day.

1/ Complainant's Exhibit No. 1.

4. The Plan of the Day (hereinafter called POD) is an administrative directive published daily by the executive officer and posted on the bulletin boards. It contains plans and orders for administration of the unit and announcements of general interest. In publishing the POD in 1972, management decided to use this means of announcing items rather than utilize the "Transshipper", the base newspaper, in order to save expense. While designed as an information medium, the POD may occasionally announce a change in working condition i.e. the closing of a gate at the base. However, these changes are discussed with the Union previously. Some minor directives, such as where to report for a training course, may also be promulgated in the POD. Further, merit promotions vacancies are listed therein. This is done as a convenience and reminder to employees, does not include complete details of the vacancy, and is not intended to be an official notice thereof.

5. Instruction 5330.1 2/, dated November 30, 1972, was issued by the commanding officer of the naval installations at Concord, California. It announced a new system of publishing the Plan of the Day. Moreover, the instructions provided for classifying news items as (a) official - items affecting the official status of military, civilian and dependents assigned to the station, such as command staff meetings, news-a-gram, etc.; (b) semi-official - items not strictly of an official nature, such as management luncheons, conferences, etc.; (c) un-official - news of personal nature, such as items for sale, rides wanted, or lost and found articles.

6. In October 1973, Captain Denham, commanding officer at the station, spoke to Roger O. Baldwin, executive officer, re the POD. The commander remarked that it contained errors and that he was concerned as to its format as well as the type of information published therein.

7. As a result of the foregoing, the POD's publication was held in abeyance for revision pursuant to a directive issued on August 13, 1974. Pursuant to Instruction 5330.1A, issued on August 16, 1974, the POD was revised. The principal revision eliminated the category "semi-official" from the categorized items to be published, but no substantial change was made in the type of material to be promulgated in the POD. Publication of the POD, suspended in August 13, 1974 was resumed on August 21, 1974.

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2/ Complainant's Exhibit No. 2.

8. No discussions or consultation was had by Respondent with the complainant herein re the suspension of publication of the POD nor as to the revision thereof.

9. In addition to revising the POD, Respondent commenced promulgating a Routine of the Day (ROD) to codify work practices and historical precedents which were reduced to writing. These included working hours, lunch time, and routine items but ROD matters were not published in the POD. In respect to publication of the ROD, the Complainant's representative appeared at meetings to discuss same, and management concededly has consulted with the union re the ROD's input or revisions.

10. Upon the issuance of Instruction 5330.1A on August 16, 1974, Thomas Gedrich, president of the Complainant union, called Albert R. Campaglia, head of Respondent's labor relations, and told him the union was concerned that the POD might be cancelled, and the employees would not receive notification of promotion announcements. Gedrich informed the union representative there was no plan to cancel the "Plan"; that the commanding officer was not happy re some items, and publication would be suspended pending revision of the POD. No request was made by complainant that Respondent consult re the suspension of the POD's publication.

11. As a result of Gedrich's concern, a meeting was held with management on August 20, at which time it was agreed that certain job vacancy announcements (163 and 165), previously listed in the POD, would be reopened and listed again in the POD. The vacancy announcements were thereafter relisted and extended to accommodate the union's complaint that the listing of said vacancies would not appear during the period when publication of the POD was held in abeyance.

#### Conclusions

It is contended by Complainant that Respondent violated the Order by suspending the publication of the POD without discussing the suspension beforehand with the union. Since the POD contains, inter alia, items properly classed as working conditions, it is argued that the obligation to meet and confer under 19(a)(6) necessarily requires a discussion with the union of any intention to take action re its publication.

The difficulty in accepting Complainant's argument is two-fold: (1) the POD, as conceived and published, is essentially a management newsletter with an emphasis upon bringing to the attention of employees bits of information regarding events on the base; (2) although the POD includes items which may be deemed working conditions, collective bargaining with respect to such matters has occurred prior to its publication.

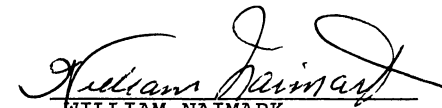
The record does not disclose that the announcements published are an attempt by the employer to either change working condition unilaterally - and thus bypass the union- or to evade an obligation to meet and confer with the bargaining representative. There is no assertion by Complainant that Respondent took action with respect to working conditions which were not subjects of discussions beforehand. As long as management does not utilize the POD for coercive purposes, or to implement employment conditions unilaterally imposed, I do not view its publication of the POD as an infringement upon the rights of the union.

In addition to publishing news items in the POD, management has permitted Complainant to submit matters for publication therein. This, I conceive, as a privilege extended to the union, and not a right to which it is entitled. Further, Respondent has included vacancy announcements in various issues for the convenience of those employees who may have missed the official listing thereof. While the union was concerned that the suspension of POD publication for 9 days would result in some employees not learning of the vacancies, the employer has apparently met that objection by listing the positions when the publication was resumed on August 21, 1974.

Since I conclude that the union herein has no vested rights with respect to the POD, except insofar as it derogates from the bargaining representative's status, I am constrained to find that it cannot object to the suspension of its publication. Moreover, the revision by management did not, in my opinion, constitute a violation of its obligation to bargain since it involved no unilateral changes in working conditions or attempt to deal with employees in regard thereto. Accordingly, and in view of the foregoing, I find that Respondent did not violate section 19(a)(1) or (6) of the Order by suspending publication of, and revising, the POD on August 13, 1974.

Recommendations

Upon the basis of the foregoing findings and conclusions the undersigned recommends that the complaint herein against Respondent be dismissed in its entirety.

  
WILLIAM NATMARK  
Administrative Law Judge

DATED: August 25, 1975  
Washington, D.C.

November 26, 1975

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

DEPARTMENT OF THE AIR FORCE,  
HEADQUARTERS, 31st COMBAT SUPPORT  
GROUP (TAC),  
HOMESTEAD AIR FORCE BASE, FLORIDA  
A/SLMR No. 578

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This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1167 (Complainant), alleging that the Respondent violated Section 19(a)(1) and (2) of Executive Order 11491, as amended, by suspending Arthur J. Schaffer, Jr., President of the Complainant, for five days due to his involvement in a safety violation.

Since about November 1971, Schaffer had been the President of the Complainant and, as such, had participated in negotiations, meetings, and grievance processing with the Respondent. On March 29, 1974, Schaffer, who was a flight line aircraft mechanic, was assisting on an aircraft engine "run up" (a procedure for testing repairs). He was approached by an employee who was not taking part in the "run up" procedure who tapped him on the shoulder, whereupon Schaffer moved part of his "head set" to one side in order to listen to the employee's remarks. The employee stated that he wanted to talk to Schaffer and Schaffer replied that he would be busy for another five or ten minutes. After waiting a few minutes, the employee departed. A few minutes thereafter, the cord between Schaffer and the aircraft was pinched by one of the tires of the aircraft as the aircraft rocked slightly backward and forward in response to the alternating increases and decreases of power in the engines. Schaffer's supervisor learned about this occurrence from other employees and admonished Schaffer that the incident constituted a safety violation inasmuch as the other employee could have distracted Schaffer and endangered the lives of the employees participating in the procedure. Schaffer, however, did not agree, and consequently the supervisor proposed Schaffer's suspension.

The Administrative Law Judge found that the suspension of Schaffer was not motivated by Schaffer's union activities. In this regard, the Administrative Law Judge concluded that the supervisor had not proposed the suspension because of the incident itself, but rather because Schaffer had not acknowledged that the incident posed certain safety hazards and that such incidents should be avoided in the future. Accordingly, the Administrative Law Judge concluded that the supervisor was concerned only about safety conditions during the "run up." The Administrative Law Judge further concluded that it did not appear that similar conduct of other employees had been or would be condoned or allowed by the Respondent, and that, therefore, it could not be found that the Respondent had subjected Schaffer to disparate treatment. Thus, the Administrative Law Judge recommended that the complaint be dismissed.

The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge, and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,  
HEADQUARTERS, 31st COMBAT SUPPORT  
GROUP (TAC),  
HOMESTEAD AIR FORCE BASE, FLORIDA

Respondent

and

Case No. 42-2573(CA)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1167

Complainant

DECISION AND ORDER

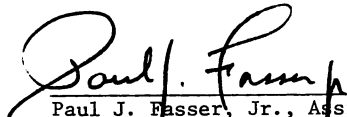
On October 10, 1975, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 42-2573(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
November 26, 1975

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

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



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In the Matter of

DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS, 31st COMBAT SUPPORT  
GROUP (TAC)  
HOMESTEAD AIR FORCE BASE, FLORIDA  
Respondent

Case No. 42-2573

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1167  
Complainant  
.....

Capt. Edmund R. Brehl, Esq.  
Office of the Staff Judge Advocate  
Headquarters, JAC-JA  
Langley Air Force Base, Virginia 23305  
For Respondent

Lisa Renee Strax, Esq.  
National Federation of Federal Employees  
1737 "H" Street, N.W.  
Washington, D.C. 20006  
For Complainant

Before: WILLIAM NAIMARK  
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on May 13, 1975 by the Assistant Regional Director for Labor-Management Services Administration of the U.S. Department of Labor, Atlanta Region, a hearing in this case was held before the undersigned on June 5, 1974 at Homestead, Florida.

This proceeding was initiated under Executive Order 11491, as amended, (herein called the Order) by the filing of a complaint on August 21, 1974 by National Federation of Federal Employees, Local 1167, (herein called the Complainant) against Headquarters 31st Combat Support Group (TAC) Homestead Air Force Base, Homestead, Florida. (herein called the Respondent).

The aforementioned complaint alleged a violation by Respondent of Sections 19(a)(1)(2) and (4) of the Order in that the Employer suspended Arthur J. Schaeffer, Jr., an employee, in order to discourage his membership in Complainant union. Subsequent to the filing thereof, the Assistant Regional Director dismissed the complaint for lack of merit. On May 7, 1975 the Assistant Secretary of Labor reversed the dismissal by the Assistant Regional Director of Sections 19(a)(1) and (2) portions of the complaint, and he remanded the case for issuance of a Notice of Hearing 1/, absent settlement thereof.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered.

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

Findings of Fact.

1. At all times material herein Complainant union is, and has been, the collective bargaining representative of the Air Force civilian employees at Respondent's base in Homestead, Florida. The union and the Employer herein have been, and are, parties to a collective bargaining agreement covering working conditions of such civilian employees.

2. Since about November 1971, Arthur J. Schaeffer has been president of Complainant union, and at all times material herein - including on March 29, 1974 - Schaeffer was flight line aircraft mechanic, 79th AEW&C Squadron, Homestead Air Force Base.

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1/ The Notice of Hearing herein was in conformity with the granting by the Assistant Secretary of the request for review and his determination that factual issues re 19(a)(1) and (2) violations be resolved at a hearing.

3. Schaeffer, as president of the Union, played an active role which included: (a) being a member of the negotiating team that met with management to negotiate a contract; (b) meeting bi-weekly with civilian personnel to discuss employees' problems; (c) handling grievances of employees and acting as their representative in dealing with management.

4. At all times material herein, including on March 29, 1974, George Miller was vice-president of Complainant. The record reflects, and I find, that Miller performed the same functions on behalf of employees as did Schaeffer, and that Miller was as active therein as the president of the Union. Further, other officers and stewards of Complainant handled grievances, and about 70 percent of the latter were handled by representatives other than Schaeffer.

5. Record testimony reveals that since 1972 management officials advised Schaeffer he was absent from his work station a good deal and spending too great a percentage of his time on union business. Schaeffer testified, and I find, that he was never reprimanded nor penalized for having engaged in Union activities or conduct as a Union representative.

6. On March 29, 1974 Larry Skipper, Line Chief of the AEW&C Squadron, was the supervisor of Schaeffer. On that date Skipper was working at a desk in a hangar checking the forms filled out by the aircraft mechanics. At about 8:45 that morning David Lenk, who worked in Transit Alert, drove his truck to the hangar where Schaeffer was stationed. Lenk inquired of Skipper as to the whereabouts of Schaeffer, and the supervisor informed him that Schaeffer was out on Able 3 flight line.

7. Upon being so advised by the supervisor, Lenk drove his vehicle out to the flight line, parked it, and approached Schaeffer who was acting as a ground controller or observer during an engine run up. At the time Schaeffer wore a headset covering both ears. When Lenk approached Schaeffer he tapped the latter upon the shoulder. Whereupon Schaeffer moved the right portion of the headset to one side so as to hear over the engine noise. Lenk told Schaeffer he wanted to talk to him and asked Schaeffer how long he would be busy. The Union president replied he would be finished in five or ten minutes, and then he pushed his leadgear back in place. After waiting a minute or two, Lenk told Schaeffer that he had to leave and the transit alert employee then departed.

8. A run up is a follow up action after corrective maintenance has taken place on the aircraft. It is done to assure that the plane is operational and fit for flight. On March 29, 1974 a run up was being performed on an EC-121 aircraft after a cylinder difficulty had been corrected. Inside the plane were several civilian employees: Jones, in the pilot seat; Phillips in the co-pilot seat, and Edward R. McGuire who operated the engineer's panel as maintenance man. Three other individuals who were stationed on the ground near the plane, functioned as engine conditioning specialists during the run up. Schaeffer's responsibility, during this run up, was to monitor the engines which were being run at high RPM's. He acted as a means of communication to those inside the aircraft thru the use of the headsets to which a cord was attached leading from the aircraft. Schaeffer was required to notify the inside crew, specially McGuire, of any activity on the ground, such as a leak, which would not be detected by the instrumentation in the aircraft.

9. The headset utilized in the run up had attached to it a cord which measures about 60 feet from the set to the nose cone of the aircraft. At the full extension of the cord there is an arc created near the plane where it touches the ground, and the distance between the wheel and the arc thereat is about ten feet. During a run up the cord is not pulled taut to avoid it breaking at either end. In the event such breakage occurred, the secondary means of communication between the ground observer and the engineer in the plane would involve hand signals.

10. After Lenk left the run up area the cord in the EC-121 got caught under the side of the carcass of the tire. This was apparently due to a cross wind attracting the cord, coupled with the wheels' changing position during the RPM's of the engines. Thus the entire movement and resetting of the aircraft resulted in the cord becoming pinched by the tire. Schaeffer informed McGuire when the cord became pinched. The RPM's on the engine were then increased, and the plane went over center and lunged forward to release the cord.

11. Upon the conclusion of the run up on March 29, 1974, which was about 9:00 a.m., the crew returned to the hangar. Someone notified McGuire that an unauthorized person had approached Schaeffer during the run up. McGuire then spoke to the crew members who verified that some individual approached Schaeffer and spoke to him during the run up. Later McGuire spoke to Sgt. Ragno, who was Lenk's supervisor at Transit Alert, and he learned that Lenk had some union business to discuss with Schaeffer and had, in fact, come to the flight line during the run up.

12. Schaeffer discovered that the crew had been questioned re Lenk's appearance at the run up and he was told some action might be taken against him. About five days later a conversation took place between Schaeffer and McGuire at which time the latter said he felt that Schaeffer committed a safety violation. The supervisor stated that Schaeffer should not have permitted Lenk to be in the flight line area; that Lenk was not engaged in official duties, but was - as McGuire had learned - intent upon transacting union business; that the appearance of an unauthorized person during a run up could have distracted the ground observer and endangered the lives of the crew. When Schaeffer replied he had nothing to do with Lenk's appearance at the line, the supervisor remarked that Schaeffer should have informed him and the run up would have ceased temporarily. Further, McGuire said the employees should have told Lenk to leave the area immediately.

During the aforesaid discussion Schaeffer took issue with the supervisor's conclusion that Lenk's appearance constituted a safety violation. Schaeffer stated it was normal practice for maintenance trucks to pull up and distract a ground controller by talking during a run up. Further, it was not customary for the controller to advise the supervisor thereof. At the conclusion of this conversation McGuire said he would have to make a report, and Schaeffer commented he would file one also.

13. McGuire testified he did not intend to recommend any discipline of Schaeffer until the latter, as aforesaid, refused to cooperate and acknowledge that a safety violation occurred. He consulted the regulations <sup>2/</sup> and would have given Schaeffer an oral reprimand if the latter had assured him the incident would not recur. One week later McGuire filed a report and he proposed a ten day suspension for Schaeffer.

14. On about May 20, 1974 Schaeffer and the supervisor discussed the matter again. At this time the pinching of the cord was mentioned. McGuire stated he felt Lenk's appearance distracted Schaeffer and caused the cord to become pinched, but the employee pointed out that it occurred after Lenk left the area and, in any event, hand signals were always available.

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<sup>2/</sup> AF Regulation 40-75 provides in paragraph 19 for various types of Disciplinary Actions. These range from oral admonishment to discharge, and included reprimands as well as suspensions. The latter penalty, which must not exceed 30 days, is declared to be a severe disciplinary action.

15. Since Schaeffer did not agree with the commission or existence of a serious safety violation, McGuire initially proposed a 10 day suspension for Schaeffer which he later reduced to five days due to being shorthanded. Accordingly, the employee was suspended for five days, resulting in a loss of three days' employment inasmuch as a weekend intervened during the suspension.

Conclusions

It is contended by Complainant that the suspension of Schaeffer was violative of 19(a)(1) and (2) of the Order. Further, Complainant maintains that management evinced anti-union animus in its treatment of the local's president; that the resultant suspension was the product of a conspiracy hatched by supervisors McGuire and Skipper to create a pretextual safety violation; and that the discriminatory purpose of the disciplinary action was in reprisal for Schaeffer's union activities - all with the accompanying intention by Respondent to discourage the employee's role as president of the union herein.

An analysis of the evidence adduced does not persuade me that the suspension of Schaeffer was motivated by his union activities. Apart from the fact that the vice-president of the union engaged in the same conduct on behalf of Complainant without reprisal, management had never reprimanded or censored Schaeffer or anyone during the years for engaging in such activities. Further, the record does not support the conclusion that the supervisors conspired to fault the employee so as to punish him for being active in representing employees in respect to their complaints. Except for some discussions regarding the amount of time Schaeffer was absent from work handling grievances, Respondent accorded him considerable latitude in performing his union duties.

• It may well be that Schaeffer was not responsible for either Lenk's appearance on the flight line or the pinching of the cord under the tire of the aircraft. Nevertheless, there was sufficient basis, in either instance, for concern by McGuire and ample justification for concluding that a hazardess condition existed during the run up. The engines revved at a very high speed and thus created a situation requiring precaution to assure safety of the crew. The appearance of an unauthorized person at the line must necessarily entail an additional risk factor during the run up.

While opinions may differ as to the action which Schaeffer should have taken in respect to Lenk, and to what extent the former was responsible for the cord becoming pinched, the fact remains that McGuire concluded the incident called for some action by Schaeffer to lessen the risk occasioned at the time. Moreover, the supervisor did not penalize Schaeffer for not admonishing Lenk to leave the flight line or the pinching of the cord. Rather was the suspension given because the employee refused to concede or acknowledge that a serious situation existed during the run up which should be avoided in the future. The record thus reflects that, far from establishing a plot to punish Schaeffer for misdeeds, McGuire did not propose to discipline him for the events occurring on March 29, 1974 event though he believed they were occasioned, in part at least, by the employee's behavior.

Record testimony does reveal McGuire did learn that Lenk had appeared at the flight line to discuss union business. However, none of the facts warrants the inference that the supervisor disciplined Schaeffer because Lenk approached the union official for that purpose. McGuire did not censure Schaeffer for the nature of the discussion on the flight line, and I cannot conclude, based on the evidence adduced, that he was concerned about anything other than safety conditions during the run up.


Complainant's counsel, in her brief, cites USAF Kingsley Field, Klamath Falls, Oregon, A/SLMR No. 443 in support of the contentions that Respondent herein engaged in disparaging conduct which is violative of the Order. While the principle enunciated in the cited case stands unchallenged, I perceive a considerable difference between the facts therein and those involved in the case at bar. The imposition of different working conditions upon the union president than other employees in the Kingsley Field case, supra, reflected disparate treatment of the union official. As such, this conduct amounted to disparagement of the employees' representative in the eyes of his fellow workers. In the instant matter, I do not conclude that Schaeffer was singled out and treated differently than others. It does not appear that any employee engaging in similar conduct would be, or had been, exculpated from the same wrong doing by management. In the absence of a finding that the employer treated the union representative disparately, I am constrained to conclude that the cited case is inapplicable herein.



Accordingly, and in view of the foregoing, I find that Respondent did not violate Section 19(a)(1) and (2) of the Order by suspending Arthur J. Schaeffer, Jr., for five days on May 21, 1974.

Recommendations

Upon the basis of the foregoing findings and conclusion the undersigned recommends that the complaint herein against Respondent be dismissed in its entirety.

  
WILLIAM NAIMARK  
Administrative Law Judge

Dated: October 10, 1975  
Washington, D.C.

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

U.S. DEPARTMENT OF AGRICULTURE,  
AGRICULTURAL RESEARCH SERVICE,  
BUDGET AND FINANCE DIVISION,  
ACCOUNTING SERVICES BRANCH,  
NEW ORLEANS, LOUISIANA  
A/SLMR No. 579

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3513 (AFGE) sought an election in a unit of all nonprofessional employees of the Accounting Services Branch, Budget and Finance Division, Agricultural Research Service, U.S. Department of Agriculture, New Orleans, Louisiana. The Activity contended that the smallest unit that could be considered appropriate for the purpose of exclusive recognition should include all employees, professional and nonprofessional, of the entire Budget and Finance Division of the Agricultural Research Service.

The Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive recognition because the claimed employees do not possess a clear and identifiable community of interest separate and apart from the other employees of the Budget and Finance Division. In this regard, he noted particularly that all of the Branches operate under the centralized control of the Division Director; all Division employees operate under the same uniform personnel procedures; and the operations of the Branches of the Division are highly integrated.

Based on these considerations, the Assistant Secretary found that the separate unit proposed by the AFGE did not contain employees who share a clear and identifiable community of interest different from other employees of the Budget and Finance Division. Moreover, he found that if such unit were established it would artificially fragment the Division and could not reasonably be expected to 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

U.S. DEPARTMENT OF AGRICULTURE,  
AGRICULTURAL RESEARCH SERVICE,  
BUDGET AND FINANCE DIVISION  
ACCOUNTING SERVICES BRANCH,  
NEW ORLEANS, LOUISIANA 1/

Activity

and

Case No. 64-2686(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 3513

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 Patrick J. Dooner. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

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

2. The American Federation of Government Employees, AFL-CIO, Local 3513, herein called AFGE, seeks an election in a unit of all nonprofessional employees of the Accounting Services Branch, Budget and Finance Division, Agricultural Research Service, U.S. Department of Agriculture, New Orleans, Louisiana. 2/ The Activity contends that the smallest unit that could be considered appropriate for the purpose of exclusive recognition should include all employees, professional and nonprofessional, of the entire Budget and Finance

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

2/ The unit appears essentially as amended at the hearing.

Division of the Agricultural Research Service (ARS). Further, it argues that the employees of the Accounting Services Branch do not share a community of interest separate from other employees, particularly those of the entire Budget and Finance Division, and that such a unit would not promote effective dealings and efficiency of agency operations.

In addition to the Accounting Services Branch located in New Orleans, Louisiana, the Budget and Finance Division consists of the Office of the Director, the Technical Services Staff and three other Branches: Budget Development, Financial Management Systems, and Financial Analysis, all located in the Washington, D. C.-Hyattsville, Maryland area.

Essentially, the ARS formulates and carries out a broad range of agricultural research programs and related activities of the Department of Agriculture for which it receives a separate appropriation from Congress. The Budget and Finance Division is responsible for planning and preparing the ARS budget and ARS budget requests for funds from the Department of Agriculture and Congress and assuring the proper administration of these funds. In this respect, the record reveals that the five Branches of the Division comprise a highly integrated operation. Thus, the Budget Development Branch establishes a budget plan and presents it to the Department of Agriculture, the Office of Management and Budget and Congress for approval. The financial management policies are developed by the Financial Management Systems Branch which designs an automated accounting system and prepares the procedures that are to be used in over 200 ARS locations around the country. Information pertaining to the allotment of the funds procured by the Budget Development Branch are fed into a computer by the Financial Analysis Branch, which also provides assistance in monitoring the reimbursable activity of the Department of Agriculture. The Accounting Services Branch is responsible for billing and for the collection of funds owed to the ARS. 3/ Finally, the fine technical aspects concerning accounting procedures, in relationship to Federal Regulations, are interpreted by the Technical Service Staff.

The record shows a dependence of each branch upon the other in the performance of their respective operations. Frequent communications occur between the entire Division and especially between the Office of the Director, the Accounting Services Branch, the Financial Analysis Branch and the Financial Management Systems Branch. Moreover, the record indicates the reassignments between the various Branches either have taken place or have been offered to employees of the Division and, furthermore, a significant potential for interchange continues to exist among all the Branches.

General responsibility for the administration of the Budget and Finance Division rests with the Director and the Assistant Director. Personnel policies regarding promotions, hiring, personnel management, as well as formal agency directives setting forth specific aspects of each major policy,

3/ The Activity contends that a planned reorganization and establishment of a National Finance Center in Michoud, Louisiana, will usurp the functions of the Accounting Services Branch and will alter substantially its composition within two years.

are formulated at the Washington headquarters. 4/ The Division Director prescribes the Division operating procedures with regard to personnel matters and, in addition, approves training, promotions (GS-7 and above), annual work plans, travel expenses, purchases of supplies and equipment and reassignments. The actual administration of personnel services, however, is undertaken by the Southern Regional Office of the ARS. This includes recruitment, the obtainment of Civil Service Registers to fill positions, classifying positions and administering the Federal Merit Promotion Plan.

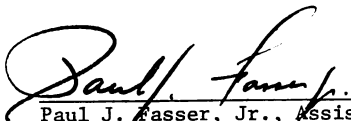
The Accounting Services Branch is headed by a Branch Chief whose authority is limited to the approval of extended sick leave, annual leave, coffee breaks, lunch hours and promotions (GS-6 and below). He cannot designate working hours and, although he can recommend training and promotions for GS-7 employees and above, these recommendations must be approved by the Director. Furthermore, the Branch Chief has no authority to promulgate personnel policies and practices, to reorganize the branch, or to establish different operating or accounting procedures.

Based on the foregoing, I find that the unit sought in the instant case is not appropriate for the purpose of exclusive recognition because the claimed employees do not possess a clear and identifiable community of interest separate and apart from the other employees of the Budget and Finance Division. In this regard, it was noted particularly that all of the Branches of the Division operate under the centralized control of the Division Director; all Division employees operate under the same uniform personnel procedures; and the operations of the Branches within the Division are highly integrated. Moreover, in my view, such a unit, if established, would artificially fragment the Budget and Finance Division and could not be reasonably expected to promote effective dealings and efficiency of agency operations. Accordingly, as the unit sought is inappropriate for the purpose of exclusive recognition, I shall order the petition herein be dismissed.

## ORDER

IT IS HEREBY ORDERED that the petition in Case No. 64-2686(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
November 26, 1975

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

4/ Although the Budget and Finance Division has no labor relations history, the record discloses that policies with respect to labor-management relations would be developed at the national level of the ARS, with no divisional or supplemental policy promulgated by the Budget and Finance Division.

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

FEDERAL DEPOSIT INSURANCE CORPORATION,  
NEW YORK REGION  
A/SLMR No. 580

This case involved an unfair labor practice complaint filed by Gerald M. Fasulo (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of Executive Order 11491, as amended, by refusing to promote the Complainant from a GS-12 bank examiner to a GS-13 bank examiner because of his membership in, and activities on behalf of, the American Federation of Government Employees, AFL-CIO, Local 3488 (AFGE).

The Complainant, an officer of the AFGE, had vigorously solicited the support of employees for the AFGE. Thereafter, the Complainant learned that the Respondent's Regional Director had rated other employees as more highly qualified for the promotion in question than the Complainant, including employees who had equal or less time-in-grade at the GS-12 level than the Complainant. As there were only a limited number of GS-13 positions available, the more highly rated employees were promoted and the Complainant was not. The Complainant then approached the Respondent's Regional Director and asked if his union involvement had anything to do with his having been bypassed for promotion. The Administrative Law Judge found that, in response to this inquiry, the Regional Director stated that he did not have to promote those who were active in the Union or, for that matter, those who were not.

The Administrative Law Judge recommended that the complaint be dismissed. In this connection, he concluded that while the evidence established that the Respondent was aware of the Complainant's union activities on behalf of the AFGE, the record was devoid of evidence of union animus on the part of the Respondent. In this regard, he noted that the evidence failed to establish that the Complainant had been subjected to disparate treatment because of his union activities and that the subjective judgement of the Regional Director had been the most important factor in the rating of the employees for promotion. He noted also that no evidence had been adduced which could have afforded a comparison of the Respondent's evaluation of the work performance of the Complainant and of those employees who had been promoted.

The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge, and ordered that the complaint be dismissed in its entirety.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL DEPOSIT INSURANCE CORPORATION,  
NEW YORK REGION

Respondent

and

Case No. 30-5656(CA)

GERALD M. FASULO

Complainant

DECISION AND ORDER

On June 17, 1975, Administrative Law Judge John H. Fenton issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant and the Respondent filed exceptions and supporting briefs with respect to the Administrative Law Judge's Report and Recommendations. The Respondent filed an answering brief with respect to the Complainant's exceptions and supporting brief and the Complainant filed a response to the Respondent's answering brief.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-5656(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.  
November 26, 1975

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

In the Matter of

FEDERAL DEPOSIT INSURANCE CORP.,  
New York Region,

Activity,

and

GERALD M. FASULO,

Complainant,

Case No. 30-5656(CA)

JOHN F. BETAR, Administrative Counsel  
RICHARD E. KNECHT, Esq.  
Federal Deposit Insurance Corp.,  
500 Seventeenth Street, N.W.  
Washington, D.C. 20429  
For the Activity

H. L. ERDWEIN  
American Federation of Government Employees  
AFL-CIO  
300 Main Street  
Orange, New Jersey 07050  
For the Complainant

BEFORE: JOHN H. FENTON  
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding under Executive Order 11491 arose upon the filing of a complaint on August 7, 1974, by Mr. Gerald M. Fasulo, against the Federal Deposit Insurance Corporation, New York Region. Notice of Hearing was issued on November 12, 1974, by the Assistant Regional Director, New York Region, Labor-Management Services Admin-

istration, on the complaint's allegations that Respondent has violated Section 19(a) (1) and (2) of the Order since on or about March 17, 1974, when it refused to promote Mr. Fasulo to GS-13 because of his membership in, and activities in behalf of Local Union Number 3488, American Federation of Government Employees, AFL-CIO. The hearing was held on January 21, 1975, in New York, New York. All parties were represented and were afforded full opportunity to be heard, to present evidence, and examine and cross-examine witnesses.

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

Findings

Mr. Fasulo is employed by FDIC as a Senior Bank Examiner, GS-12. In late July 1973 efforts were begun, centered principally in the Albany suboffice of the New York Region of FDIC, to organize a union. Fasulo was among the early members of Local Union No. 3488, AFGE, and was elected Executive Vice President. Thomas Procopio was the President until he resigned from FDIC on March 31, 1974, whereupon Fasulo became the ranking official.

In October of 1973, Head Bank examiner Robert J. Fay informed Head Bank Examiner Arthur G. Stow by telephone that employees in the Albany office had joined the union, that a meeting took place in New Jersey involving nine or ten people and that a meeting was to take place at the upcoming Regional Office conference at Grossinger's in the Catskills. Allegedly no names were mentioned. Mr. Stow passed this information on to Regional Director Claude Phillippe in a memo, again allegedly withholding even the name of the source of the information. (Phillippe recalled a conversation) 1/

1/ Mr. Fay did not deny that in April of 1974 he asked Mr. Fasulo the names of all the union officers and wrote them down. Mr. Fasulo testified that in September or October 1973, Mr. Fay was given the names of officers and organizers of the union and wrote them down. Mr. Fay never categorically denied this. While I find it difficult to believe that those who relay such information would edit it for purposes of preserving the anonymity of the organizers, or, in the case of Mr. Stow, that such a brief and generalized comment as he admits passing on warranted a memorandum, my suspicions in this respect are not alone a proper foundation for imputing knowledge of Fasulo's union activities to Respondent. There is no evidence that either Fay or Stow is a supervisors. See FDIC, A/SLMR No. 459, where the Assistant Secretary rejected Respondents' contention that all 70-75 Commissioned Bank Examiners (GS-11 through GS-14) are supervisors.

In October or November of 1973, before taking charge of the Albany office, Mr. Charles J. Lacijon was told by Mr. Fasulo about the formation of the union in the Albany office. Within about a week, Mr. Lacijon admits, he relayed that information, without any details, to Regional Director Phillippe. He testified that Phillippe was "not too concerned".

In December the New York Regional Office held a 3-day conference of all professional personnel at Grossinger's resort in the Catskills. About 165 employees attended. Procopio and Fasulo distributed literature during breaks, lunch and after the sessions. Fasulo testified that he personally solicited about 70-80 employees while distributing applications. A union organizational meeting was held on the evening of the second day, conducted by him, at a nearby Holiday Inn, and attended by approximately 100-125 employees. Fasulo sat at a front table, on a platform, with union President. Procopio, a Mr. Brugman, a Mr. Fallon and AFGE Representative H.L. Erdwein. Fasulo asserts that he secured 45 to 50 applications for membership, and 40-45 signatures to a petition during and after the conference. No evidence was offered that Phillippe or any other agent of Respondent witnessed or was otherwise made aware of this activity.

The subject of union also came up during the regular business hours of the conference. A written question was passed from the audience to Regional Director Phillippe, asking what management's attitude was toward a union. Fasulo and Procopio testified that Phillippe responded that he saw no advantage to a union, and that he would not join one as it would do nothing for him. Phillippe's version is that he replied that management had no attitude one way or the other, and that he facetiously added that he would not join one as it would do nothing for him. All agree that his remark provoked laughter, although Fasulo and Procopio assert that it prompted Head Examiner Stow to say to the seated union officers: "Where are all the rabble rousers now"? A Washington official of the Corporation then told the audience that it would not object to the formation of a union. I conclude that there was, during these discussions, no illegal interference with employees rights. Rather I conclude that the remarks were indeed facetious, provoking general laughter in an apparently relaxed audience.

In late February or early March, 1974, Regional Director Phillippe submitted to headquarters in Washington, D.C., his ratings of GS-12 examiners who were eligible by virtue of time-in-grade for promotion to GS-13. 2/ Examiners were rated, in the order he considered appropriate, within the categories of Outstanding, Well-Qualified, Qualified and Not Qualified. All the examiners rated Outstanding or Well-Qualified were

2/ GS-12 is the journeyman level for examiners. GS-13 is a competitive promotion, there being fewer such positions than there are GS-12s who are "eligible" to fill them by virtue of meeting the time and competence criteria.

promoted on March 17, 1974. These included Mr. Rubenstein who had equal time-in-grade, and Mr. Berardi, Mr. Ketcha and Mr. Hovan, who had less time-in-grade than Fasulo. Fasulo was rated Qualified.

This prompted Fasulo to request, or demand, an explanation of Phillippe. On March 21 he asked the latter if his union involvement had anything to do with his having been bypassed for promotion. He testified that Phillippe replied that he "saw no reason why he should promote anyone who joined the labor union", and that, after an embarrassing pause when he realized what he had said, Phillippe added "or, for that matter, anyone who has not joined a labor union". Fasulo asserted that Phillippe did not at this time state that he was unaware of Fasulo's Union activities. Fasulo further asserted that he asked on what basis promotions were made, and that Phillippe told him that only he can know when somebody is ready to be a GS-13, whereupon Fasulo asked whether there was something wrong with his work. Phillippe was allegedly very evasive about this, pointing out after referring to some index cards that Fasulo had advanced very rapidly to date, and asking what he was complaining about in those circumstances. There followed an exchange about the sources and the accuracy of Fasulo's information about the most recent promotions. Towards the end of the conversation, according to Fasulo, Phillippe said that the "convenience and needs" factor of his reports was too short, failing to give a full enough picture of the situation. Fasulo testified that this was the only criticism of his work until July 8, 1974, when he received a written complaint about his work. He sees this as a response to his unfair labor practice charge which was mailed on July 5, received on July 8, and acknowledged on July 9.

Phillippe, of course, presented a very different version of the conversation of March 21. He asserted that Fasulo's initial question on that day was his first knowledge of Fasulo's union activities, and that he told him so. <sup>3/</sup> He further told him that he tried to be objective in all his recommendations and base them solely upon merit, and that an interest in the union would not influence him one way or the other. Then, according to Phillippe, he called Fasulo's attention to the fact that he had detected deficiencies in his reports and had telephonically advised him that they were too brief. He also told him that he should increase his coverage, particularly of his investigative reports, and expressed his general view that, while he did not feel Fasulo was ready to perform the duties of a GS-13 examiner, it should not take him too long if he applied himself diligently. Phillippe further testified, that, as of the time of

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<sup>3/</sup> As indicated earlier, I find it very difficult to credit the denial that specific and detailed information of the early organizational effort was ever divulged to Phillippe, or that he was unaware of Fasulo's role at the Catskills conference.

the hearing, he still did not regard Fasulo as ready for GS-13 responsibilities. He asserted that additional incidents since the recommendation made in February/March 1974, show the lack of depth in Fasulo's reporting and his analysis of a bank's condition, and another involved disobedience of instructions. These were offered as evidence confirming Phillippe's prior judgment that Fasulo was not ready for promotion, especially in that the comment page of his reports tended to be brief, perfunctory and stereotyped.

One prior incident relied upon by Respondent concerned a February, 1972, examination of a bank in the Virgin Islands. Fasulo was in charge of three other Examiners. They were quartered in a hotel close to the bank, where there was an additional charge for Mrs. Fasulo. They moved to a more expensive hotel some distance away, and rented a car as an alternative to taxis. There was no extra charge for Mrs. Fasulo. Their vouchers were trimmed a total of about \$80.00 for alleged personal use of the automobile, although no adjustment was made of hotel costs because no limit had been set. Phillippe allegedly reprimanded Fasulo very strongly for using bad judgment. Fasulo testified that they had to leave the very unsatisfactory first hotel, and that the flat rate rental for the car was \$80.00 per week as compared to \$24.00 per day for taxis. The use of this incident impressed me as an afterthought, dredged up to support what happened later. No formal action was taken against the participants, and it was not used in explanation of the failure to recommend Fasulo for promotion in 1974.

In March, 1974, Fasulo allegedly failed to carry out the instructions of Review Examiner Weinmann with respect to a Saving and Loan Bank which was converting to a Mutual Savings Bank, requiring Weinmann to make his own telephonic investigation.

By memo dated July 8 (the date on which his unfair labor practice charge was received) Fasulo was criticized for submitting a report in which he made reference to a bank's surplus ratio, which ratio had been adjusted to reflect market depreciation of securities. According to Phillippe, Fay and Stow, the reference made should have been to the book ratio. The "errors and omissions" form reserved for use where serious errors occur was not used in this instance.

In November, 1974, Fasulo was instructed to make a personal, on-site investigation of a bank. After submitting a report on the basis of a telephonic investigation, and admitting his failure to follow instructions, he was told by Phillippe to make a proper investigation on the following day. Again, allegedly, in November, 1974, Fasulo submitted an incomplete report on an EDP Service Center. All these incidents were related by Phillippe as matters which reinforced his original judgment that Fasulo's work is superficial--that he "lacks depth in his analyses, and he does not follow through, and he takes the line of least resistance, and he is not inclined to be industrious and to come through with what we consider to be the proper analysis...". All such after-the-fact criticisms are, of course, also subject to the interpretation that they represent a knit-picking effort to shore up a prior decision for which there existed little in the way of substantial, well-documented, support. A look at Fasulo's over-all performance record is therefore in order.

Fasulo entered service with FDIC on August 21, 1966, as a GS-6 trainee. He was promoted to GS-7 on February 26, 1967. On January 23, 1969, he received a performance evaluation of Satisfactory, being rated Outstanding in the areas of dependability and cooperativeness. On January 31, 1969, he was promoted to GS-9, and on March 22, 1970, he was promoted to GS-11. On February 21, 1971, he received the same evaluation as before, and on May 16, 1971, he was promoted to GS-12. For the year ending in April, 1974, he received a Satisfactory performance rating, receiving Outstanding ratings in industry, dependability and cooperativeness, and Satisfactory ratings in all other areas.

Fasulo asserted that he progressed more rapidly than any of his counterparts, until the point of his Union involvement. Activity Exhibit No. 2 shows the GS-12 Examiners of the New York Region by EOD, date of promotion to GS-12, and number of months in GS-12 as of August 8, 1974. It shows that eight of the 20 Examiners had begun working for FDIC before Fasulo (six with greater net service time) and that two have been in grade 12 longer than Fasulo. It also shows that the 15 Examiners who were hired during the period from June, 1965 to June, 1969, and thus may fairly be compared to Fasulo, achieved GS-12 in an average of 72 months as compared with 57 months for him. Only one of these (Ferguson) progressed more rapidly than Fasulo. Activity Exhibit No. 3 lists the 22 GS-13 Examiners. It shows that four of them started employment after Fasulo, that two of these (Berardi and Rubenstein) and two others (Hovan and Ketcha) were promoted to GS-12 on or after Fasulo's promotion to GS-12 and that six achieved GS-13 status with less time-in-grade than Fasulo. The 10 Examiners on that list who were hired within the time-frame used above, achieved GS-12 status in an average of 61 months, thus taking four months longer than Fasulo did. <sup>4/</sup> Average time for advancement to GS-12 for all such Examiners on both lists was 66 1/2 months, or over nine months off the pace of Fasulo. The GS-13's in that time-frame were promoted after slightly less than 3 years in grade. At the time of the critical promotions, on March 17, 1974, Fasulo had been in grade for 34 months. The six who advanced more rapidly from GS-12 to GS-13 did so in an average of 26.5 months. Of these Berardi had about 5 months less total service, Rubenstein had several weeks less, Hovan and Ketcha had 14 months more, Poling had one year more and Stow had 25 months more. Thus, while these figures do not support Fasulo's assertion that he advanced more rapidly than any of his colleagues until his involvement in Union activities, they do show that he was making very rapid progress indeed. His track record is sufficiently impressive, as are his ratings, to prompt a very critical, even suspicious, look at his failure to continue to progress at a time associated with Union activity.

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<sup>4/</sup> White has been left out of this analysis, as the figures for him are obviously erroneous.

### Analysis and Conclusions

It is clear from this record that promotion to GS-13 is the big step in the progress of an Examiner. Progress through GS-12, while not uniform, is fairly routine. Advancement to GS-13, on the other hand, represents a significant step forward from the journeyman level of performance. Thus a fair number of Examiners level out at GS-12, some apparently permanently. Excellence in discharging the more routine responsibilities of the GS-12 is therefore not predictive of early promotion to the substantially more demanding GS-13 role. It is also clear from his ratings that Fasulo was a very industrious and dependable Examiner. It is at the heart of the Activity's defense, aside from professed ignorance of Fasulo's role in the Union, that the lack of depth in his analyses showed as he encountered progressively more complex and difficult investigations and examinations.

It is extremely difficult, at best, for me to substitute my judgment for that of his superiors in assessing his readiness for promotion relative to that of others. As noted, the criticisms advanced in support of the Activity's judgment were on the whole after-the-fact, and did not impress me as substantial. Perhaps more importantly, this record leaves them, as well as his performance on the whole, in a vacuum. The ratings reflecting the performance of his competitors were not made available. The criticisms or praise of their work, if made, are unknown. The view of middle management as to the relative worth of Fasulo and those who were promoted in March of 1974 are undisclosed. On the record before me it appears that the subjective judgment of Regional Director Phillippe determined the order in which eligible GS-12 Examiners would be promoted. Precisely why Berardi, Rubenstein, Hovan and Ketcha were selected, and Fasulo was not, was not made a part of this record, and can only be a matter for conjecture. No comparisons can be made. Complainant, of course, must establish by a preponderance of the evidence that Respondent was motivated by illegal considerations. Absent something tantamount to a finding that Respondent confessed or otherwise disclosed such a purpose, it is not here possible to come to such a conclusion. Assuming Respondent was indeed aware of Fasulo's Union activities, and even positing the existence of statements by agents of Respondent indicative of animus toward Union adherents, I could not on this record find sufficient support for the conclusion that the selections for promotion were discriminatory. There exists no basis for finding disparity of treatment where the record lacks the facts upon which to come to a reasoned conclusion regarding Fasulo's performance as compared to that of his colleagues. While I am inclined to be suspicious, given Fasulo's role in the Union, his career accomplishments and the lack of any early indication that his rapid progress was coming to a halt, there is no proper predicate for a finding of discrimination. There is no doubt that the failure to promote him in March came as a shock to him, and there is little doubt in my mind but that he had substantial reason to expect a continuation of his steady and relatively rapid progress. This, however, is more a comment on the quality of Respondent's career development system than an indication of discrimination, for there is no evidence that Fasulo or anyone else had regular sessions

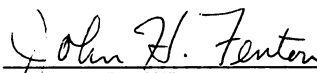
with his superiors in which his strengths and weaknesses were analyzed and his progress toward his career goals was assessed. He only knew, as Respondent virtually concedes, that his work was rarely criticized until after he complained of the failure to promote him. Nor is there any evidence that he was singled out for praise.

Here, there is no evidence of animus toward the Union. As noted, I attach no such meaning to Phillippe's remarks at Grossingers. Nor do I credit Fasulo's allegation that Phillippe casually confessed an illegal act when Fasulo confronted him on March 21, 1974, to request an explanation for being passed over in the last round of promotions. I believe that in Fasulo's honest recollection of the exchange, but I accept Phillippe's general version of the conversation. I doubt that either of them reconstructed the discussion with accuracy. Fasulo admitted he was in a state of shock. It is clear that he quickly suggested that his Union activities were at the bottom of what was to him otherwise inexplicable, and that he was not prepared to accept, if indeed he fully heard, other explanations. I think it likely that Phillippe, in responding to the accusation with which the question was loaded, said that he did not have to promote those who are active in the Union, or, for that matter, those who are not. I do not find it reasonable to conclude that Phillippe uttered any admission.

In summary, I find that this record will support a finding that Respondent was aware of Fasulo's Union activities, notwithstanding the absence of positive evidence to establish that any agent of management observed him in such a role or otherwise learned of it. Such an inference is warranted, in my judgement, because of the open and notorious nature of his activity, especially at the Grossinger gathering, and because of the existence of informers. It strains credulity beyond the breaking point to accept the notion that management officials maintained an Olympian indifference to such matters, as if the mere existence of healthy curiosity, or the receipt of such information was an affront to the Executive Order. The record is, however, devoid on any evidence tending to establish that Respondent was disposed to oppose organization of the Union by proscribed means, or, indeed, that it harbored any Union animus. Finally, the nonselection of Fasulo is not so lacking in justification as to give rise to an inference that it is to be explained only by reference to his Union activity. Given his employment history I am not without my doubts, but suspicion is not enough. In the circumstances I am constrained to recommend that the complaint be dismissed.

### Conclusion

Having found that Respondent has not engaged in conduct violative of Sections 19(a) (1) and (2) of the Executive Order, I recommend that the complaint be dismissed in its entirety.

  
 JOHN H. FENTON  
 Administrative Law Judge

Dated: June 17, 1975  
 Washington, D.C.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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

VETERANS ADMINISTRATION DOMICILIARY,  
WHITE CITY, OREGON

VETERANS ADMINISTRATION DOMICILIARY,  
WHITE CITY, OREGON  
A/SLMR No. 581

Respondent

and

Case No. 71-3017

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1089, AFL-CIO,  
WHITE CITY, OREGON

Complainant

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1089, AFL-CIO, White City, Oregon (Complainant) alleging essentially that the Respondent violated Section 19(a)(1) and (2) of the Order by repeatedly passing over an employee for promotion, who was a past president and an active member of the Complainant, and by an alleged remark by a supervisor to another employee during an April 1974 promotion evaluation that the subject employee's union activities hurt him--not his work.

Finding that the testimony of the witnesses in support of the complaint was either hearsay or based on events well beyond the reach of the complaint, or both, the Associate Chief Administrative Law Judge concluded that the Complainant did not present any probative and competent evidence tending to prove the allegations of the complaint. Accordingly, he recommended that the instant complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Associate Chief Administrative Law Judge's findings, conclusions, and recommendations and ordered that the instant complaint be dismissed in its entirety.

DECISION AND ORDER

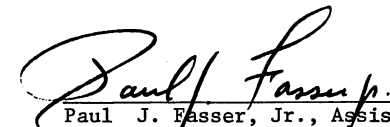
On September 3, 1975, Associate Chief Administrative Law Judge John H. Fenton issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Associate Chief Administrative Law Judge's Recommended Decision and Order.

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

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-3017 be, and it hereby is, dismissed.

Dated, Washington, D. C.  
November 26, 1975

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

U.S. DEPARTMENT OF LABOR  
 OFFICE OF ADMINISTRATIVE LAW JUDGES  
 WASHINGTON, D.C. 20210



Before: JOHN H. FENTON  
 Associate Chief Judge

..... :  
 In the Matter of :  
 :  
 VETERANS ADMINISTRATION :  
 DOMICILIARY : CASE NO. 71-3017  
 WHITE CITY, OREGON :  
 Respondent :  
 and :  
 AMERICAN FEDERATION OF GOVERNMENT :  
 EMPLOYEES, LOCAL 1089, AFL-CIO :  
 WHITE CITY, OREGON :  
 Complainant :  
 .....

RECOMMENDED DECISION  
Statement of the Case

This proceeding arose upon Complainant's filing of an unfair labor practice complaint on August 21, 1974, alleging that Respondent violated Section 19(a)(1) and (2) of Executive Order 11491, as amended, by passing over Mr. Orlando Tufano for promotion in April, 1974, and by a supervisor's remark to another employee that he was not promoted because of his Union activities. Notice of Hearing was issued on February 7, 1975 by the Assistant Regional Director, San Francisco Region, Labor-Management Services Administration.

A hearing was held on March 12, 1975, in Medford, Oregon. The parties were afforded full opportunity to be heard, to present evidence bearing upon the issues, to examine and cross-examine witnesses and to make argument and file briefs. Based on the entire record, I make the following findings of fact, conclusions of law and recommendation.

Findings of Fact and Conclusions of Law

Mr. Orlando Tufano is employed in the kitchen at Respondent's facility in White City, Oregon. He allegedly has been passed over many time for promotions because of his Union activities. Specifically, he was not promoted in April, 1974, and a former employee named Jean Adams reported that Chief Cook Miller, a supervisor, had said that Mr. Tufano had been hurt by his Union activities. However, Mrs. Adams did not appear at the hearing. <sup>1/</sup> The Union called four witnesses in an apparent effort to show that Mr. Tufano was well-qualified for promotion and that Respondent was hostile towards

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<sup>1/</sup> A letter from her was placed in the rejected exhibit file.

Robert Nogler  
 National Representative AFGE, AFL-CIO  
 Room 606  
 610 Southwest Broadway  
 Portland, Oregon 97205

Roy Marlia, President  
 AFGE, Local 1089  
 Veterans Administration Domiciliary  
 White City, Oregon 97501  
 For the Complainant

Harvey Wax, Esq.  
 Veterans Administration  
 Office of District Counsel  
 211 Main Street  
 San Francisco, California

Norman Jacobs, Esq.  
 Labor Relations Specialist  
 Veterans Administration Central Office  
 Washington, D. C.

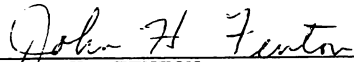
Bernard F. Grainey, Esq.  
 District Counsel  
 Veterans Administration  
 Portland, Oregon  
 For the Respondent

Union activists. Their testimony was, however, either hearsay or based on events well behind the reach of the complaint, or both. After some discussion both on and off the record concerning the rules of evidence and about the possibility that Mrs. Adams might be offered as a witness at some later date, the Union abruptly announced its intention not to call any further witnesses. The Activity then made a motion for summary judgment on the ground that no probative evidence of any violations had been presented.

A reading of the record confirms my impression, conveyed to the parties at the close of the hearing, that Complainant did not present any probative and competent evidence tending to prove the allegations of the complaint. Accordingly, I conclude that the complaint must be dismissed.

Recommendation

Having found that Respondent has not engaged in conduct violative of Section 19(a)(1) and (2) of the Act, I recommend that the complaint be dismissed in its entirety.

  
\_\_\_\_\_  
JOHN H. FENTON  
Associate Chief Judge

DATED: September 3, 1975  
Washington, D. C.

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

DEPARTMENT OF THE NAVY,  
PUGET SOUND NAVAL SHIPYARD,  
BREMERTON, WASHINGTON  
A/SLMR No. 582

This case involved an unfair labor practice complaint filed by the Boilermakers Union, Local 290, Bremerton, Washington (Complainant) alleging that the Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington (Respondent), violated Section 19(a)(1), (2) and (6) of Executive Order 11491, as amended, by the Respondent's Group Superintendent rendering a second step decision pursuant to a negotiated grievance procedure in which he threatened disciplinary action against the grievant and his representative for allegedly failing to follow the grievance procedure.

The Associate Chief Administrative Law Judge found that there was no record evidence that Respondent had violated Section 19(a)(2) or (6) of the Order. However, the Associate Chief Administrative Law Judge found that Respondent had violated Section 19(a)(1) when its Group Superintendent, in a written decision under the grievance procedure, threatened discipline against the grievant and his representative for allegedly incorrectly invoking the negotiated agreement's grievance procedure. In this connection, he noted that such action could only have the obvious consequence of chilling the assertion of contract rights by warning those who would use such procedure that it must be done without a flaw or discipline could ensue. The Associate Chief Administrative Law Judge found also that such action by the Respondent would discourage employees from using the negotiated grievance procedure and that this was inherently destructive of rights assured under Section 1(a) of the Order.

Upon consideration of the Associate Chief Administrative Law Judge's Recommended Decision and Order and the entire record in the matter, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Associate Chief Administrative Law Judge's findings, conclusions and recommendations, and issued an appropriate remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
PUGET SOUND NAVAL SHIPYARD,  
BREMERTON, WASHINGTON

Respondent

and

Case No. 71-3030

BOILERMAKERS UNION, LOCAL 290,  
BREMERTON, WASHINGTON

Complainant

DECISION AND ORDER

On September 4, 1975, Associate Chief Administrative Law Judge John H. Fenton issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Associate Chief Administrative Law Judge's Recommended Decision and Order.

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

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, shall:

1. Cease and desist from:

(a) Threatening to take disciplinary action against employees, or their union representatives, because they invoke the negotiated grievance machinery in a manner allegedly contrary to the required procedure.

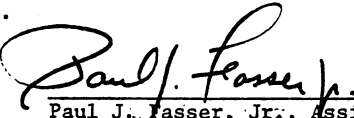
(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

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

(a) Post at its Bremerton, Washington, facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commander of the Shipyard, and they shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Commander shall take reasonable steps to assure that such notices are not altered, defaced or covered by any other material.

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

Dated, Washington, D.C.  
November 26, 1975

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

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT threaten to take disciplinary action against employees, or their union representatives, because they invoke the negotiated grievance machinery in a manner allegedly contrary to required procedure.

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

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.



. . . . .  
In the Matter of :  
  
DEPARTMENT OF THE NAVY :  
PUGET SOUND NAVAL SHIPYARD :  
BREMERTON, WASHINGTON :  
Respondent : CASE NO. 71-3030  
  
and :  
  
BOILERMAKERS UNION, LOCAL 290 :  
BREMERTON, WASHINGTON :  
Complainant :  
. . . . .

William K. Holt  
Business Manager and Secretary-Treasurer  
Boilermakers Local #290  
P. O. Box 488  
Bremerton, Washington 98310  
For the Complainant

Edward T. Borda, Esq.  
Counsel for the Department of the Navy  
Labor Disputes and Appeals Section  
Washington, D. C. 20390  
For the Respondent

Before: JOHN H. FENTON  
Associate Chief Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding under Executive Order 11491 was initiated upon the filing of a complaint on September 13, 1974, by Boilermakers Union Local 290 against the Puget Sound Naval Shipyard. Notice of Hearing was issued on January 31, 1975 by the Assistant Regional Director for Labor-Management Services, San Francisco Region.

The complaint alleged that Respondent violated Sections 19(a)(1), (2) and (6) 1/ on May 30, 1974, when Group Superintendent John F. Longmate rendered a second step decision pursuant to the negotiated grievance procedure in which he threatened disciplinary action against the grievant and his Union representatives for allegedly failing to follow the grievance procedure.

A hearing was held in Bremerton, Washington, on March 14, 1975. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent moved to dismiss the complaint upon completion of the Union's case, and chose not to call any witnesses. A brief was filed by the Union, which has been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following conclusions and recommendations.

Findings of Fact

Complainant is an affiliate of the Bremerton Metal Trades Council, which is party to a contract with Respondent (Joint Exhibit No. 1). Article XXIX thereof set forth a grievance procedure which provides, in pertinent part:

"Section 3. Any grievance not taken up with the employee's immediate supervisor within fifteen (15) working days after the occurrence of the matter out of which the grievance arose, shall not be presented nor considered at a later date except cases where the employee was not aware of being aggrieved. Extension may be mutually agreed upon to provide for unusual cases.

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1/ At the hearing, Complainant moved to amend the complaint to add a Section 19(a)(4) allegation, asserting that the original charge embraced such a claim, and that its absence in the complaint was an oversight. No evidence even tending to support such an allegation was introduced. The motion is therefore denied.

"Section 4. The following grievance procedure applies to all eligible employees of the unit.

a. Informal Step. An employee shall first take up his grievance informally with his immediate supervisor. The immediate supervisor will meet with the employee and Council steward and attempt to resolve the grievance. The supervisor must give his answer within five (5) working days. The Council and the Employer anticipate that most employee grievances will be settled at this informal level."

On January 23, 1974, Mr. Clarence Groves, a shipfitter, was assigned the task of removing lead bricks from the ballast tanks of a submarine. During the day he remarked to his immediate supervisor, Mr. Paul Powers, that the work was dirty, and that he should either be issued coveralls or given "dirty pay" (extra compensation for work which subjects the employee to abnormal conditions). Mr. Powers indicated his agreement and issued Mr. Groves a chit for coveralls.

On the next day Mr. Groves broached the matter to his shop steward Mr. William Workman. Both Mr. Groves and Mr. Powers happened to come to Mr. Workman's counter later that day, and Workman requested dirty pay on behalf of Groves. Supervisor Powers rejected the request.

On January 31, Mr. Groves filed a written (Step 1) grievance with Shipfitter Superintendent McCaughn (Respondent's Exhibit No. 2). It was rejected on February 4 on the ground that formal consideration of the grievance was precluded until such time as Article XXIX, Section 4 was complied with through informal discussions with the immediate supervisor. (Respondent's Exhibit No. 1).

Thereafter Mr. Groves and Mr. Workman retraced their steps and engaged in further fruitless discussions with Mr. Powers, rather than informing Mr. McCaughn that they had, in fact, complied with the requirements for informal efforts to resolve the grievance. On February 12, Mr. Groves filed another written grievance with Mr. McCaughn, formally requesting environmental differential pay for the period from January 23 to February 11, claiming that his assignment to the removal of lead ballast during that time exposed him to abnormal working conditions warranting additional compensation. Mr. McCaughn rejected the claim in a memorandum dated February 28, essentially

on the ground that Mr. Groves was not exposed to soiling of body or clothing beyond what is normally to be expected in the performance of a shipfitter's duties. The parties then advanced to Step 2 before Group Superintendent Longmate. Mr. Groves, Steward Workman and Mr. William K. Holt, Business Manager and Secretary-Treasurer of Complainant, met with Mr. Longmate on April 3, 1974. The latter clearly threatened the grievant and his representative with the possibility of future disciplinary action should they again neglect to follow the contract's requirements concerning informal resolution of grievances. No one disputed his assumption that the grievance had never been properly brought to the attention of Mr. Groves' immediate supervisor. On May 30, Mr. Longmate issued his written decision, granting in part the request for environmental pay. In doing so, he had the following to say at paragraph 2:

"You had full opportunity to describe the working conditions and functions that you felt justified the payment of dirty work differential. In reviewing all aspects of this issue subsequent to this meeting, I found it necessary to call you and your Metal Trades representative to a further meeting. I found that the negotiated grievance procedure had not been followed by you or your Metal Trades representatives in processing this grievance. At no time prior to initiating this grievance had you ever approached your supervisor to discuss the matter of dirty pay differential. Further, I found that the grievance had been initiated and forwarded to the head of the shop without your supervisor having any knowledge that you felt a problem existed or that you had filed a grievance. The most fundamental aspect of the grievance procedure is that every effort is to be made to resolve problems at the lowest level possible. Even more fundamental, a grievance should not exist until the immediate supervisor has had opportunity to resolve the problem felt to be at issue. In that second meeting held with you and your representative I instructed both of you in this matter. I will consider this memorandum to you with a copy to your Metal Trades representatives to serve as a letter of caution that should subsequent occasions arise where the fundamental guidelines for problem resolution are not followed, formal discipline will be considered."

This threat, or warning, is the heart of the case. In addition, Complainant also presented evidence that Group Superintendent Longmate otherwise intimidated employees who sought to use the grievance machinery by displaying what they perceived as an attitude hostile to grievants. Thus, testimony was elicited indicating that he was hard-nosed and un-receptive, argumentative and difficult. Steward Workman testified that he resigned his position with the Union in part because of the threat quoted above. There was also testimony that an environmental differential grievance brought by Mr. Jack Lancaster was not decided until six months after the hearing. Thus, the Union sought to establish that Respondent, through Mr. Longmate, intimidated, restrained and coerced employees in the exercise of their rights.

#### Contentions of the Parties

The Union contends that Respondent threatened to punish employees and their Union representatives, for alleged procedural errors in the processing of a grievance, in order to discourage the exercise of such rights, in violation of Section 19(a)(1). It also argues, as noted above, that Respondent otherwise discouraged the use of the contract's provisions for resolving claims for environmental differential pay by inordinate delay in processing such claims, and by receiving them in a manner which displayed its hostility towards grievants and their representatives. It does not articulate the theories upon which it would bottom Section 19(a)(2) and (6) violations.

Respondent contends, essentially, that Group Superintendent Longmate's warning of disciplinary action has the effect of compelling employees and their representatives to comply with the contract's terms, and does not constitute a threat to punish employees because they engage in activity protected by the Executive Order. It further argues that no facts were presented which would support a finding that Respondent has discriminated against any employee in violation of Section 19(a)(2), or refused to consult, confer or negotiate with Complainant in violation of Section 19(a)(6).

Discussion and Conclusions

The record is devoid of evidence that Respondent has in any way encouraged or discouraged membership in Complainant by discrimination in regard to any term or condition of employment. Likewise, there is no evidence that Respondent has refused to confer, consult or negotiate with Complainant in violation of Section 19(a)(6). At most, in these respects, Complainant seems to argue that Respondent has handled grievances related to "dirty pay" in such a manner as to discourage employees from pursuing their contract rights, or of seeking vindication of those rights through the Union. In addition, it apparently contends that this failure to accept such claims, or grievances related to them, in a cheerful and accommodating way, and to act upon them promptly, is violative of the obligation to consult and confer. In sum, as I understand it, the Union asserts that Respondent, in its effort to hold down the costs of environmental differential pay, has treated it in a manner no self-respecting union should have to tolerate, and which the Executive Order should not countenance. As noted, I fail to perceive how the Respondent's actions violate either Section 19(a)(2) or (6).

The threat to consider discipline against employees or Union representatives who fail to properly invoke the grievance procedure, however, is a violation of 19(a)(1). It has the obvious consequence of chilling the assertion of contract rights by warning those who would pursue their claims that they do so at their peril. Section 3 of Article XXIX affords Respondent a complete remedy for the kind of administrative burdens improperly processed grievances present to it, as described in Group Superintendent Longmate's memo of May 30. Pursuant to its terms, employees who do not follow the prescription for processing a grievance do so at the peril of forfeiting their grievance. This clearly should be a sufficient deterrent to those tempted to skip the effort to resolve a grievance with their immediate supervisor. Absent such a readily available and completely satisfactory remedy for Respondent's legitimate concerns, there would be considerably more force to the argument that Respondent has the right to impose discipline in order to compel compliance with the contract. Here, resort to discipline is totally unnecessary for such purposes, leaving as the only foreseeable consequence of

the threat to use discipline that of discouraging employees from using the grievance machinery. The only remaining issue, then, is whether such discouragement of an employee's use of the grievance machinery interferes, restrains or coerces him in the exercise of rights assured by the Order.

The Assistant Secretary of Labor for Labor-Management Relations has held that agency action which discourages the filing of grievances pursuant to a negotiated grievance is inherently destructive of the rights assured employees in Section 1(a) of the Order - to form, join and assist a labor organization freely and without fear of penalty or reprisal. 2/ It follows that Superintendent Longmate's threats violated Section 19(a)(1) of the Order, both by discouraging employees from filing grievances and discouraging Union representatives from becoming associated with such grievances.

Recommendation

Having found that Respondent has engaged in conduct violative of Section 19(a)(1), I recommend that the Assistant Secretary adopt the following Order designed to effectuate the purposes of the Executive Order.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25 of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington shall:

1. Cease and desist from:

(a) Threatening to take disciplinary action against employees, or their Union representatives, because they invoke the negotiated grievance machinery in a procedurally irregular way.

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2/ National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No. 295; Department of Defense Arkansas National Guard, A/SLMR No. 53.

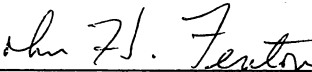


(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

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

(a) Post at its Bremerton, Washington facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commander of the Shipyard, and they shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Commander shall take reasonable steps to assure that such notices are not altered, defaced or covered by any other material.

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

  
JOHN H. FENTON  
Associate Chief Judge

DATED: September 4, 1975  
Washington, D. C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT threaten to take disciplinary action against employees, or their Union representatives because they invoke the negotiated grievance machinery in a procedurally irregular way.

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

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature) (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,  
REGION 3, PUBLIC BUILDINGS SERVICE,  
CENTRAL SUPPORT FIELD OFFICE  
A/SLMR No. 583

GENERAL SERVICES ADMINISTRATION,  
REGION 3, PUBLIC BUILDINGS SERVICE,  
CENTRAL SUPPORT FIELD OFFICE

Respondent

and

Case No. 22-5570(CA)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2151, AFL-CIO

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2151, AFL-CIO, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by its unilateral change in its past practice of permitting unrestricted employee parking.

On August 7, 1975, Associate Chief Administrative Law Judge John H. Fenton 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 Associate Chief Administrative Law Judge's Report and Recommendations. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Associate Chief Administrative Law Judge's Report and Recommendations. The Respondent, on the other hand, did not file exceptions.

Noting that informing a steward as an affected employee of a change in working conditions did not satisfy the Respondent's obligation to give notice to the Complainant concerning a proposed change in working conditions, the Associate Chief Administrative Law Judge found that the Respondent, by its June 26, 1974, notice to employees, effected changes in working conditions without prior bargaining with the Complainant in violation of Section 19(a)(1) and (6) of the Order. Additionally, the Associate Chief Administrative Law Judge dismissed the allegation, first raised at the hearing, that the Respondent's unilateral promulgation of a policy contained in a November 12, 1973, memo constituted an additional violation of Section 19(a)(1) and (6) of the Order as the issuance of the November 12, 1973, memo occurred more than nine months before the filing of the complaint in this matter.

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

Upon consideration of the Associate Chief Administrative Law Judge's Report and Recommendations, and the entire record in this case, including the Complainant's exceptions, the Assistant Secretary adopted the Associate Chief Administrative Law Judge's findings, conclusions and recommendations. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary

of Labor for Labor-Management Relations hereby orders that the General Services Administration, Region 3, Public Buildings Service, Central Support Field Office, Washington, D. C., shall:

1. Cease and desist from:

(a) Instituting changes in its policy of permitting unrestricted parking of its employees' private vehicles on Government property without first meeting and conferring with the American Federation of Government Employees, Local 2151, AFL-CIO, or any other exclusive representative of its employees.

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


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

(a) Upon request, meet and confer with the American Federation of Government Employees, Local 2151, AFL-CIO, or any other exclusive representative of its employees, with respect to changes in its policy of permitting unrestricted parking of its employees' private vehicles on Government property.

(b) Post at its facilities throughout the Central Support Field Office copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Manager of the Central Support Field Office and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D. C.  
November 26, 1975

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

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute changes in the policy of permitting unrestricted parking of our employees' private vehicles on Government property without first meeting and conferring with the American Federation of Government Employees, Local 2151, AFL-CIO, or any other exclusive representative of our employees.

WE WILL, upon request, meet and confer with the American Federation of Government Employees, Local 2151, AFL-CIO, with respect to changes in the policy of permitting unrestricted parking of our employees' private vehicles on Government property.

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



. . . . . :  
In the Matter of :  
:  
GENERAL SERVICES ADMINISTRATION, :  
REGION 3, PUBLIC BUILDINGS SERVICE, :  
CENTRAL SUPPORT FIELD OFFICE : CASE NO. 22-5570(CA)  
Respondent :  
:  
and :  
:  
AMERICAN FEDERATION OF GOVERNMENT :  
EMPLOYEES, LOCAL 2151, AFL-CIO :  
Complainant :  
. . . . . :

CHARLES I. LIBURD  
Labor Management Relations Officer  
General Services Administration  
Region 3  
On behalf of the Respondent  
  
WILLIAM WALDENMAIER  
National Representative  
District 14, American Federation of  
of Government Employees  
On behalf of the Complainant

BEFORE: JOHN H. FENTON  
Associate Chief Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This is a proceeding under Executive Order 11491. Notice of Hearing was issued on November 22, 1974, by the Assistant Regional Director for Labor-Management Services, Philadelphia Region, based on a Complaint filed on October 10 by Complainant alleging that Respondent violated Sections 19(a)(1) and (6) of

the Order by announcing and enforcing changes in its parking policy at its facility located at 10 P Street, S.W., Washington, D.C., without consulting with Complainant, the recognized representative of the affected employees.

A hearing was held on January 28, 1975, in Washington, D.C. All parties were afforded an opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations:

Findings of Fact

On November 12, 1973, the Chief, Special Services Branch, GSA, issued a memorandum to subordinate Chiefs concerning the inspection and control of private vehicles. In relevant respect it announced at paragraph 2 the following restrictions upon parking for private vehicles:

10 P Street, S.W. - No parking of private vehicles will be allowed . . . . inside the fencing. Full use is expected of the areas outside . . . . the fencing. Parking spaces are to be marked and assignment controlled. 1/

At that time the approximately 175 employees involved herein were assigned to the Navy Yard. In late January 1974 their relocation to 10 P Street began in order to consolidate 12 different shops in one facility. It was staggered on a shop by shop basis, and was not completed until March. In addition, in March over 100 trucks were moved into the enclosure.

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1/ Announcement of this policy was not attacked in the Complaint, and was apparently at that time unknown to Complainant, as consultation did not take place. It is in any event beyond the reach of the Complaint filed 11 months later.

Because of the staggered nature of the relocation, there was in its earlier stages ample room for all private vehicles. The November 12 memo was therefore ignored, and unrestricted parking was permitted. As the shift of personnel neared completion, and particularly upon the arrival of the trucks, there no longer was room to accommodate all, and the movement of official trucks was impeded. Acting Building Manager Willard Meyer therefore issued permits to the shops, for allocation of a limited number of spaces to key personnel, and caused his supervisors to instruct all other personnel that the policy against the parking of private vehicles within the enclosure would be enforced. It appears that such allocation of spaces was not made by reference to any outstanding GSA regulation setting priorities in that area. In addition, this limited allocation, like the earlier free access, was violative of the November 12 memo. Some personnel, feeling these restrictions to be an unfair and unwarranted departure from the earlier policy, disregarded the instructions. There was therefore a continuing impediment to the use of official vehicles. Throughout this time, no Union officials were told of these changes, except as at least one shop steward received the same warning received by all other employees.

Finally, in order to correct the continuing disregard of supervisors' instructions, Mr. Meyer on June 26, 1974, issued a notice to all employees. It announced that, beginning on July 1,

... parking within the fenced area on the West side of "P" Street, S.W., and the area adjacent to the building and fence on "P" Street will be restricted to vehicles displaying special reserved parking tickets. Vehicles parking in these posted spaces will be ticketed.

Again, no Union officer was made aware of management's decision to strictly enforce a policy of excluding private vehicles without permits from the enclosure.

Positions of the Parties

Complainant contended in its Complaint that Respondent violated Sections 19(a)(1) and (6) by its issuance of the June 26 notice, which constituted an unilateral change in its past practice of permitting unrestricted parking. In its closing argument and its brief, the Complainant added contentions that promulgation of the November 12 memo, and the subsequent establishment of criteria for an allocation of parking at the P Street facility were further unilateral acts violative of Sections 19(a)(1) and (6).

Respondents defense in essence is that the June 26 notice was a reaffirmation of the policy expressed in the November 12 memo, which followed upon a brief period during which enforcement of the policy expressed in the latter would have served no practical purpose, and there was no obligation to consult concerning reestablishment of the pre-existing condition of employment. It further argues that, if there existed a duty to consult, it was discharged when the various supervisors orally informed stewards of its intention to enforce the prohibition of private parking within the enclosure.

Conclusion

Parking privileges are clearly working conditions concerning which management under Section 11(a) has an obligation to meet and confer in good faith with the bargaining representative. Here, the policy respecting the P Street facility enunciated in the November 12, 1973 memo is immune from attack as a unilateral establishment of a parking policy because it occurred more than 9 months before the complaint was filed. The June 26 notice to employees, to which the complaint was addressed constituted a change in that policy, in that it permitted private parking by permit. It also constituted a change in the interim policy of unrestricted parking. Thus, unless there is merit to Respondent's argument that notice to an affected steward satisfied the obligation to give notice to the Union, Respondent failed to provide the Union with an opportunity for good faith consultation before effecting the change.

I conclude that informing stewards, like all other employees, that their working conditions are about to change does not satisfy that obligation. Here it is clear that no agent of Respondent ever approached any agent of the Union, in his capacity as an agent of the Union, to propose a change. I do not regard the Great Lakes Naval Hospital 2/ decision as controlling. There, the notice, like the notice here, was clearly not intended to be an invitation to bargaining, but it was addressed to the Union president as an affected employee, and the Assistant Secretary found it constituted notice to the Union. Stewards occupy the lowest level of a labor organization's hierarchy. Absent evidence that stewards have regularly been used as conduits of such information to higher Union officials, I would not find mere notice to a steward, without any indication that management was receptive to consultation on the issue, as sufficient to satisfy management's obligation to give notice to the Union. To hold otherwise would require the conclusion that Agency action affecting working conditions is not unilateral and therefore unlawful, even though taken with no intention of recognizing the Union's role as exclusive bargaining representative, so long as some steward could be charged with actual or constructive knowledge of management's plans, in a time frame which would afford a reasonable opportunity for meaningful consultation upon appropriate request. While the element of good faith intention to disclose plans to the bargaining representative was apparently not present in the Great Lakes Naval Hospital case, notice was there provided to the Union's chief executive officer. To permit the mere knowledge of a steward to render privileged what would otherwise be unilateral conduct on the part of an Agency would tend to make a game of the obligations imposed by Section 11(a), and would hardly contribute to harmonious labor relations in government.

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2/ U.S. Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SIMR No. 289.

I therefore conclude that Respondent, by its June 26 notice, effected changes in its parking policy without prior consultation with the Union, in violation of Section 19(a)(6) of the Order. I further find that such action tends to interfere with, restrain or coerce employees in the exercise of their rights assured by the Order, in violation of Section 19(a)(1). 3/ As indicated earlier, Complainants' contention at the hearing that the November 12, 1973 memo was unilaterally promulgated is rejected because it occurred more than nine months before the complaint was filed. 4/

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Rules and Regulations, I recommend that the Assistant Secretary of Labor for Labor-Management Relations adopt the following Order designed to effectuate the policies of Executive Order 11491, as amended.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the General Services Administration, Region 3, Public Buildings Service, Central Support Field Office, Washington, D.C., shall:

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3/ Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SIMR No. 454.

4/ I do not address Complainant's contentions, first advanced in its brief, that Respondent thereafter unilaterally changed its parking policy first by permitting unrestricted [continued on next page]

1. Cease and desist from:

(a) Unilaterally changing its policy with respect to the parking of employees' vehicles on government property, or any other condition of employment without first conferring or negotiating with Local 2151, American Federation of Government Employees or any other exclusive representative of its employees.

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

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

(a) Upon request, consult, confer, or negotiate with Local 2151, American Federation of Government Employees or any other exclusive representative of its employees with respect to changes in its policy with respect to the parking of employees' vehicles on government property.

(b) Post at its facilities throughout the Central Support Field Office copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Manager of the Central Support Field Office and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulleting boards and other places where notices to employees are customarily posted. The Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

4/ - continued

parking and then by allocating some spaces within the enclosure. Aside from the problems posed by their belatedness, a resolution of these issues would not add to the scope of the recommended Order.

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

*John H. Fenton*  
\_\_\_\_\_  
JOHN H. FENTON  
Associate Chief Judge

AUG 7 1975  
DATED:  
Washington, D. C.

## N O T I C E T O A L L E M P L O Y E E S

## PURSUANT TO

## A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute changes in the policy with respect to parking private vehicles on government property without consulting, conferring, or negotiating with Local 2151, American Federation of Government Employees or any other exclusive representative of our employees.

WE WILL, upon request, consult, confer, or negotiate with Local 2151, American Federation of Government Employees, with respect to changes affecting parking privileges of private vehicles on government property.

\_\_\_\_\_  
(Agency or Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

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

DEPARTMENT OF THE NAVY,  
NAVAL UNDERSEA CENTER,  
SAN DIEGO, CALIFORNIA  
A/SLMR No. 584

This case involved a petition for amendment of certification filed by the Department of the Navy, Naval Undersea Center, San Diego, California, (Activity).

By its petition the Activity sought to amend the designation of the Activity and to amend the designation of the locations of the covered employees to reflect changes precipitated by a reorganization. The exclusive representative, the National Federation of Federal Employees, Local 1478 (NFFE), agreed with the proposed amendments.

As the evidence reflected that following the closing of one location containing unit employees the unit employees at the three remaining locations continued to perform the same functions, the Assistant Secretary, noting the agreement of the parties, amended the certification to reflect the requested changes.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
NAVAL UNDERSEA CENTER,  
SAN DIEGO, CALIFORNIA

Activity-Petitioner

and

Case No. 72-5273(AC)

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 1478

Labor Organization

DECISION AND ORDER AMENDING CERTIFICATION

Upon petitions 1/ duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Eleanor M. Haskell. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject case, the Assistant Secretary finds:

The Activity filed the subject petition for amendment of certification seeking to amend the designation of the Activity and the organizational locations of the unit as set forth in the certification of representative. 2/ In this regard, the Activity proposes that the certification be amended to read as follows:

All employees of the Naval Undersea Center, San Diego, California, working at the facilities at Morris Dam,

1/ During the hearing, the International Association of Fire Fighters, Local F-33, requested withdrawal of its RO petition previously filed in Case No. 72-5168(RO) and consolidated for hearing with the subject petition. The withdrawal request subsequently was approved by the Assistant Regional Director.

2/ On December 30, 1970, the National Federation of Federal Employees, Local 1478, herein called NFFE, was certified as the exclusive representative in a unit of all Wage Grade and General Schedule employees serviced by the Civilian Personnel Office, Naval Undersea Research and Development Center, 3202 E. Foothill Blvd., Pasadena, California, excluding managers, supervisors, guards, persons performing personnel work except in a purely clerical capacity, professional employees, temporary employees, employees with duty stations at San Diego, California, and Wage Grade employees on San Clemente Island.

the Long Beach Naval Support Activity, and San Clemente Island, California, excluding managers, supervisors, guards, persons performing personnel work except in a purely clerical capacity, professional employees, temporary employees, and Wage Grade employees on San Clemente Island. 3/

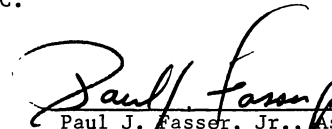
The parties agreed on the appropriateness of the proposed amendment of the certification. The record reveals that effective June 9, 1972, the designation of the Activity was changed from Naval Undersea Research and Development Center to Naval Undersea Center. Regarding the designation of the organizational locations, the evidence discloses that prior to April 1973, the unit in question encompassed employees of the Activity's facilities at Pasadena, Morris Dam, Long Beach and San Clemente Island, California. Effective May 3, 1974, a reorganization resulted in the closing of the Pasadena facility and transfer of most of its employees to a facility in San Diego, California. Remaining at the same physical locations were unit employees at the Morris Dam, Long Beach, and San Clemente Island facilities who continued to perform the same functions as they performed prior to the reorganization. Further, the record reveals that since the date of certification these employees have been represented continuously by the NFFE.

Accordingly, consistent with the parties' agreement, I shall order that the prior certification be amended to conform to the existing circumstances resulting from the change in the designation of the Activity and the change in the designation of the exclusively recognized unit's locations precipitated by the reorganization.

ORDER

IT IS HEREBY ORDERED that the certification granted to the National Federation of Federal Employees, Local 1478, on December 30, 1970, be, and it hereby is, amended by substituting therein as the designation of the Activity, Naval Undersea Center, San Diego, California, for Naval Undersea Research and Development Center, 3202 E. Foothill Blvd., Pasadena, California, and by substituting as the designation of the unit's locations, the facilities at Morris Dam, the Long Beach Naval Support Activity, and San Clemente Island, California.

Dated, Washington, D. C.  
November 25, 1975

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

3/ The NFFE currently represents exclusively a unit of Wage Grade employees at the Activity's facility on San Clemente Island.

November 26, 1975

A/SLMR No. 585

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,  
EASTERN REGION  
A/SLMR No. 585

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DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,  
EASTERN REGION

Respondent

and

Case No. 30-5951(CA)

NATIONAL ASSOCIATION OF AIR TRAFFIC  
SPECIALISTS, EASTERN REGION

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the National Association of Air Traffic Specialists, Eastern Region (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order based on the Respondent's Facility Chief threatening to give the Complainant's Facility Representative leave without pay for tardiness and his accusing the Facility Representative of breaking and entering the Respondent's offices and using the Respondent's equipment to conduct union business.

On September 16, 1975, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety.

Noting that the evidence did not establish that the warnings to the Facility Representative regarding tardiness resulted from the Facility Representative's union activities and, further, finding that the evidence did not support the allegation concerning the accusation of breaking and entering, the Administrative Law Judge recommended that the complaint be dismissed.

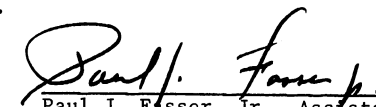
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject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

The Assistant Secretary, noting particularly the absence of exceptions, adopted the findings, conclusions, and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-5951(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
November 26, 1975

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

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



In the Matter of

DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
EASTERN REGION

Respondent Agency . Case No. 30-5951 (CA)

and

NATIONAL ASSOCIATION OF AIR TRAFFIC  
SPECIALISTS, EASTERN REGION  
Complainant

Clinton Worthley  
Regional Director, NAATS  
66 Legdewood Drive  
Smithtown, New York 11787

Russell L. Wexler  
Advisor, Eastern Region, NAATS  
For the Complainant

James E. Eagan  
Chief, Labor Relations Branch  
Federal Aviation Administration  
J.F.K. International Airport  
Jamaica, New York 11430  
For the Respondent

Before: MILTON KRAMER  
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated December 2, 1974 and filed December 9, 1974, alleging violations of Sections 19(a)(1), (2), and (4) of the Executive Order. The complaint alleged that on October 21, 1974, the Respondent (by Mr. Harold Purowitz, Facility Chief, Flight Service Station/International Flight Service Station, New York) threatened to give Mr. Harold Brown (Complainant's Facility

Representative) leave without pay for tardiness, and on or about October 24 delivered a letter dated October 22 (subject: tardiness) to Mr. Brown alleging numerous instances of tardiness, and at that time (October 24, 1974) accused Mr. Brown of breaking and entering the Respondent's offices and using Respondent's equipment to conduct union business. On April 7, 1975, an amended complaint, dated April 3, 1975, was filed alleging the same conduct and alleging that it was in violation of Sections 19(a)(1) and (2) of the Executive Order.

On December 27, 1974, in accordance with an extension of time, the Respondent filed a response to the original complaint denying in part the allegations of the complaint and alleging that the remainder was in the normal course of business and was unrelated to Mr. Brown's status as the Complainant's Facility Representative.

On April 16, 1975, the Acting Assistant Regional Director issued a Notice of Hearing to be held June 10, 1975, at the J.F.K. International Airport, Jamaica, New York. A hearing was held before me at that place on June 10 and 11, 1975. The Complainant was represented by its Regional Director and the Respondent was represented by the Chief, Labor Relations Branch, F.A.A., Eastern Region. Both sides examined and cross-examined witnesses and introduced exhibits. Both parties waived closing argument.

At the close of the oral hearing the time for filing briefs was extended to July 14, 1975. The Complainant filed a brief on July 11, 1975 and the Respondent on July 16, 1975.

Facts

The Federal Aviation Administration is a component of the Department of Transportation. Among its facilities are Domestic Flight Service Stations and International Flight Service Stations. The principal functions of Flight Service Stations are to furnish information to general aviation pilots concerning weather conditions in the vicinity and expected destinations and en route and concerning physical conditions at airports. It is a round-the-clock operation. In performing such functions it employs primarily Air Traffic Specialists. Prior to July 21, 1974, it had a Domestic Flight Service Station at MacArthur Airport, Islip, Long Island, New York and an International Flight Service Station at Kennedy Airport, Jamaica, Long Island, New York. On that

date those two facilities were combined to form the New York FSS/IFSS, the Facility here involved.

Harold H. Purowitz has been an employee of FAA since some substantial time prior to 1974. He became Facility Chief of the Domestic Flight Service Station at Islip about June 22, 1974 and on July 21, 1974 he became Facility Chief of the New York FSS/IFSS. Sam Yesselman is his deputy.

The National Association of Air Traffic Specialists is the duly certified exclusive representative of the F.A.A. Air Traffic Specialists in the Eastern Region of F.A.A. It has a collective bargaining agreement with the Respondent Federal Aviation Administration, Eastern Region which has been in effect since September 11, 1973. There was an antecedent agreement between the parties.

Harold E. Brown has been employed by the Federal Aviation Administration since April 15, 1968, all or most of the time as an Air Traffic Specialist. He was employed in that capacity at Islip from about May 1 to about November 9, 1974. In November 1974 he was transferred to the Flight Service Station at Teterboro, New Jersey where he had been employed when he initially was employed by F.A.A. It was while he was employed at Islip that Purowitz became the Facility Chief at the Domestic Flight Service Station there and later the Facility Chief of the combined New York FSS/IFSS. Brown and Purowitz were not employed at the same facility at any other time.

In July 1974 Brown became the Complainant's Alternate Facility Representative at Islip and on September 9 he became the Facility Representative. On October 18, 1974 he filed a grievance with Purowitz concerning the training program.

On or about October 19, 1974, Purowitz asked Yesselman, his deputy, to work up the tardiness and sick leave records of the Air Traffic Specialists. It had been the policy of Purowitz in his prior positions to have a tabulation of such records prepared approximately annually. Yesselman prepared a chart showing the tardiness records of the Specialists who had been tardy more than twice in the period from September 1 through October 19. Four (of the approximately 45) Specialists had reported late more than twice in that period. It was the practice for a Specialist to report from five to fifteen minutes before his official starting time to be briefed on weather patterns by the person he was relieving. A Specialist on duty cannot leave at the end of his shift unless and until his relief appears.

Harold E. Brown was one of the four whose name appeared on Yesselman's tabulations. The other three had been tardy, respectively, three times for a total of 18 minutes, three times for a total of 16 minutes, and three times for an aggregate of 31 minutes. Each of those three was counselled about his tardiness by Purowitz or Yesselman. Harold Brown had been tardy seven times in the same period for an aggregate of 272 minutes. Five of his tardinesses had been for between four and nine minutes each, but one was a tardiness of two and a half hours and one was a tardiness of an hour and three-quarters.

On October 21 Purowitz called Brown to his office to discuss Brown's record of tardiness. Purowitz told Brown that the next time he was tardy he would be on leave without pay for the period of tardiness. On October 22 Purowitz prepared a memorandum to Brown confirming their discussion of October 21. Brown was on leave on October 22 and 23, and Purowitz did not deliver the memorandum to Brown until October 24.

Barbara Prinz is Purowitz's secretary. She uses a typewriter, of which she is fond and proud, which has a quite unusual type. She knows of only one other typewriter in the F.A.A. that has that type, a typewriter in the Traffic Control Center in Leesburg, Virginia. On October 22 or 23, 1974, she saw a copy of a memorandum written by Brown and addressed to "All NAATS Members" that had been posted on the bulletin board that appeared to her to have been typewritten on her typewriter. She called it to the attention of Purowitz who also thought it was typewritten on Prinz' typewriter. In fact, the memorandum had been typewritten by Brown's fiancée at her place of employment (not in the F.A.A.) after working hours.

Purowitz called Brown to his office on October 24 to give Brown his memorandum of October 22 confirming their discussion of October 21. While giving Brown the memorandum he asked Brown something like "Did you use Barbara's typewriter?" Brown denied having done so, and that was the end of the matter until the unfair-labor-practice charge was served. But Brown construed that as an accusation that Brown had broken and entered into Prinz' office after her working hours because he could not have used her typewriter during working hours, her office was locked at other times, and Brown did not have access to a key to her office. Purowitz did not intend his question as an accusation of breaking and entering.

There is considerable evidence in the record concerning claimed misconduct of the Respondent that is irrelevant to the claimed misconduct alleged in the complaint.

Discussion and Conclusions

The first paragraph of the "Basis of the Complaint" alleges that Purowitz threatened to give Brown leave without pay for tardiness. Such allegation was proven; indeed, it was admitted by Purowitz. But standing alone such conduct does not show a violation of the Executive Order.

It is only by an extremely liberal reading of the complaint that it can be found to allege that such threat was made because Brown was a union official or because Brown as a union official had filed a grievance under the negotiated grievance procedure. But even if we so read it, such an allegation was not proven.

To be sure, the threat followed hard on Brown filing a grievance on October 18, 1974. But there is nothing even to indicate that the threat was motivated by the filing of the grievance other than the fallacious reasoning of post hoc ergo propter hoc. That is not enough.

The fact that Brown was threatened with leave without pay for tardiness while three other Specialists, who like Brown had been tardy more than twice in the relevant period, were only counseled, does not prove that Brown was threatened because of his union status or activities. Those three had been tardy three times each, one for an aggregate of 16 minutes, one for an aggregate of 18 minutes, and the third for an aggregate of 31 minutes. Brown was tardy in the same period seven times for an aggregate of 272 minutes, once by two and a half hours and once by an hour and three quarters. Such a difference in degree justified and explains the different treatment. Punctuality is important in the work of an Air Traffic Specialist. The operation they perform is conducted around the clock, and a Specialist completing his shift cannot leave until another Specialist reports to take over. In fact, it is customary for a Specialist to report from five to fifteen minutes before his official shift begins, to be briefed on weather patterns by the Specialist he is relieving. Such a practice may require these men to work extra time without compensation but that is a problem with which Executive Order 11491 does not deal.

The second paragraph of the "Basis of the Complaint" alleges that Purowitz accused Brown of breaking and entering F.A.A. offices to use F.A.A. equipment for union business. Purowitz did not use language that was directly accusatory, and said nothing about breaking and entering. Brown construed it as an accusation of breaking and entering because he thought he could not have used Prinz' typewriter without breaking and entering.

This item in the complaint appears to have been the result more of a misunderstanding than of anything else. The complaint alleges a violation of Sections 19(a)(1) and (2) of the Executive Order. This item in the complaint clearly was not a violation of Section 19(a)(2). It had nothing to do with discrimination in conditions of employment. And even if it were an accusation, and a false accusation, nothing was done about it. It could have, but not necessarily have, interfered with Brown's exercise of rights assured by the Executive Order, and hence a violation of Section 19(a)(1), only if Brown were imaginative and hypersensitive. And even if it were a false accusation, it was only coincidental that it pertained to Brown's activities as a union representative. The accusation, if there was one, would have been the same if it had related to a memorandum Brown had addressed to his civic association or his bowling team or his religious group.

I conclude, primarily, that no such accusation was in fact made, whatever Brown understood. I conclude also that if it had been made, there was insufficient nexus between the accusation and union activity to constitute a violation of Section 19(a)(1) of the Executive Order.

Recommendation

I recommend that the complaint be dismissed.



MILTON KRAMER  
Administrative Law Judge

Dated: September 16, 1975  
Washington, D.C.

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

DEPARTMENT OF THE ARMY,  
 FORT MCPHERSON, GEORGIA  
 A/SLMR No. 586

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 1759 (AFGE Local 1759), sought to clarify its exclusively recognized unit at Fort McPherson, Georgia, so as to include all non-supervisory and nonprofessional employees who currently are employed by Fort McPherson, but are located physically at Fort Gillem, Georgia, (formerly the Atlanta Army Depot). The Activity agreed that the employees assigned to Fort Gillem should be included in AFGE Local 1759's existing unit.

The Assistant Secretary found that the evidence adduced during the hearing in this case did not provide a sufficient basis upon which a decision could be made regarding the appropriateness of the unit clarification sought. In this regard, he noted, among other things, that there was insufficient evidence with respect to the number, duties, job classifications, skills, supervision, transfer and work contacts of the employees at Fort McPherson and Fort Gillem. He also noted that prior to a Department of Army reorganization on June 30, 1974, the Atlanta Army Depot (Depot) was part of the Army Materiel Command and that the American Federation of Government Employees, AFL-CIO, Local 81 (AFGE Local 81) held exclusive recognition for all nonprofessionals at the Depot, but the record was unclear as to the scope of such unit, the number of employees, their job classifications, the impact of the above-mentioned reorganization and the current status of AFGE Local 81.

In these circumstances, the Assistant Secretary remanded the matter to the appropriate Assistant Regional Director for the purpose of securing additional evidence in accordance with his decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,  
 FORT MCPHERSON, GEORGIA

Activity

and

Case No. 40-6126(CU)

AMERICAN FEDERATION OF GOVERNMENT  
 EMPLOYEES, AFL-CIO, LOCAL 1759

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 Otis Chennault. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 1759, herein called AFGE Local 1759, the exclusive representative of certain employees of the Department of the Army at Fort McPherson, Georgia, seeks to clarify its existing exclusively recognized unit so as to include all nonsupervisory and nonprofessional employees of Fort Gillem, Georgia (formerly the Atlanta Army Depot), who currently are employed by Fort McPherson, Georgia, but are located physically at Fort Gillem, Georgia. The Activity and the AFGE agree that the employees assigned to Fort Gillem should be included in AFGE Local 1759's existing unit. In this regard, they assert that Fort McPherson employees physically located at Fort Gillem do not constitute a separate organizational entity but, rather, are an extension of Fort McPherson.

The Activity, located at Fort McPherson, Georgia, is part of the U. S. Army Command whose mission is to organize, equip, station, train and maintain the combat readiness of active U. S. Army units and U. S. Army Reserve Forces. Overall direction of the Activity is vested in the Commander, Fort McPherson. The evidence established that on

December 9, 1963, AFGE Local 1759 was accorded exclusive recognition by the Activity for a unit described as: All civilian employees at Fort McPherson, Georgia, excluding managerial officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors and guards. At the time of the hearing herein, this exclusively recognized unit consisted of approximately 1,442 employees.

On December 8, 1964, American Federation of Government Employees, Local 81, herein called AFGE Local 81, was granted exclusive recognition for a unit of all nonprofessional employees at the Atlanta Army Depot, (Depot) Forest Park, Georgia. The Depot was part of the Army Materiel Command whose mission involved the management and procurement of inventories throughout the United States for the Department of the Army. On June 30, 1974, pursuant to a Department of the Army reorganization, the Army Materiel Command discontinued operations at the Depot and, thereafter, all real property was transferred to Fort McPherson and placed under the U. S. Army Forces Command. The Depot, after the reorganization, was renamed Fort Gillem.

With regard to the employees in the unit represented by AFGE Local 81, the record is unclear as to the scope of such unit, the number of employees, their job classifications and duties prior to June 30, 1974, the date of the reorganization. Further, the record is not clear as to the impact of such reorganization on the unit employees. Thus, the record shows that an uncertain number of employees remained at Fort Gillem and that an uncertain number moved to Fort McPherson after the reorganization. It is not clear in either case as to precise numbers, job classifications or duties of such employees, or whether they remained in substantially the same organizational unit, or were assimilated into new organizational units. Nor is the record clear as to whether such employees retained their original job classifications and duties and were merely transferred to the new command, or whether they were terminated and rehired in new classifications.

In addition, with regard to the employees in the unit represented by AFGE Local 1759, the record is not clear as to their organizational structure, number, job classifications, duties, and supervision. Further, the record is not clear as to the impact of the reorganization upon employees in this unit. Thus, the record indicates merely that, since the reorganization, certain employees have been assigned temporarily to Fort Gillem; that there has been, or will be, permanent transfer of undisclosed organizational units from Fort McPherson to Fort Gillem; and that certain personnel policies and other terms and conditions of employment prevailing at Fort McPherson have been extended in undisclosed degree to employees at Fort Gillem.

Further, the record is ambiguous with regard to the current status of AFGE Local 81. Thus, the record shows that a trustee for AFGE Local 81 disclaimed interest in representing any employees at Fort

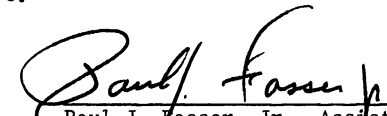
Gillem, and that AFGE Local 81 failed to appear at the hearing although it was served with a copy of the Notice of Hearing in this matter. However, the record further reflects that a letter protesting the subject petition was sent to the Activity, apparently by members of AFGE Local 81, or on their behalf, but it does not reflect the basis for the protest, nor the parties making such protest.

Under all these circumstances, I find that the record does not provide an adequate basis upon which to determine the appropriateness of the clarification action sought by the petition herein. Therefore, I shall remand the subject case to the appropriate Assistant Regional Director for the purpose of reopening the record in order to secure additional evidence.

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Assistant Regional Director.

Dated, Washington, D. C.  
November 26, 1975

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

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
NAVAL AIR STATION,  
FALLON, NEVADA  
A/SLMR No. 587

DEPARTMENT OF THE NAVY,  
NAVAL AIR STATION,  
FALLON, NEVADA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1841

Complainant

Case Nos. 70-2477,  
70-2496 and  
70-4076  
A/SLMR No. 432  
FLRC No. 74A-80

SUPPLEMENTAL DECISION AND ORDER

On July 10, 1974, an Administrative Law Judge issued his Report and Recommendations finding, among other things, that the Respondent Activity violated Section 19(a)(1) of the Order by requiring employees to read and initial a January 16, 1973, letter from the Respondent's Commanding Officer to the Complainant's President which was posted by the Activity on its bulletin boards. The Administrative Law Judge further found, however, that the actual posting of the letter by the Respondent did not violate the Order. In his Decision and Order issued September 30, 1974, the Assistant Secretary rejected the Administrative Law Judge's findings with regard to the January 16th posting and found a violation of Section 19(a)(1) and (6), noting that, in his view, absent agreement by the exclusive representative, direct communications by agencies or activities with unit employees with respect to matters relating to the collective bargaining relationship necessarily undermined the exclusive representative's rights set forth in Section 10(e) to be dealt with exclusively in matters affecting the terms and conditions of employment of the unit employees it represents.

On July 10, 1974, Administrative Law Judge Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, finding, among other things, that the Respondent Activity violated Section 19(a)(1) of the Order by requiring employees to read and initial a January 16, 1973, letter from the Respondent's Commanding Officer to the Complainant's President which was posted by the Respondent on its bulletin boards. The Administrative Law Judge further found, however, that the actual posting of the January 16, 1973, letter by the Respondent did not violate the Order. In this latter regard, the Administrative Law Judge, although noting that the letter involved contained statements which might be offensive to the Complainant, reasoned that an activity can communicate with employees and report its version of any meeting on its position in labor-management matters so long as the communications do not involve unlawful threats and promises of benefit and do not constitute an attempt to bypass the exclusive representative.

On October 24, 1975, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the subject case which, in part, rejected the Assistant Secretary's rationale. Thus, the Council noted that, in its view, the Order does not proscribe all communications with unit employees over matters relating to the collective bargaining relationship. Rather, the Council concluded that only those communications which, for example, amount to an attempt by agency management to bypass the exclusive representative and negotiate directly with unit employees, or which urge employees to put pressure on the representative to take a certain course of action, or which threaten or promise benefits to employees are violative of the Order. Noting that the content, intent and effect of the January 16, 1973, letter could reasonably be equated with an attempt to bargain directly with unit employees and to urge them to put pressure on the union to take certain actions, the Council found, in agreement with the Assistant Secretary but based on different rationale, that the posting of the January 16th letter by the Respondent was in violation of Section 19(a)(1) and (6) of the Order.

In his Decision and Order issued September 30, 1974, the Assistant Secretary rejected the Administrative Law Judge's finding with regard to the January 16th posting and noted that, in his view, absent agreement by the exclusive representative, direct communications by agencies or activities with unit employees with respect to matters relating to the collective bargaining relationship necessarily undermined the exclusive representative's rights set forth in Section 10(e) to be dealt with exclusively in matters affecting the terms and conditions of employment of the unit employees it represents. Accordingly, the

Pursuant to the Council's Decision on Appeal, the Assistant Secretary modified the order and remedial notice to all employees in A/SLMR No. 432 to conform with the Council's holding and rationale expressed therein.



Assistant Secretary found that the Respondent's conduct in posting the January 16, 1973, letter was inconsistent with the Respondent's obligation to deal exclusively with the exclusive representative in violation of 19(a)(1) and (6) of the Order.

On October 24, 1975, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the subject case which, in part, rejected the Assistant Secretary's rationale. Thus, the Council noted that, in its view, the Order does not proscribe all communications with unit employees over matters relating to the collective bargaining relationship. Rather, the Council concluded that only those communications which, for example, amount to an attempt by agency management to bypass the exclusive representative and negotiate directly with unit employees, or which urge employees to put pressure on the representative to take a certain course of action, or which threaten or promise benefits to employees are violative of the Order. In this regard, noting that the content, intent and effect of the January 16, 1973, letter could reasonably be equated with an attempt to bargain directly with unit employees and to urge them to put pressure on the union to take certain actions, the Council found that the Assistant Secretary's decision that the communications involved in the instant case violated Section 19(a)(1) and (6) was consistent with the purposes of the Order.

Based on the Council's holding, and the rationale contained therein, I hereby modify the order and remedial notice to all employees in the subject case to read as follows:

#### ORDER

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

1. Cease and desist from:

(a) Posting letters on bulletin boards relating to meetings pertaining to the collective bargaining relationship between the Fallon Naval Air Station and the American Federation of Government Employees, Local 1841, the employees' exclusive representative, where the content and effect of such letters constitute an attempt to bargain directly with unit employees and to urge them to put pressure on their exclusive representative to take certain actions.

(b) Requiring employees to read and initial communications posted on bulletin boards pertaining to the collective bargaining relationship between the Fallon Naval Air Station and the American Federation of Government Employees, Local 1841, the employees' exclusive representative, unless there exists a mutual agreement to permit such action.

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

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

(a) Post at its facility at Naval Air Station, Fallon, Nevada, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, Department of the Navy, Naval Air Station, Fallon, Nevada, and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D. C.  
November 26, 1975

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

## NOTICE TO ALL EMPLOYEES

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

PURSUANT TO

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

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT post letters on bulletin boards relating to meetings pertaining to the collective bargaining relationship between the Fallon Naval Air Station and the American Federation of Government Employees, Local 1841, our employees' exclusive representative, where the content and effect of such letters constitute an attempt to bargain directly with unit employees and to urge them to put pressure on their exclusive representative to take certain actions.

WE WILL NOT require our employees to read and initial communications posted on bulletin boards pertaining to the collective bargaining relationship between the Fallon Naval Air Station and the American Federation of Government Employees, Local 1841, our employees' exclusive representative, unless there exists a mutual agreement to permit such action.

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

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

Department of the Navy, Naval  
Air Station, Fallon, Nevada

and

American Federation of Government  
Employees, Local 1841

A/SLMR No. 432  
FLRC No. 74A-80

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal from a Decision and Order of the Assistant Secretary originates from an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1841 (union), contending, in pertinent part, that the Department of the Navy, Naval Air Station, Fallon, Nevada (activity), had violated section 19(a)(1) and (6) of the Order by posting a letter, without prior union approval, allegedly containing threats and demonstrating that the activity held the union in disdain. The letter was a communication from the activity's commanding officer to the union's president which reflected events occurring at a special meeting between the union's president and the activity's executive officer held to solve a negotiating problem and an unfair labor practice charge. The letter stated that: (1) it had been brought to the attention of the activity's commanding officer that the union's president had been involved in "highly irregular tactics and procedures" and had been "quoted as making highly suspicious statements, concerning management, which . . . [prompted questioning of] certain loyalties and integrities . . . in exercising the calling of . . . [her union] office"; (2) the executive officer "would not be intimidated by any 'blackmail' tactics on the part of the Union"; and (3) "any further tactics . . . to convey threats, intimidations or otherwise seek to hamper the collective bargaining process [would result in the activity's charging the union with] . . . failing to negotiate in good faith," since such actions "are clearly recognizable as violations under the Executive Order 11491, as amended, and if continued will result in formal charges."

The Assistant Secretary found first,

. . . absent mutual agreement between an exclusive bargaining representative and an agency or activity concerning the latter's right to communicate directly with unit employees over matters

relating to the collective bargaining relationship, direct communications such as that involved in this situation necessarily tend to undermine the status of the exclusive bargaining representative.

The Assistant Secretary reasoned that,

. . . by directly reporting to unit employees matters which have arisen in the context of the collective bargaining relationship, an agency or activity necessarily undermines an exclusive representative's rights set forth in Section 10(e) to be dealt with exclusively in matters affecting the terms and conditions of employment of the unit employees it represents. Any lesser standard clearly would be in derogation of the collective bargaining relationship.

The Assistant Secretary, after concluding that the need for such a policy was clearly demonstrated in this case where the activity's "communication to unit employees created an unfavorable impression with respect to the actions of the Complainant's [union's] President," and, in his view, "necessarily tended to undermine the Complainant's exclusive bargaining status," found that the agency's posting of the letter at issue was "inconsistent with its obligation under the Order to deal exclusively with the exclusive representative of its employees in violation of Section 19(a)(6)" and moreover, "such conduct necessarily interfered with the rights of unit employees in violation of Section 19(a)(1)."

As a remedy, the Assistant Secretary ordered the activity to cease and desist from such posting of letters and to post a notice to that effect.

Thereafter, the Assistant Secretary's decision was appealed to the Council by the agency. Upon consideration of the petition for review, and the opposition for review filed by the union, the Council determined that a major policy issue was presented by the decision of the Assistant Secretary, namely:

The propriety of the finding of the Assistant Secretary that, absent mutual agreement between an exclusive bargaining representative and an agency or activity concerning the latter's right to communicate directly with unit employees over matters relating to the collective bargaining relationship, direct communications (such as those involved in the instant case) necessarily tend to undermine the status of the exclusive representative, in violation of the Order.

The Council also determined that the agency's request for a stay met the criteria for granting such a request as set forth in section 2411.47(c) of its rules, and granted the request. Only the union filed a brief on the merits as provided for in section 2411.16 of the Council's rules.

Opinion

Section 10(e) of the Order provides, in pertinent part, that:

When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. . . .

This concept of "exclusive recognition" in the Federal service, first provided for under Executive Order 10988, was carried over and strengthened under Executive Order 11491, as amended. In describing the obligation owed to an exclusive representative, the Report of the President's Task Force on Employee-Management Relations in the Federal Service, which led to the issuance of E.O. 10988, stated:

. . . if an employee organization is chosen by the majority of the employees in an appropriate unit it becomes the only formal recognized representative for the unit. In its dealings with management officials it is considered to speak for all of the employees of the unit, a responsibility which it must, of course, meet.<sup>1/</sup> [Emphasis deleted.]

Thus, when a labor organization has been selected as the exclusive representative of employees in an appropriate unit, agency management must deal with it only, to the exclusion of other labor organizations and without engaging in direct negotiations with unit employees over matters within the scope of the collective bargaining relationship. To permit otherwise would allow agency management to avoid the responsibility owed to the exclusive representative to treat it as the only formal representative who speaks for all unit employees.

While the obligation to deal only with the exclusive representative over matters relating to the collective bargaining relationship is clear, this does not mean that all communication with unit employees over such matters is prohibited. Indeed, under certain circumstances agency management is obligated to engage in communications with bargaining unit employees regarding the collective bargaining relationship. For example, section 1(a) of the Order requires that "The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section . . . ." [Emphasis supplied.] In determining whether a communication is violative of the Order, it must be judged independently and a determination made as to whether that communication constitutes, for

<sup>1/</sup> Report of the President's Task Force on Employee-Management Relations in the Federal Service, A Policy for Employee-Management Cooperation in the Federal Service (1961), at 14.

example, an attempt by agency management to deal or negotiate directly with unit employees or to threaten or promise benefits to employees. In reaching this determination, both the content of the communication and the circumstances surrounding it must be considered.<sup>2/</sup> More specifically, all communications between agency management and unit employees over matters relating to the collective bargaining relationship are not violative. Rather communications which, for example, amount to an attempt to bypass the exclusive representative and bargain directly with employees, or which urge employees to put pressure on the representative to take a certain course of action, or which threaten or promise benefits to employees are violative of the Order. To the extent that communication is permissible, it is immaterial whether such communication was previously agreed upon by the exclusive representative and the agency or activity concerning the latter's right to engage in such communication.

Regarding the instant case, the Assistant Secretary found that agency management posted the contents of a letter to the union president reflecting the events which occurred at a special meeting between the executive officer and the union president held to solve a negotiating problem and an unfair labor practice charge. This, then, poses the question whether, in the circumstances of the case, agency management's actions constituted an effort to impair the status of the exclusive representative by attempting to convey to employees that they should bypass the union and deal directly with management or to solicit employees to cause their representative to take some particular course of action. The Assistant Secretary, stating ". . . it is improper for agencies or activities to communicate directly with unit employees with respect to matters relating to the collective bargaining relationship," found that management had violated the Order. Applying our views on the differences between permissible and prohibited communications, we find no basis for overturning the Assistant Secretary's findings insofar as the specific communications here involved. That is, the content, intent and effect of the letter can reasonably be equated with an attempt to bargain directly with employees and to urge them to put pressure on the union to take certain actions.


For the foregoing reasons, while determining that the Order does not provide that, absent mutual agreement between an exclusive bargaining representative and an agency or activity concerning the latter's right to

<sup>2/</sup> An analogous distinction is that drawn in the Council's recent decision in National Aeronautics and Space Administration (NASA), Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, A/SLMR No. 457, FLRC No. 74A-95 (September 26, 1975), Report No. , wherein certain "information gathering" meetings between management and unit employees were found not to be "formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit," and, accordingly, management was not required to permit the union to be present at such meetings.

communicate directly with unit employees over matters relating to the collective bargaining relationship, direct communications necessarily tend to undermine the status of the exclusive representative in violation of the Order, we find that the Assistant Secretary's decision that the communications involved in the instant case violated section 19(a)(1) and (6) is consistent with the purposes of the Order.

Accordingly, pursuant to section 2411.18(b) of the Council's Rules and Regulations, we sustain the Assistant Secretary's decision and vacate our earlier stay of that decision.

By the Council.

  
Henry B. Frazier III  
Executive Director

Issued: October 24, 1975

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

UNITED STATES DEPARTMENT OF THE NAVY,  
 NAVAL ORDNANCE STATION,  
 LOUISVILLE, KENTUCKY  
 A/SLMR No. 588

The Federal Labor Relations Council (Council), on October 23, 1975, issued its Decision on Appeal, FLRC No. 74A-54, in which it held, contrary to the Assistant Secretary's Decision and Order in A/SLMR No. 400, that: (1) Section 10(e) of Executive Order 11491, as amended, does not impose upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own representative; and (2) an agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee designates another representative, does not constitute an unfair labor practice.

Accordingly, pursuant to Section 2411.18(b) and (c) of its Rules, the Council set aside the pertinent portions of the Assistant Secretary's Decision and Order in A/SLMR No. 400 and remanded the case to him for appropriate action consistent with its decision.

Based on the Council's holding in FLRC No. 74A-54, and the rationale contained therein, the Assistant Secretary ordered that the pertinent portion of the complaint be dismissed.

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

UNITED STATES DEPARTMENT OF THE NAVY,  
 NAVAL ORDNANCE STATION,  
 LOUISVILLE, KENTUCKY

Respondent

and

Case Nos. 41-3126(CA),  
 41-3128(CA),  
 41-3129(CA),  
 A/SLMR No. 400,  
 A/SLMR No. 471,  
 and  
 FLRC No. 74A-54

INTERNATIONAL ASSOCIATION OF MACHINISTS  
 AND AEROSPACE WORKERS,  
 LOCAL LODGE 830, AFL-CIO

Complainant

SECOND SUPPLEMENTAL DECISION AND ORDER

On December 11, 1974, the Federal Labor Relations Council (Council) issued a decision accepting the Respondent's petition for review and staying certain paragraphs of the Assistant Secretary's remedial order in A/SLMR No. 400. As to those portions of the order in A/SLMR No. 400 which were not stayed by the Council, the Assistant Secretary, in a Supplemental Decision and Order dated December 30, 1974, 1/ ordered that the Respondent comply with his order. In this regard, he required among other things, that a notice to all employees be posted in accordance with A/SLMR No. 400, as modified by the Council's decision.

On October 23, 1975, the Council issued its Decision on Appeal in the subject case finding, contrary to the Assistant Secretary, that: (1) Section 10(e) of the Order does not impose upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own

1/ A/SLMR No. 471.

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

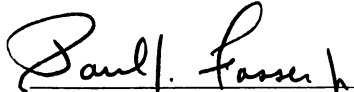
representative; and (2) an agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee designates another representative, does not constitute an unfair labor practice. Accordingly, pursuant to Section 2411.18(b) and (c) of its Rules, the Council set aside the pertinent portions of the Assistant Secretary's Decision and Order in A/SLMR No. 400 and remanded the case to him for appropriate action consistent with its decision.

Based on the Council's holding in the instant case, and the rationale contained therein, I shall order that paragraphs 1.c. and 2.c. of the remedial order in A/SLMR No. 400 be rescinded and that paragraph 2.d. of the order be rescinded to the extent that it requires the Respondent to post a notice reflecting the requirements of paragraphs 1.c. and 2.c. of the order.

ORDER

IT IS HEREBY ORDERED, consistent with the foregoing, that the pertinent portion of the complaint in Case No. 41-3129(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
November 26, 1975

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

United States Department of the Navy,  
Naval Ordnance Station,  
Louisville, Kentucky

and

International Association of  
Machinists and Aerospace Workers,  
AFL-CIO, Local Lodge 830

A/SLMR No. 400  
FLRC No. 74A-54

DECISION ON APPEAL FROM  
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary who found, among other things, that the Naval Ordnance Station, Louisville, Kentucky (the activity) was in violation of section 19(a)(1) and (6) of the Order by failing to recognize Local Lodge 830, International Association of Machinists and Aerospace Workers (the union) as the representative of a unit employee who was involved in an adverse action proceeding.

The relevant facts, as found by the Administrative Law Judge (ALJ) and adopted by the Assistant Secretary, are as follows: The activity served upon an employee who was a member of the union's exclusive bargaining unit a notice of proposed removal, which provided, in pertinent part, that:

You may reply to this notice personally or in writing, or both . . . .  
You will be allowed ten (10) calendar days from receipt of this notice to reply . . . . Consideration will be given to extending this period if you submit a request stating your reasons for needing more time. If you reply personally, you may be accompanied by any one person of your choice who is willing to represent you . . . .

Near the end of the period provided for response in the notice, the employee became ill and was hospitalized. Upon hearing of the employee's condition, the union's chief steward, purporting to act for the employee, sought an extension of the time limit specified for reply to the notice of proposed removal. The request was denied by the activity on the ground that the employee involved had not designated the chief steward as his representative as required by the notice of proposed removal and by pertinent Navy regulations.<sup>1/</sup> After expiration of the originally specified

<sup>1/</sup> The Navy regulation, CMMI 752, paragraph 2-5(b)(3) provides that ". . . in making an oral reply, an employee may elect to be accompanied

(Continued)

notice period, the activity advised the employee of its decision to remove him. The employee subsequently appealed the decision to remove him to the Civil Service Commission under the appropriate adverse action appeals procedures, and the activity's action was sustained by both the Commission's Atlanta Regional Office and the Board of Appeals and Review. During the pendency of the proceedings before the Civil Service Commission, the union initiated the unfair labor practice proceedings which are the subject of this appeal.

In deciding that the activity had violated section 19(a)(1) and (6) of the Order,<sup>2/</sup> the Assistant Secretary found, in pertinent part:

(Continued)

by a representative. Since the opportunity for a hearing is accorded only in the appellate process under Navy procedure, a formal hearing will not be held." It is also apparently Navy policy (according to the agency's petition for review) to extend the right of representation to employees wishing to make a written response to the notice of proposed adverse action.

Further, Article 14 (Adverse Actions and Disciplinary Actions) of the negotiated agreement between the parties provides, in relevant part:

Section 2. When the employer contemplates disciplinary or adverse action against an employee, the employee will be notified, in writing, of the proposed action and the reasons therefor. Such actions must be for just cause and the employee shall have the opportunity to reply to the charges, personally and/or in writing, to the appropriate management official. In making his reply, the employee may be represented by his Union representative or any person of his choice who is willing to represent him. . . .

Section 3. When a notice of decision to effect a disciplinary or adverse action is issued to the employee, and the employee appeals the action, but does not select a Union representative, the Union shall have the right to have an observer present at the hearing and to make the views of the Union known under the conditions set forth in applicable regulations.

2/ Sec. 19. Unfair labor practices. (a) Agency management shall not--

(1) interfere with, restrain or coerce an employee in the exercise of the rights assured by this Order;

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

Section 10(e) of the Order clearly imposes upon exclusive representatives an affirmative obligation to represent the interests of all unit employees. Under the particular circumstances of this case, involving a unit employee who is subject to an adverse action proceeding, I find that the Complainant (the employee's exclusive representative) had an ongoing obligation under Section 10(e) of the Order to represent the interests of the employee until such time as he indicated his desire to choose his own representative pursuant to Section 7(d)(1) of the Order. [Footnotes omitted.]

He further found that:

. . . the Respondent's failure to recognize the Complainant as the representative of the unit employee involved in the adverse action proceeding was in derogation of the Complainant's exclusive representative status and, thereby, violated Section 19(a)(6) of the Order. Moreover, in my view, such conduct had a concomitant coercive effect upon the rights of unit employees assured by the Order in violation of Section 19(a)(1) of the Order.

The Council, in response to the agency's petition for review, granted a stay of pertinent portions of the Assistant Secretary's Decision and Order and accepted the case for review on two major policy issues as set forth below. The agency chose to stand on the views set forth in its petition for review. The union filed a brief on the merits.

Opinion

The two major policy issues presented in this case are as follows:

1. Whether section 10(e) of the Order imposes upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own representative.
2. Whether an agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee elects to choose a different representative, constitutes an unfair labor practice under the Order.

Each of these issues will be considered separately below.

Issue 1 The Assistant Secretary found that section 10(e) of the Order "clearly imposes upon exclusive representatives an affirmative obligation to represent the interests of all unit employees" and hence, imposes upon the union in the circumstances of this case "an ongoing obligation under section 10(e) of the Order to represent the interests of the employee until such time as he indicated his desire to choose his own representative pursuant to section 7(d)(1), of the Order."

In so finding, the Assistant Secretary cited, with emphasis, certain portions of section 10(e) of the Order, as follows:

When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. . . .

The Council has concluded that this reliance upon the first and second sentences of section 10(e) is misplaced and constitutes a misinterpretation of section 10(e). The first sentence of section 10(e) is a statement of certain rights of representation which must be accorded a labor organization which has acquired exclusive recognition in a bargaining unit. That is, the first sentence provides that an exclusive representative is entitled to act for and to negotiate agreements covering all employees in the unit. The second sentence imposes certain obligations upon a labor organization when it acquires the rights of an exclusive representative. That is: "It [the exclusive representative] is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership." (Emphasis added.) In relying upon only that portion of the second sentence which is not underscored here, the Assistant Secretary erroneously found an obligation imposed on the exclusive representative beyond that which was intended by the Order. Taken as a whole, this second sentence does not obligate the exclusive bargaining agent to represent the interests of unit employees in all circumstances. Rather, as may be seen from that part of the second sentence which we have underscored, the exclusive representative is enjoined to act without discrimination and without regard to union membership when representing or negotiating an agreement on behalf of unit employees within the scope of its authority under the Order. In summary, the second sentence of section 10(e) does not impose an affirmative duty on the exclusive representative to act for unit employees whenever it is empowered to do so under the Order, but only prescribes the manner in which the exclusive representative must provide its services to unit employees when acting within its scope of authority established by other provisions of the Order.

In conclusion, with respect to the first issue raised, section 10(e) of the Order does not impose upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own representative.<sup>3/</sup>

<sup>3/</sup> Having determined that section 10(e) of the Order does not impose upon an exclusive representative an obligation to represent unit employees in an adverse action proceeding, it is unnecessary to pass on the Assistant Secretary's further conclusion that such obligation continues until the employee chooses his own representative in a grievance or appellate action pursuant to section 7(d)(1).

Issue 2. We have concluded above that an exclusive representative has no obligation under the Order to represent unit employees in an adverse action proceeding. However, we also noted that the first sentence of section 10(e) accords such exclusive representative the right to act for and to negotiate agreements covering all employees in the unit. We next consider whether those rights may extend to the representation of an individual bargaining unit employee in an adverse action proceeding, and if so, whether the union had such rights in the circumstances of this case. Only if we are able to answer both questions in the affirmative may we conclude that an agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee elects to choose a different representative, constitutes an unfair labor practice under the Order and, hence, sustain the Assistant Secretary's finding that the agency violated section 19(a)(1) and (6) of the Order.

Clearly, the express language of the first sentence of section 10(e) accords the exclusive representative the right to negotiate an agreement covering all unit employees, which right to negotiate may not be preconditioned upon the desires of any individual member of the bargaining unit. By negotiating such an agreement, the exclusive representative is exercising its right "to act for . . . all employees in the unit." Similarly, an exclusive representative, in the administration of a negotiated agreement, must be able to act for all unit employees where necessary to preserve and effectuate rights secured for all unit employees through the collective bargaining process. In short, whenever an exclusive representative is representing all unit employees within the scope of its authority under the agreement and/or the Order, its right to act for such unit employees is not contingent upon the prior designation of one or more individual employees in the unit.

In our opinion, the first sentence of section 10(e) which empowers an exclusive representative to act for all unit employees as noted above also authorizes it to act for or on behalf of an individual unit employee. However, as we interpret the first sentence of section 10(e), the exclusive representative's right to act for or represent an individual unit employee, as distinguished from its right to act for all unit employees, is not without limitation. That is, while a labor organization may on its own initiative act on behalf of a unit employee pursuant to its authority under contract or the Order, such a right is not inherent where, as here, it concerns an employee's adverse action proceeding, which is a procedure established pursuant to law and regulation rather than by agreement or the Order. Such matters, which are fundamentally personal to the individual and only remotely related to the rights of the other unit employees, are not automatically within the scope of the exclusive representative's 10(e) rights, which are protected by the Order. This is not to say, however, that a right could not be accorded to the exclusive representative to act on behalf of individual unit employees. Certainly the parties to an exclusive relationship could negotiate rights to be accorded the exclusive representative related to individual employee adverse actions so long as they were otherwise consistent with applicable law and regulations. However, it should be noted here that the parties, in negotiating the agreement which was effective when



the events involved herein arose had provided only that "the employee may be represented by his Union representative or any person of his choice who is willing to represent him. . . "4/ Thus, it was recognized that before the exclusive representative had the right to act for the individual, there had to be a prior choice by the employee to that effect.

In the instant case the union had no contractual right to act upon its own initiative and attempt to serve as the employee's representative in an adverse action proceeding.5/ Moreover, as found by the Assistant Secretary, the individual employee had not selected the union as his representative and so advised agency management.

Therefore, with respect to the second issue raised, the agency's failure to recognize the labor organization's status as an employee's representative in an adverse action proceeding, did not constitute an unfair labor practice under the Order.6/

4/ See footnote 1, supra, p. 1.

5/ We do not here find that such a right could be negotiated in conformity with law and regulation.

6/ In reaching the above conclusion, we have addressed only the question of the union's rights under the Order to represent a unit employee in an adverse action proceeding prior to the agency's imposition of disciplinary action. No issue was presented concerning the individual employee's rights under the Order, and that question has not been considered by the Council.

As previously noted (supra, p. 2), however, after the agency took adverse action against the individual employee herein, he appealed such action pursuant to part 772 of the Civil Service Commission Rules and Regulations, wherein the employee duly requested and was accorded the right to be represented by his union representative, and wherein the Commission's Atlanta Regional Office and the Board of Appeals and Review both addressed the issue of whether the employee's right to representation in the earlier stage of the adverse action proceeding was denied. In this regard, the ALJ's Report and Recommendation on pages 22, 23 and 24 quotes directly from the Commission decisions to show that the employee's claim of denial of representation had been reviewed and considered, with particular reference to the FPM and the provisions of the negotiated agreement applicable to the employee. The Commission decision found that there was no evidence to show the employee's rights had been violated, that he had been extended his rights, and that his removal was not procedurally defective. Of course, the union's unfair labor practice claims against the agency under the Order were declared "not at issue" in the foregoing proceeding, which concerned only the employee's rights under the adverse action appeals procedure.

Conclusion

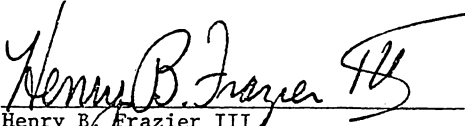
In summary, for the reasons discussed above, the Council's conclusions are:

1. Section 10(e) does not impose upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own representative.
2. An agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee designates another representative, does not constitute an unfair labor practice.

Therefore, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's finding that the United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, violated section 19(a)(1) and (6) of the Order by refusing to allow the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, the complainant, to represent the interests of an employee in the bargaining unit in an adverse action proceeding until the employee has chosen a representative.

Pursuant to section 2411.18(c) of the Council's rules of procedure, we hereby remand this matter to the Assistant Secretary for appropriate action consistent with this decision.

By the Council.

  
 Henry B. Frazier III  
 Executive Director

Issued: October 23, 1975

December 10, 1975

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

NATIONAL PARK SERVICE  
A/SLMR No. 589

In this case, the National Park Service (NPS) filed an "RA/AC" petition, which, in effect, sought a determination by the Assistant Secretary with respect to the impact of a reorganization of March 3, 1974, on the exclusively recognized unit of the National Federation of Federal Employees, Local 800 (NFFE), at certain parks and facilities in Virginia, and on the exclusively recognized unit of the International Brotherhood of Painters and Allied Trades, Local 1997, AFL-CIO (IBPAT), at the National Capital Parks, a component of the NPS which consists of certain parks and facilities in the Washington, D.C., metropolitan area. The NPS sought to clarify and amend the NFFE's unit to reflect that such unit no longer encompassed employees of the Virginia State Office or of the Manassas National Battlefield Park (Manassas Park). Further, the NPS sought an election in the remainder of the NFFE's unit, asserting that it had a good faith doubt that the NFFE currently represented a majority of the employees in such unit. Thereafter, the NFFE filed a "CU/AC" petition in which it sought to amend its certification so as to change the designation of the Manassas Park to "National Capital Parks, Manassas National Battlefield Park." The amended certification sought by the NFFE also would delete any reference to the Virginia State Office. The IBPAT intervened in the these proceedings on the basis that the employees of the Manassas Park had accreted to its unit of National Capital Parks employees.

Under all of the circumstances, the Assistant Secretary found that the employees of the Manassas Park have been so thoroughly combined and integrated with those of the National Capital Parks that they have accreted into the unit of employees currently represented by the IBPAT. In this regard, it was noted particularly that the mission and functions of the Manassas Park have been substantially affected by the subject reorganization, and that the employees of the Manassas Park are now subject to the personnel policies and practices of the National Capital Parks. Thus, it was noted that numerous employees have been transferred between the various parks and offices of the National Capital Parks during the past three years and that such transfers are expected to continue. Moreover, the evidence established that the central office of the National Capital Parks coordinates and directs many special projects which result in temporary details of employees from the central office to the various parks, that any of the parks of the National Capital Parks may become involved in such projects from time to time, and that such projects are an integral part of the urban oriented mission of the National Capital Parks. The record revealed also that the employees of the National Capital Parks, including the Manassas Park, share common training, the same areas of consideration for promotions, transfers, and reductions-in-force, and are subject to

the same personnel policies and practices. Accordingly, the Assistant Secretary ordered that the NFFE's "CU/AC" petition which, in effect, sought to retain the employees of the Manassas Park in its exclusively recognized unit, be dismissed. Further, the Assistant Secretary ordered that the NFFE's certification be amended and clarified pursuant to the NPS's AG petition to exclude employees of the Manassas Park to reflect that the Virginia State Office has been abolished, and to reflect that the Mid-Atlantic Regional Office of the NPS is the currently designated activity with respect to the employees included in the NFFE's certified unit.

The Assistant Secretary also found that the NFFE was not "defunct" at the time the Activity's petition was filed in this matter inasmuch as the evidence did not establish that the NFFE was unwilling or unable to represent the unit employees. Thus, the record revealed that there had been at least one officer of the NFFE at all times since its certification, that the NFFE National Office had taken affirmative action to represent unit employees, and that there currently are 58 members of the NFFE on dues withholding. As the NFFE is not "defunct," and as the RA petition filed by the NPS was based on an alleged good faith doubt as to the majority status of the NFFE in the existing unit (as distinguished from the position that the reorganization had so substantially changed the character and scope of the unit that it was no longer appropriate, which was not alleged), the Assistant Secretary ordered that the RA petition be dismissed inasmuch as it had been untimely filed under Section 202.3(c)(1) of the Assistant Secretary's Regulations. The Assistant Secretary also noted that, in any case, the evidence was insufficient to establish objective considerations necessary to support a good faith doubt by the Activity that the NFFE no longer continued to represent a majority of the employees in the existing unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL PARK SERVICE 1/

Activity-Petitioner

and

Case No. 22-5755[(RA)(AC)]

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,  
Local 800

Labor Organization

and

INTERNATIONAL BROTHERHOOD OF PAINTERS AND  
ALLIED TRADES, LOCAL 1997, AFL-CIO

Intervenor

NATIONAL PARK SERVICE

Activity

and

Case No. 22-5796[(CU)(AC)]

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,  
LOCAL 800

Petitioner

and

INTERNATIONAL BROTHERHOOD OF PAINTERS AND  
ALLIED TRADES, LOCAL 1997, AFL-CIO

Intervenor

DECISION AND ORDER AMENDING AND CLARIFYING UNIT

Upon petitions duly filed under Section 6 of Executive Order 11491,  
as amended, a consolidated hearing was held before Hearing Officer

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

Madeline Jackson. 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 800, herein  
called NFFE, the Assistant Secretary finds:

In 1972 the NFFE was certified as the exclusive representative of  
certain employees of the National Park Service, hereinafter called NPS,  
located in the State of Virginia. The employees in the certified unit  
were located in the Virginia State Office, the Manassas National Battle-  
field Park, the Appomattox Court House National Historical Park, the  
Booker T. Washington National Monument, the Fredericksburg National  
Military Park, the George Washington Birthplace National Monument, the  
Petersburg National Battlefield Park, the Richmond National Battlefield  
Park, the Shenandoah National Park, and the Colonial National Historical  
Park. The record discloses that on March 3, 1974, pursuant to a  
reorganization, the Virginia State Office was abolished, the Manassas  
National Battlefield Park (hereinafter called Manassas Park) was  
transferred to the jurisdiction of the National Capital Parks, a  
component of the NPS, and the remainder of the parks in the certified  
unit were transferred to the jurisdiction of the Mid-Atlantic Regional  
Office of the NPS.

The NPS filed the subject "RA/AC" petition [Case No. 22-5755(RA)(AC)]  
which, in effect, sought a determination by the Assistant  
Secretary with respect to the impact of the March 3, 1974, reorgan-  
ization on the exclusively recognized unit represented by the NFFE, and  
on a unit of National Capital Parks employees represented exclusively by  
the International Brotherhood of Painters and Allied Trades, Local  
1997, AFL-CIO, herein called IBPAT. 2/ In effect, the NPS sought to  
clarify and amend the NFFE's unit to reflect that such unit no longer  
encompassed employees of the Virginia State Office or of the Manassas  
Park. Further, the NPS sought an election in the remainder of the  
NFFE's unit, asserting that it had a good faith doubt that the NFFE  
currently represented a majority of the employees in such unit.  
Thereafter, the NFFE filed the subject "CU/AC" petition [Case No. 22-  
5796(CU)(AC)] in which it sought to amend its certification so as to  
change the designation of the Manassas Park to the "National Capital  
Parks, Manassas National Battlefield Park." The amended certification  
sought by the NFFE also would delete any reference to the Virginia State  
Office. The IBPAT intervened in these proceedings on the basis that  
the employees of the Manassas Park had accreted to its unit of  
National Capital Parks employees.

The NPS contends that the employees of the Manassas Park no longer  
share a community of interest with the other employees currently

2/ The IBPAT was certified in 1972 as the exclusive representative  
in an activity-wide unit of certain employees of the National  
Capital Parks.

represented by the NFFE. In this regard, the NPS argues that the management, personnel programs, and mission of the National Capital Parks are different from those of the Mid-Atlantic Regional Office of the NPS, which, as indicated above, currently has authority over all of the aforementioned parks except the Manassas Park. Thus, the NPS asserts that the March 3, 1974, reorganization resulted in new areas of consideration for promotions, transfers, and reductions-in-force with respect to the employees of the Manassas Park, that the mission and functions of this Park have changed and are continuing to undergo revisions in order to accommodate the urban emphasis of the National Capital Parks, and that the implementation of these changes, in some instances, already has affected the Manassas Park. Additionally, the NPS takes the position that it has a good faith doubt that the NFFE currently represents a majority of the employees in the remainder of the exclusively recognized unit represented by the NFFE based on an alleged lack of representational activity by that labor organization, and that the NFFE is "defunct." The NFFE, on the other hand, contends that, with respect to employees in the Manassas Park, the reorganization in question resulted only in the administrative transfer of certain higher level management functions from a regional authority of the NPS to the National Capital Parks, and that this transfer has not resulted in any changes with respect to the immediate supervision or duties of the employees at the Manassas Park. Thus, the NFFE asserts that the employees at the Manassas Park have not accreted into the IBPAT's unit of National Capital Parks employees, that a finding of such an accretion would disrupt a stable collective bargaining relationship, and that it is speculative to conclude that the Manassas Park ultimately will be effected by the reorganization. Moreover, with respect to the doubt of majority status raised by the NPS, the NFFE contends that it is willing and able to represent the employees in its exclusive unit, and that the NPS did not present sufficient grounds to support a good faith doubt as to the NFFE's continued majority status.

#### Manassas Park

The record reveals that the transfer of the Manassas Park to the jurisdiction of the National Capital Parks, pursuant to the reorganization of March 3, 1974, was predicated upon the expansion of the Washington, D.C., metropolitan area and the resulting increase of urban visitors to the Manassas Park, which is located approximately 35 miles from Washington, D.C. The National Capital Parks consists of a number of parks and other facilities in and around Washington, D.C. It was determined by the NPS that the Manassas Park should be included within the National Capital Parks, which administers a program suited to the recreational needs of urban visitors as well as to the historical interests emphasized by other NPS parks. The evidence establishes that, prior to the reorganization, the Manassas Park and the other aforementioned parks in the State of Virginia had been under the authority of the Virginia State Office which, in turn, had reported to the Northeast Regional Office of the NPS. As a result of the reorganization, the parks previously under the Virginia State Office (other than the Manassas Park) were transferred to the jurisdiction of the Mid-Atlantic Regional Office of the NPS. At the time the subject petitions were filed, the NFFE's unit consisted of approximately 310 employees, nine

of whom were located at the Manassas Park. Of the nine employees at the Manassas Park, the majority were maintenance workers or laborers who were assigned janitorial duties and a variety of other duties associated with the maintenance of the Park, such as cutting grass, trimming trees, and mending fences. In addition, certain of the Park employees were engaged in providing informational services for visitors, or in performing administrative tasks such as typing.

While the record reveals that the basic duties and immediate supervision of employees at the Manassas Park have not yet changed as a result of the reorganization, the evidence also establishes that, as a result of the reorganization, a number of changes were effectuated with respect to the employees at the Manassas Park. In this regard, ultimate supervisory responsibility for employees at the Manassas Park now resides in the National Capital Parks. Further, the personnel policies and practices of the National Capital Parks apply to the Manassas Park. Thus, the Washington, D.C., metropolitan area became the area of consideration for reductions-in-force involving employees of the Manassas Park, and the National Capital Parks became the area of consideration concerning the promotion and reassignment of these employees. In this latter regard, the record revealed that one employee transferred from the George Washington Memorial Parkway of the National Capital Parks to the Manassas Park, that some 16 employees have transferred between various parks and offices of the National Capital Parks within the past three years, and that this pattern of reassignments is expected to continue throughout the National Capital Parks, including the Manassas Park. Moreover, the urban oriented mission of the National Capital Parks has resulted in numerous temporary details of employees between the central office of the National Capital Parks and its various parks. Thus, special events maintenance crews have been assigned temporarily by the central office to the Antietam National Battlefield Park for the purpose of setting up stages and sound systems for performances by the National Symphony Orchestra. Further, central office personnel have been involved in the transportation and supervision of children's groups from Washington, D.C., who have visited various parks of the National Capital Parks located in Washington, D.C., and its environs. In this connection, the National Capital Parks has established an administrative support position to assist in coordinating such projects, and a personnel management evaluation has been conducted in which the superintendents of the various parks, including the Manassas Park, have offered advice on the classification of certain seasonal employees. Also, the National Capital Parks conducts training sessions for its employees, including those at the Manassas Park. 3/

Under all of these circumstances, I find that the employees of the Manassas Park have been so thoroughly combined and integrated with

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3/ The record reveals that the employees of the Manassas Park attended training sessions with other employees of the NFFE's unit prior to the reorganization and that, since the reorganization, employees of the Manassas Park no longer participate in such training sessions.

those of the National Capital Parks that they have accreted into the unit of employees currently represented by the IBPAT. In this regard, it was noted particularly that the mission and functions of the Manassas Park have been substantially affected by the subject reorganization, and that the employees of the Manassas Park are now subject to the personnel policies and practices of the National Capital Parks. Thus, it was noted that numerous employees have been transferred between the various parks and offices of the National Capital Parks during the past three years and that such transfers are expected to continue. Moreover, the evidence establishes that the central office of the National Capital Parks coordinates and directs many special projects which result in temporary details of employees from the central office to the various parks, that any of the parks and facilities of the National Capital Parks may become involved in such projects from time to time, and that such projects are an integral part of the urban oriented mission of the National Capital Parks. The record reveals also that the employees of these parks, including the Manassas Park, share common training, the same areas of consideration for promotions, transfers, and reductions-in-force, and are subject to the same personnel policies and practices. In these circumstances, I shall order that the NFFE's "CU/AC" petition which, in effect, sought to retain the employees of the Manassas Park in its exclusively recognized unit, be dismissed.

In addition, based on the foregoing circumstances and the facts discussed below, I shall amend and clarify NFFE's certification pursuant to the NPS's AC petition to exclude employees of the Manassas Park, to reflect that the Virginia State Office has been abolished, and to reflect that the Mid-Atlantic Regional Office of the NPS is the currently designated activity with respect to the employees included in the NFFE's certified unit.

The NPS's RA petition and the status of the NFFE's exclusively recognized unit.

As noted above, the NPS contends that the NFFE is "defunct." The record reveals that the Virginia State Office of the NPS and the NFFE negotiated a one-year agreement which became effective on February 15, 1973, and which provided for automatic renewal thereafter on a yearly basis unless either party indicated a desire to renegotiate the agreement. Subsequently, the parties negotiated a supplemental agreement which became effective on March 12, 1973. On July 15, 1974, the Mid-Atlantic Regional Office of the NPS informed the NFFE's National Office that the Virginia parks of the NPS represented by the NFFE had been placed under the authority of the Mid-Atlantic Regional Office, and that the Mid-Atlantic Regional Office had been unable to contact the local officers of the NFFE. In this connection, the record reveals that, although the NFFE local was without a president at that time, a secretary-treasurer held office during this period and the NFFE's National Office had agreed to assume the NFFE's representational functions until other officers were elected. In this latter regard, the record indicates that the NFFE assisted employees who had filed grievances pursuant to the grievance procedure of the aforementioned

negotiated agreement, and that it had been necessary to bring such grievances to the attention of a superintendent of one of the parks involved herein on only one occasion. The evidence also establishes that the telephone number and address of the NFFE National Office were known to the employees of the NFFE's unit, and that they had occasionally sought and received assistance from this office. Although there have been only two unit-wide meetings of members since the NFFE's certification, the record reveals that attendance at these meetings had been poor because it was difficult for members to travel the distances involved in order to meet at a central location, and that, as a result, membership meetings have since been scheduled at the park level. The evidence further establishes that currently there are 58 members of the NFFE on dues withholding and that 15 new members recently were added.

Based on the foregoing, I find that the NFFE was not "defunct" at the time the Activity's petition was filed in this matter inasmuch as the evidence does not establish that the NFFE was unwilling or unable to represent the unit employees. <sup>4/</sup> Thus, the record reveals that there has been at least one officer of the NFFE at all times since its certification, that the NFFE National Office has taken affirmative action to represent unit employees, and that there currently are 58 members of the NFFE on dues withholding. As the NFFE is not "defunct," and as the NPS's RA petition is based on an alleged good faith doubt as to the majority status of the NFFE in the existing unit (as distinguished from the position that the reorganization had so substantially changed the character and scope of the NFFE's unit that it was no longer appropriate, which was not alleged), I shall order that the subject RA petition be dismissed inasmuch as it was untimely filed under Section 202.3(c)(1) of the Assistant Secretary's Regulations. <sup>5/</sup> Thus, based upon the expiration date of the parties' negotiated agreement, the subject RA petition could have been timely filed only between

<sup>4/</sup> See Federal Aviation Administration, Department of Transportation, A/SLMR No. 173. See also U.S. Naval Air Station, New Orleans, Belle Chasse, Louisiana, A/SLMR No. 520.

<sup>5/</sup> Section 202.3(c)(1) of the Assistant Secretary's Regulations provides that: "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed...not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed and dated by the activity and the incumbent exclusive representative." See also Denver Airway Facilities HUB Sector, FAA, Rocky Mountain Region, DOT, Aurora, Colorado, A/SLMR No. 535.

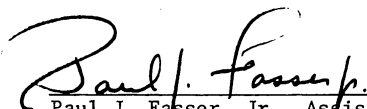
ORDER

IT IS HEREBY ORDERED that the RA petition in Case No. 22-5755, and the CU and AC petitions in Case No. 22-5796 be, and they hereby are, dismissed.

IT IS FURTHER ORDERED that the unit sought to be clarified in Case No. 22-5755, in which the National Federation of Federal Employees, Local 800, was certified in 1972 as the exclusive representative of certain employees of the National Park Service in Virginia, be, and it hereby is, clarified to exclude from said unit the employees of the Manassas National Battlefield Park.

IT IS FURTHER ORDERED that the certification of representative accorded the National Federation of Federal Employees, Local 800, in 1972 for certain employees of the National Park Service in Virginia, be, and it hereby is, amended by deleting any reference to the Virginia State Office, and by including therein as the designation of the activity, "National Park Service, Mid-Atlantic Regional Office."

Dated, Washington, D.C.  
December 10, 1975

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

6/ Even assuming that the NPS's RA petition was filed timely, I find that the evidence is insufficient to establish objective considerations necessary to support a good faith doubt by the Activity that the NFFE no longer continues to represent a majority of the employees in the existing unit. Thus, as noted above, the record reveals that the NFFE has and continues to represent employees in the unit, and that a significant number of employees continue to be on dues withholding.

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

DEPARTMENT OF THE AIR FORCE,  
AERONAUTICAL SYSTEMS DIVISION,  
AIR FORCE SYSTEMS COMMAND,  
WRIGHT-PATTERSON AIR FORCE BASE, OHIO  
A/SLMR No. 590

This case involved a petition for amendment of certification (AC) filed by Lodge 2065, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), seeking to change the unit description to include those General Schedule Engineering Technicians assigned to the Technical Facilities Division and to designate a change in organizational title of the Directorate of Flight Test to the 4950th Test Wing. The IAM represents exclusively all nonsupervisory Wage Board (WB) employees serviced by the Aeronautical Service Division, with the exception of those assigned to the Directorate of Flight Test and the Foreign Technology Division.

With regard to the approximately 26 General Schedule Engineering Technicians in the Activity's Technical Facilities Division, the employees in question were at one time Wage Board (WB) employees, but as a result of a competitive merit promotion action in 1974, they became General Schedule (GS) employees. The Activity contended that, as a result of their competitive merit promotion, the GS Engineering Technicians have acquired increased responsibilities and no longer continued to share a clear and identifiable community of interest with the WB employees.

The evidence established that, despite the change in their designation and method of compensation, the duties of the employees in question had not changed substantially; that they had not undergone any formalized training; and that they continued to work in the same location and in close contact with WB employees. Consequently, the Assistant Secretary found that the GS Engineering Technicians continued to share a clear and identifiable community of interest with the WB employees represented by the IAM.

Accordingly, he ordered that the unit be clarified to include all GS Engineering Technicians of the Technical Facilities Division and, in addition, that the IAM certification be amended to designate the change in organizational title of the Directorate of Flight Test to the 4950th Test Wing.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,  
AERONAUTICAL SYSTEMS DIVISION,  
AIR FORCE SYSTEMS COMMAND,  
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Activity

and

Case No. 53-7818(AC/CU)

LODGE 2065, INTERNATIONAL ASSOCIATION  
OF MACHINISTS AND AEROSPACE WORKERS,  
AFL-CIO

Petitioner

DECISION AND ORDER AMENDING CERTIFICATION  
AND CLARIFYING UNIT

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

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

The Petitioner, Lodge 2065, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called IAM, is the exclusive representative of certain employees of the Activity. 1/ In this

1/ On October 15, 1970, the IAM was certified as the exclusive representative in a unit of: "All Aeronautical Systems Division serviced non-supervisory wage board personnel located in Wright-Patterson Air Force Base excluding those assigned to Directorate of Flight Test and Foreign Technology Division; and also excluding managers, supervisors, foremen, guards, and those employees in personnel work in other than a purely clerical capacity." Specifically, the certification encompasses employees in the Air Force Aero Propulsion Laboratory (APL), the Air Force Avionics Laboratory (AFAL), the Air Force Materials Laboratory (AFML), the Air Force Flight Dynamics Laboratory (AFFDL), the Administrative Office of the Aeronautical Systems Division (DA), the Deputy for Engineering, the Directorate of Crew and AGE (ENC), and the Aerospace Research Laboratory (ARL).

proceeding, the IAM seeks to amend its certification to reflect a change in the organizational designation of the Directorate of Flight Test to the 4950th Test Wing and to clarify the status of approximately 26 General Schedule (GS) Engineering Technicians employed in the Technical Facilities Division of the Activity's APL. 2/ Prior to March 24, 1974, these employees had been classified as Wage Board (WB) employees; however, as of that date, they were merit promoted competitively to newly created positions of GS Engineering Technicians and, concomitantly, 26 WB positions were abolished. The IAM contends that the duties performed by the employees in question are essentially the same as those they performed prior to the merit promotions, that they use the same tools and work in the same location, and that the change in the method of their compensation should not remove them from the IAM unit. The Activity, on the other hand, takes the position that the GS Engineering Technicians acquired increased responsibilities requiring them to write reports for the project engineer, as well as collect and analyze test data and, as a result, they no longer continue to share a clear and identifiable community of interest with the WB employees in the unit.

The mission of the APL is to formulate and conduct basic exploratory and advanced research in aeronautical systems that support aircraft, particularly engine power, fuels and lubricants. Within the APL is the Technical Facilities Division which facilitates this mission by performing in-house research and providing engineering support to the other divisions of the APL. 3/ Specifically, it directs the fabrication, modification and repair of experimental prototype test systems, propulsion support equipment, and instrumentation systems, in addition to performing studies and analyses to define the characteristics of experimental facilities.

The record indicates that the GS Engineering Technician position was created in order to improve the interface between the Project Engineer, who conceptually develops the experimental test to be performed, and the GS Engineering Technician, who is responsible for actually performing the test. The evidence establishes, however, that there is no established training program to upgrade WB employees to this GS position. Rather, the employees in question receive instruction from the project engineer on a "need to know basis."

With respect to the specific duties performed by the disputed employees, the evidence establishes that the GS Engineering Technicians of the Technical Facilities Division are required to attend meetings with the project engineer at all stages of the project, set up and

2/ At the hearing, the parties stipulated to the change in the organizational title of the Directorate of Flight Test to the 4950th Test Wing. There was no record evidence to indicate that such stipulation was improper.

3/ In addition to the Technical Facilities Division, the APL consists of four other divisions: Ramjet, Turbine Engine, Aerospace Power, and Fuels and Lubrication.

December 10, 1975

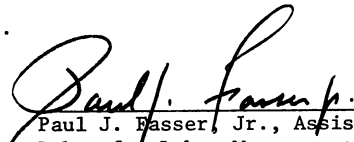
conduct the tests, gather and analyze the data, and write a final report. While it appears that they have the increased responsibility of assuring the proper execution of a test project, the evidence indicates that the GS Engineering Technicians are performing essentially the same duties that they performed as WB employees. In addition, the record reveals that the employees in question have continued to work at the same physical location, the same test area and, in this connection, they come in contact with WB employees participating in the test project. Moreover, while the evidence establishes that the interface between the GS Engineering Technicians and the project engineers has increased, they continue, nevertheless, to work closely with WB employees in performing the required tests.

Based on the foregoing circumstances, I find that the GS Engineering Technicians employed in the Technical Facilities Division continue to share a clear and identifiable community of interest with the WB employees of the Activity represented by the IAM. Particularly noted in this regard were the facts that the employees in question have not undertaken any formalized training with respect to their new positions; their duties have not changed substantially despite the change in their designation and method of compensation; they continue to work in the same location; and they continue to work in close contact with the WB employees in performing the required tests. <sup>4/</sup> Accordingly, I find that the existing exclusively recognized unit should be clarified to include the GS Engineering Technicians in the Activity's Technical Facilities Division and, in addition, I find that the IAM's certification should be amended to reflect the change in designation of the Directorate of Flight Test to the 4950th Test Wing.

IT IS HEREBY ORDERED that the certification issued on October 15, 1970, to Lodge 2065, International Association of Machinists and Aerospace Workers, AFL-CIO, be, and hereby is, amended by substituting therein for the Directorate of Flight Test, the 4950th Test Wing, Air Force Systems Command, Wright-Patterson Air Force Base, Ohio.

IT IF FURTHER ORDERED that the unit exclusively represented by Lodge 2065, International Association of Machinists and Aerospace Workers, AFL-CIO, be, and hereby is, clarified by including those General Schedule Engineering Technicians assigned to the Technical Facilities Division identified by the symbols AFAPL-TF.

Dated, Washington, D. C.  
December 10, 1975

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

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

DEPARTMENT OF ARMY,  
HEADQUARTERS, WESTERN AREA MILITARY TRAFFIC  
MANAGEMENT COMMAND,  
DIRECTORATE OF PERSONAL PROPERTY,  
OAKLAND ARMY BASE, OAKLAND, CALIFORNIA  
A/SLMR No. 591

This case arose when the American Federation of Government Employees, AFL-CIO, Local 1157 (AFGE), filed a petition seeking an election in a unit of all nonsupervisory, nonprofessional General Schedule employees within the Directorate of Personal Property at the Activity. The Activity contended that the proposed unit would not promote effective dealings or efficiency of agency operations, and that the appropriate unit should include other unrepresented nonsupervisory, nonprofessional General Schedule and Wage Grade employees of Headquarters, Western Area Military Traffic Management Command, Oakland Army Base, Oakland, California (HQWAMTMC).

The Assistant Secretary found that the unit sought by the AFGE was not appropriate for the purpose of exclusive recognition. In this regard, he noted that the employees of the claimed unit are serviced by the same Civilian Personnel Office as other unrepresented HQWAMTMC employees and have similar areas of consideration for reductions-in-force and promotions, and further, that the skills utilized by the employees within the claimed unit are found among unrepresented HQWAMTMC employees and that there have been several instances of transfers from HQWAMTMC Offices and Directorates into the claimed unit. In these circumstances, the Assistant Secretary found that the employees in the claimed unit did not share a separate and distinct community of interest from other unrepresented employees at HQWAMTMC and that the proposed fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

<sup>4/</sup> See Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 547 and Department of the Navy, Charleston Naval Shipyard, A/SLMR No. 302.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF ARMY,  
HEADQUARTERS, WESTERN AREA MILITARY TRAFFIC  
MANAGEMENT COMMAND,  
DIRECTORATE OF PERSONAL PROPERTY,  
OAKLAND ARMY BASE, OAKLAND, CALIFORNIA

Activity

and

Case No. 70-4743(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 1157  
OAKLAND, CALIFORNIA

Petitioner

DECISION AND ORDER

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

Upon the entire record in this case, 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 1157, seeks an election in a unit consisting of all nonsupervisory, nonprofessional General Schedule employees within the Directorate of Personal Property, Headquarters, Western Area Military Traffic Management Command, Oakland Army Base, Oakland, California. The Activity contends that the appropriate unit should consist of all nonsupervisory, nonprofessional General Schedule and Wage Grade employees assigned to the organizational elements of Headquarters, Western Area Military Traffic Management Command, Oakland Army Base, Oakland, California (HQWAMTMC), including 10 units currently represented by the Petitioner at the Activity. In this regard, the

Activity asserts that the proposed unit is not appropriate as the claimed employees share common interests and working conditions with other unrepresented employees and, further, that the petitioned for unit would not promote effective dealings and efficiency of agency operations. 1/

The mission of HQWAMTMC is to provide transportation services involved in the surface, water and air movement of Department of Defense sponsored cargo within and through the continental United States and to manage assigned installations and activities in 14 Western states. Organizationally, HQWAMTMC is subdivided into 8 offices and 8 directorates. These are: Office of Equal Opportunity; Office of Public Affairs; Office of Staff Judge Advocate; Office of Planning; Office of Safety and Security; Air Cargo Support and Evaluation Office; Western Management Information Systems Officer; Office of The Commander; Directorate of Inland Traffic; Directorate of International Traffic; Directorate of Support Services; Directorate of Procurement; Directorate of Personnel and Administration; Comptroller Directorate; Directorate of Communications-Electronics; and the Directorate of Personal Property. The Directorate of Communications-Electronics and the Western Management Information Systems Officer are tenant organizations of HQWAMTMC.

The evidence reveals that the Directorate of Personal Property is responsible for the surveillance, shipment and storage of Department of Defense personal property and U.S. Government sponsored household goods. The claimed unit consists of 11 employees and is subdivided into a Traffic Division and a Storage Division. The Traffic Division essentially provides technical services and information regarding personal property transport, whereas the Storage Division conducts on site inspections of warehouses and storage facilities to determine contract awards and compliance. The Storage Division has 5 employees, all of whom are Storage Specialists, while the Traffic Division has 6 employees with the following job classifications: Secretary; Procurement Clerk; Transportation Assistant and Traffic Management Specialist (3).

The record discloses that employees within the claimed unit and other unrepresented HQWAMTMC employees are serviced by the same Civilian Personnel Office; have similar areas of consideration for

1/ The Petitioner represents approximately 67 percent of the Activity's authorized complement of civilian employees at HQWAMTMC and has a long history of collective bargaining with the Activity under Executive Orders 10988 and 11491. Also, the record reveals that the National Federation of Federal Employees; Local No. 1, represents the Activity's nonsupervisory General Schedule employees in the Directorate of Procurement and that the Service Employees International Union, AFL-CIO, Local 250, represents all HQWAMTMC non-appropriated fund employees.

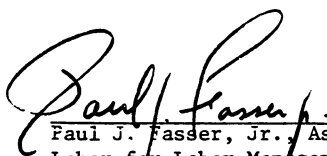
reductions-in-force, promotions and job transfers; and receive identical fringe benefits. Moreover, they have essentially the same skills, tour of duty and method of pay as certain other HQWAMTMC employees; have similar lines of authority and supervision; and are subject to the same labor relations programs and policies. In this connection, the record shows that there have been several instances of transfers and promotions from HQWAMTMC Offices and Directorates into the claimed unit and that many of the skills utilized by employees within the claimed unit are also found among other unrepresented HQWAMTMC employees. Additionally, the record reveals that the claimed unit is located in the same building as a substantial majority of HQWAMTMC administrative units and that the employees of the claimed unit have considerable work contacts with other HQWAMTMC Offices and Directorates. Further, the Activity offers all employees, regardless of their duty station, occupational and career training, and the Commander, HQWAMTMC is authorized to conduct labor negotiations at the headquarters level.

Based on the foregoing, I find that the claimed unit is not appropriate for the purpose of exclusive recognition under the Order. Particularly noted in this regard was the fact that the employees within the claimed unit, among other things, are serviced by the same personnel office as other unrepresented HQWAMTMC employees and have similar areas of consideration for reductions-in-force and promotions. Moreover, the record reveals that the skills utilized by employees in the claimed unit are found among other unrepresented HQWAMTMC employees and, in this regard, there have been several instances of employee transfers from HQWAMTMC Offices and Directorates into the claimed unit. Accordingly, 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 unrepresented employees of the Activity. Moreover, in my view, such a fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the subject petition be dismissed.

## ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-4743(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.  
December 10, 1975

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

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

ARMY AND AIR FORCE EXCHANGE SERVICE,  
FORT BENNING EXCHANGE,  
FORT BENNING, GEORGIA  
A/SLMR No. 592

This case involved a petition for amendment of recognition filed by the Federal Employees Metal Trades Council, AFL-CIO (Petitioner) seeking to amend the recognition of the unit to include: All regular full-time (hourly-paid) employees of the Army and Air Force Exchange Service who are employed at Fort Benning, Georgia.

On August 26, 1973, a reorganization was instituted by the Army and Air Force Exchange Service (AAFES) whereby the Fort Benning Exchange, along with the Robin Air Force Base Exchange and Moody Air Force Base Exchange, became responsible directly to a newly established administrative level, the West Georgia Area Exchange (WGAE). The WGAE offices were located at Fort Benning. This new administrative level consolidated certain administrative functions previously performed at the Base Exchanges. In this respect, the WGAE offices, located at Fort Benning, were staffed with approximately 50 bargaining unit employees, which included approximately 39 administratively clerical and 11 maintenance employees, administratively transferred from the Fort Benning Exchange. On December 28, 1974, the Activity terminated dues deductions for the 11 maintenance employees.

While the Activity conceded that the transferred employees did not experience a change in duties, work location, pay or supervision, it contended, nevertheless, that the disputed employees originally shared a "weak" community of interest with the rest of the bargaining unit employees and, as a result of the transfer, this "weak" community of interest had been mitigated further. Specifically, in regard to the 11 maintenance employees, it contended that, after the transfer, their duties included occasional overnight assignments to other member exchanges. Consequently, they no longer shared a clear and identifiable community of interest with the bargaining unit employees of the Fort Benning Exchange.

The Petitioner, on the other hand, asserted that the disputed employees had experienced no change in duties, work location, supervision, benefits, personnel policies, and classification and, therefore,

should continue to be included in the exclusively recognized bargaining unit.

The Assistant Secretary concluded that the administratively transferred employees continue to share a clear and identifiable community of interest with other unit employees represented by the Petitioner. He noted, in this regard, that, while subsequent to the reorganization, various administrative functions were centralized at the WGAE offices and that the disputed employees were covered on different payrolls, both the administrative clericals and the maintenance employees, as before, reported to work at the same place at Fort Benning, received assignments from and were responsible to the same immediate supervisor, received the same rate of pay and schedule of benefits, were governed by the same personnel policies and procedures, and performed essentially the same duties. Moreover, he noted that the temporary duty assignments of the maintenance employees were insignificant in number and, for the most part, minimal in length.

Accordingly, he ordered that the recognized unit be amended to include all regular full-time (hourly-paid) employees of the Army and Air Force Exchange Service who are employed at Fort Benning, Georgia.

A/SLMR No. 592

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,  
FORT BENNING EXCHANGE,  
FORT BENNING, GEORGIA

Activity

and

Case No. 40-5352(AC)

FEDERAL EMPLOYEES METAL TRADES COUNCIL,  
AFL-CIO, FORT BENNING, GEORGIA

Petitioner

DECISION AND ORDER AMENDING RECOGNITION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Robert F. Woodland. 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 Federal Employees Metal Trades Council, AFL-CIO, Fort Benning, Georgia, herein called Petitioner, the Assistant Secretary finds:

The Petitioner filed the subject petition seeking to amend its recognition to include all regular full-time (hourly-paid) employees of the Army and Air Force Exchange Service, herein called AAFES, who are employed at Fort Benning, Georgia. 1/ The record indicates that

1/ The unit represented for which the Petitioner was accorded exclusive recognition in 1964 included: "All regular full-time (hourly-paid) employees of the Ft. Benning Exchange, Ft. Benning, Georgia; excluded: Any managerial, executive, or professional employees; any employee in personnel work in other than a purely clerical capacity; all supervisors as defined by Executive Order 11491; employees whose assigned duties require that they represent the interests of the AAFES, management or one of its Activities in consultations or negotiations with the union."

beginning in 1972, the AAFES undertook a reorganization of its entire exchange system in the continental United States. At all times material herein, the Southeast Exchange Region was one of five exchange regions in the AAFES. Prior to August 1973, the Fort Benning Exchange was an autonomous exchange responsible directly to the Southeast Exchange Region. Effective August 26, 1973, a reorganization was instituted whereby the Fort Benning Exchange, along with the Robin Air Force Base Exchange and Moody Air Force Base Exchange, became responsible directly to a newly established administrative level, the West Georgia Area Exchange, herein called WGAE. The WGAE's offices were located at Fort Benning. 2/ The imposition of this new managerial level, which consolidated certain administrative functions previously performed at the Fort Benning, Robin and Moody Air Force Base Exchanges, was consistent with AAFES' desire for centralization of such services as accounting, personnel, contract administration and certain management operations. In this respect, the WGAE offices located at Fort Benning were staffed with approximately 50 bargaining unit employees, which included 39 administrative clericals and 11 maintenance employees, administratively transferred from the Fort Benning Exchange. The evidence establishes that on December 28, 1974, the Activity terminated dues deductions for the 11 maintenance employees.

While the Activity concedes that the transferred employees have not experienced a change in duties, work location, pay and supervision, it contends, nevertheless, that the disputed employees originally shared a "weak" community of interest with the rest of the bargaining unit employees and, as a result of the transfer and the added responsibility for supporting the WGAE member exchanges, this "weak" community of interest has been mitigated further. It further contends that the maintenance employees occasionally are assigned overnight temporary duties to other member exchanges. Hence, it argues that the disputed employees no longer share a clear and identifiable community of interest with the bargaining unit employees of the Fort Benning Exchange. 3/ In response, the Petitioner contends that the disputed employees have experienced no change in duties, work location, supervision, benefits, personnel policies, and classification since the transfers occurred. Consequently, the Petitioner maintains that the transfers were the result of a paper reorganization and, therefore, the reassigned

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2/ Subsequently, the Fort McClellan and Redstone Arsenal Exchanges were added to the WGAE in May 1975, joining the Fort McPherson Exchange which was added in July 1974.

3/ During the hearing, the Hearing Officer ruled that the Activity's contention that the Union could not engage in effective dealings because it was without an elected president for more than a year and the local was unable to obtain a quorum of 11 members for any election of officers, had no bearing on the appropriateness of the bargaining unit.

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employees should continue to be included in the exclusively recognized bargaining unit.

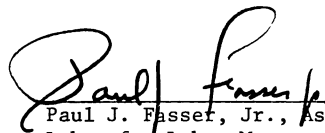
The record indicates that, while subsequent to the reorganization, various administrative functions were centralized at the WGAE offices, and that the disputed employees were covered on different payrolls, both the administrative clericals and the maintenance employees, as before, reported to work at the same place at Fort Benning, received assignments from and were responsible to the immediate supervisor, received the same rates of pay and schedule of benefits, were governed by the same personnel policies and procedures, and performed essentially the same duties, with the exception that maintenance employees were required occasionally to perform these duties at the other member exchanges. 4/ The evidence established further that all of the transferred employees continued to maintain the same work contacts with other employees who undisputedly remained in the Fort Benning Exchange bargaining unit.

Based on the foregoing circumstances, I find that the administratively transferred employees in issue continue to share a clear and identifiable community of interest with the other bargaining unit employees represented by the Petitioner and, therefore, remain in the bargaining unit. Accordingly, I find that the existing recognition should be amended to include: All regular full-time (hourly-paid) employees of the Army and Air Force Exchange Service who are employed at Fort Benning, Georgia. 5/

ORDER

IT IS HEREBY ORDERED that the unit, recognized in 1964, represented by the Federal Employees Metal Trades Council, AFL-CIO, be, and hereby is, amended to include: All regular full-time (hourly-paid) employees of the Army and Air Force Exchange Service who are employed at Fort Benning, Georgia.

Dated, Washington, D. C.  
December 10, 1975

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

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4/ The evidence establishes that the temporary duty assignments were infrequent and, in normal situations, minimal in length.

5/ I find that such a base-wide unit will promote effective dealings and efficiency of agency operations.

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

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARIZONA AIR NATIONAL GUARD,  
PHOENIX, ARIZONA  
A/SLMR No. 593

ARIZONA AIR NATIONAL GUARD,  
PHOENIX, ARIZONA

Activity

and

Case No. 72-5294(RO)

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.

Petitioner

ARIZONA AIR NATIONAL GUARD  
PHOENIX, ARIZONA

Activity

and

Case No. 72-5183(CU)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 3046

Petitioner

DECISION AND ORDER CLARIFYING UNIT

The subject case involved an RO petition filed by the Association of Civilian Technicians, Inc., (ACT) seeking an election in a unit including all Air National Guard Technicians employed by the 107th Tactical Control Squadron (TCS) at the Papago Military Reservation, Arizona Air National Guard, Phoenix, Arizona. The ACT asserted that the relocation of the Air National Guard Technicians of the 107th TCS from Sky Harbor Airport, Phoenix, Arizona, to the Papago Military Reservation removed such employees from an existing unit represented by the American Federation of Government Employees, AFL-CIO, Local 3046 (AFGE). It also asserted that the Air National Guard Technicians of the 107th TCS have a clear and identifiable community of interest separate from the Air National Guard Technicians at the Sky Harbor Airport and that a separate unit at the Papago Military Reservation would promote effective dealings and efficiency of agency operations. Also involved in this matter was a petition for clarification of unit (CU) filed by the AFGE seeking to clarify its existing unit at Sky Harbor Airport by changing the description of the existing unit from all Air National Guard Technicians employed at Sky Harbor Airport to all Air National Guard Technicians employed by the Arizona Air National Guard, Phoenix, Arizona, in order to have it conform to the relocation of Air National Guard Technicians to the Papago Military Reservation.

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

The Assistant Secretary found that the employees of the 107th TCS, after their relocation to the Papago Military Reservation, continued to share a clear and identifiable community of interest with those Air National Guard Technicians at Sky Harbor and remained in the existing exclusively recognized unit represented by the AFGE. In this connection, he found that inasmuch as the employees sought by the ACT were covered by a negotiated agreement, the ACT's petition was filed untimely under Section 202.3(c) of the Assistant Secretary's Regulations. Accordingly, he ordered that the petition be dismissed.

Upon the entire record in these cases, including a brief submitted by the Association of Civilian Technicians, Inc., herein called ACT, the Assistant Secretary finds:

With respect to the CU petition, the Assistant Secretary, having found that those Air National Guard Technicians who have been relocated from the Sky Harbor Airport to the Papago Military Reservation have remained in the existing exclusively recognized unit, issued an order clarifying the unit to include, additionally, all Arizona Air National Guard Technicians employed at the Papago Military Reservation, Phoenix, Arizona.

In Case No. 72-5294(RO), the ACT filed a petition seeking an election in a unit including all Air National Guard Technicians employed by the 107th Tactical Control Squadron (TCS) at the Papago Military Reservation, Arizona Air National Guard, Phoenix, Arizona. In this regard, the ACT contends that the relocation of the Air National Guard Technicians of the 107th TCS from Sky Harbor Airport to the Papago Military Reservation removed such employees from an existing unit at Sky Harbor Airport exclusively represented by the American Federation of Government Employees, AFL-CIO, Local 3046, herein called AFGE, that the Air National Guard Technicians of the 107th TCS now have a clear and identifiable community of interest separate from the Air National Guard Technicians at Sky Harbor Airport, and that a separate unit at the Papago Military Reservation would promote effective dealings and efficiency of agency operations.

In Case No. 72-5183(CU), the Petitioner, AFGE, filed a petition for clarification of unit seeking to clarify its existing unit at Sky Harbor Airport by changing the description of the existing unit from all Air National Guard Technicians employed at Sky Harbor Airport, Phoenix, Arizona, to all Air National Guard Technicians employed by the Arizona Air National Guard, Phoenix, Arizona. In this connection, the AFGE contends that the proposed change is designed merely to reflect the results of the relocation of Air National Guard Technician employees of the 107th TCS from the Sky Harbor Airport, Phoenix, to the Papago Military Reservation, Phoenix, and that the employees of the 107th TCS continue to remain in the AFGE's existing unit. 1/ The Activity took no position with regard to either petition.

The record reveals that on September 29, 1969, the Activity granted the AFGE recognition as the exclusive representative of all its Air National Guard Technician employees located at Sky Harbor Airport, Phoenix, Arizona. An initial negotiated agreement was executed on November 22, 1971, and, thereafter, the parties entered into a second agreement dated November 4, 1974, which expires on November 3, 1976. At the time the AFGE obtained exclusive recognition at Sky Harbor, its unit consisted of all Air National Guard Technician employees of the 161st Air Refueling Group (AREGP), the only Air National Guard Technician employees at Sky Harbor at that time.

On June 10, 1972, the 107th TCS Squadron of Air National Guard Technician employees was established at Sky Harbor and became a functional unit within the facility. The Base Detachment Commander 2/ at Sky Harbor was responsible for labor relations matters at the facility, including the newly organized 107th TCS. In this connection, he established the same working hours for the employees of the 107th TCS and the 161st AREGP, assigned them their facilities, and approved their civilian courses of instruction. The record also showed that the Technician Personnel Officer (TPO) at Sky Harbor serviced both the 161st AREGP and 107th TCS in regard to merit promotion and reduction-in-force actions, and that the Sky Harbor Time and Attendance Section provided time, leave and payroll services for the 107th TCS. In connection with the foregoing, the parties stipulated that, following its establishment, the 107th TCS became a function within the base and was included in the AFGE's exclusively recognized unit.

On November 15, 1974, the 107th TCS was moved intact to the Papago Military Reservation, Phoenix. The record reveals that this physical relocation did not substantially affect the employees' terms and conditions of employment. Thus, the 107th TCS employees continued to perform the same job functions that they performed prior to the move with no substantial change in their working conditions, immediate supervision, job contacts or personnel policies, including reductions-in-force considerations.

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1/ The Papago Military Reservation is located seven miles from Sky Harbor Airport.

2/ This position is presently referred to as Air Commander.

Under these circumstances, I find that the employees of the 107th TCS, after their relocation to the Papago Military Reservation, continued to share a clear and identifiable community of interest with those Air National Guard Technicians at the Sky Harbor Airport. 3/ Moreover, it was noted that effective dealings have been experienced in the unit encompassing employees of both the 161st AREGP and the 107th TCS as evidenced by the negotiated agreements executed by the AFGE and the Activity and that the Activity has taken no position nor presented any evidence that such a unit has not or would not promote effective dealings and efficiency of agency operations.

Accordingly, as the employees sought here by the ACT remained part of the existing AFGE unit at the Activity covered by a negotiated agreement, I find that ACT's instant petition was filed untimely under Section 202.3(c) of the Assistant Secretary's Regulations. 4/ I, therefore, shall order that the petition in Case No. 72-5294(RO) be dismissed.

With respect to the petition for clarification of unit in Case No. 72-5183(CU), having found that those Air National Guard Technicians who have been relocated from the Sky Harbor Airport to the Papago Military Reservation have remained in the existing exclusively recognized unit represented by the AFGE, I shall order that the existing unit of Arizona Air National Guard Technicians employed at Sky Harbor Airport, Phoenix, Arizona, be clarified to include, additionally, all Arizona Air National Guard Technicians employed at the Papago Military Reservation, Phoenix, Arizona.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, AFL-CIO, Local 3046, received recognition as exclusive bargaining representative on September 29, 1969, under Executive Order 10988 be, and hereby is, clarified to include, additionally, all Arizona Air National Guard Technicians employed at the Papago Military Reservation, Phoenix, Arizona.

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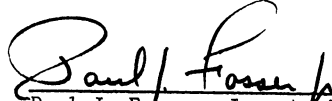
3/ There was no evidence that the employees in the claimed unit had been denied effective and fair representation by the AFGE.

4/ Section 202.3(c) provides, in pertinent part, that, "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows: (1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed and dated...."

IT IS FURTHER ORDERED that the petition in Case No. 72-5294(RO) be, and it hereby is, dismissed.

December 10, 1975

Dated, Washington, D.C.  
December 10, 1975

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

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

DEPARTMENT OF THE NAVY,  
SUPERVISOR OF SHIPBUILDING,  
CONVERSION AND REPAIR, USN,  
LONG BEACH, CALIFORNIA  
A/SLMR No. 594

This case involved a petition for clarification of unit filed by the International Federation of Professional and Technical Engineers, Local 174, Chapter 1, AFL-CIO-CLC (Petitioner), seeking to clarify the supervisory status of the GS-12 Production Controller job classification. The Petitioner maintained that these positions were part of the bargaining unit in that incumbent employees infrequently performed supervisory duties in directing one employee. The Activity contended that the independent judgment, authority and responsibility of the GS-12 Production Controllers in directing their subordinates demonstrated that the positions are supervisory within the meaning of the Order and should be excluded from the unit.

The Assistant Secretary found that the GS-12 Production Controller, were, in fact, supervisors within the meaning of the Order and should be excluded from the unit. In this regard, he noted that employees in this classification possessed effective authority to, among other things, assign work, adjust grievances and complaints, initiate disciplinary actions, and effectively recommend hiring, awards, and the scheduling of overtime and annual leave.

Accordingly, the Assistant Secretary ordered that the unit be clarified consistent with his decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,  
SUPERVISOR OF SHIPBUILDING,  
CONVERSION AND REPAIR, USN,  
LONG BEACH, CALIFORNIA

Activity

and

Case No. 72-5321

INTERNATIONAL FEDERATION OF  
PROFESSIONAL AND TECHNICAL  
ENGINEERS, LOCAL 174,  
CHAPTER 1, AFL-CIO-CLC

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Rodger E. 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, including briefs filed by the Activity and the Petitioner, the Assistant Secretary finds:

The Petitioner filed a petition for clarification of an exclusively recognized existing unit of all graded employees of the Activity, excluding management officials, supervisors, guards and employees engaged in Federal personnel work in other than a purely clerical capacity. <sup>1/</sup> Specifically, the Petitioner seeks to clarify the supervisory status of employees in the GS-12 Production Controller job classification. In this regard, it asserts that the incumbents in this classification are not supervisory employees within the meaning of the Order in that they infrequently utilized supervisory authority in directing a single employee and, therefore, should be included in the unit. The Activity, on the other hand, takes the position that the authorized duties and responsibilities of the incumbents indicate that they are supervisors within the meaning of the Order and, thus, should be excluded from the unit.

<sup>1/</sup> The Petitioner was certified as the exclusive bargaining representative for this unit on August 21, 1970. On June 25, 1975, the Activity and Petitioner entered into a negotiated agreement covering employees in the unit.

The record reflects that the Activity is engaged in the administration of contracts with private contractors for the building, conversion and repair of Navy ships. It is organized into five departments: Administrative, Contracts, Material, Quality Assurance and Planning. The Planning Department is further subdivided into four divisions - Advance Planning, Planning and Estimating, Design Coordination and Planning Coordination - and is headed by the Planning Officer and his deputy, the Planning Superintendent. Each division has a GS-12 division head except the Planning and Coordination division which has three GS-12 Planning Coordination Branch Heads. These latter positions are the Production Controller job classifications in question in this matter. The Planning Superintendent is the immediate supervisor of the three division heads as well as the three disputed GS-12 Production Controllers. Each GS-12 Production Controller has under his authority an assistant GS-11 Production Controller. In this regard, the record indicates that due to an increased work load it is planned that another GS-11 Production Controller assistant will be assigned to each GS-12 Production Controller.

The evidence established that the GS-12 Production Controllers are responsible for developing, coordinating and controlling the planning, scheduling, estimating and funding processes necessary to repair and/or overhaul the ships assigned by the Superintendent. The record revealed that GS-12 Production Controllers use independent judgment in assigning and periodically reviewing the work of their GS-11 subordinates. Moreover, they have the authority to recommend effectively the scheduling of annual leave and to determine and recommend overtime for their GS-11 subordinates. They also have the authority to initiate disciplinary action and adjust grievances and complaints, although the record showed that no such authority had ever been exercised. The record also revealed that they prepare performance appraisals for annual performance ratings, within grade increases and merit promotions. Further, the evidence established that they have the authority to recommend effectively GS-11 assistant Production Controller applicants for hire, and to recommend their subordinates for awards.

Based on the foregoing circumstances, I find the employees in the classification GS-12 Production Controller possess supervisory authority as set forth in Section 2(c) of the Order. <sup>2/</sup> Thus, the

<sup>2/</sup> Section 2(c) of the Executive Order reads as follows:

"Supervisor" means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effective 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.

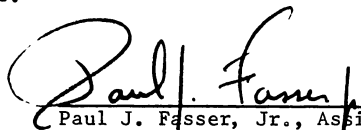


employees in this job classification are responsible for the quality and quantity of the total branch output. They possess the effective authority to assign work, adjust grievances and complaints, initiate disciplinary actions and effectively recommend hiring, awards, and the scheduling of overtime and annual leave. Further, they are required to exercise independent judgment in performing these functions. <sup>3/</sup> Moreover, contrary to the apparent contention of the Petitioner, the number of subordinates over whom this authority is exercised is not dispositive with respect to a determination of supervisory status. <sup>4/</sup> Accordingly, and noting the absence of evidence that the supervisory authority exercised is merely sporadic or infrequent, I find the employees in the disputed classification are supervisors within the meaning of the Order and, therefore, should be excluded from the unit.

## ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein be, and it hereby is, clarified by excluding from said unit employees assigned to the positions classified as GS-12 Production Controllers.

Dated, Washington, D. C.  
December 10, 1975

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

<sup>3/</sup> Cf. Department of the Navy, United States Naval Weapons Center, China Lake, California, A/SLMR No. 128, FLRC No. 72A-11; Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 129, FLRC No. 72A-12.

<sup>4/</sup> See United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4.

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

U.S. DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE,  
REGIONAL OFFICE,  
JUNEAU, ALASKA  
A/SLMR No. 595

This case involved an unfair labor practice complaint filed by an individual, Raymond Brown (Complainant), alleging that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by failing to confer or consult with the National Federation of Federal Employees, Local 251 (NFFE) by unilaterally changing the deadline by which employees affected by a move from Juneau to Sitka, Alaska, were required to move to the new location, and by discouraging membership in the NFFE by not locating temporary government housing for the Complainant, Raymond Brown, the designated representative of the NFFE, and by placing the Complainant on absent without leave (AWOL) status.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Complainant had acted as an individual, rather than in behalf of the exclusive representative, in charging the Respondent with an improper failure to meet and confer with the exclusive representative, and that the obligation to meet and confer set forth in Section 11(a) of the Order is owed by an agency or activity to the labor organization which is the exclusive representative of employees in the unit, and not to any individual. Therefore, the Assistant Secretary concurred in the Administrative Law Judge's recommendation that the allegation in the complaint alleging a violation of Section 19(a)(6) of the Order be dismissed. Furthermore, the Assistant Secretary agreed with the Administrative Law Judge's conclusion that the Respondent had not engaged in any acts violative of Section 19(a)(1) of the Order.

However, the Assistant Secretary found, contrary to the Administrative Law Judge, that the Respondent did, in fact, assert as a defense to the 19(a)(2) allegations in the complaint that the issues raised by such allegation were the subject of an appeals procedure which had been invoked. Therefore, in the Assistant Secretary's view, consideration of these issues was barred by Section 19(d) of the Order. Thus, although the Assistant Secretary agreed with the Administrative Law Judge's conclusion on the merits that the evidence did not support finding that the Respondent violated Section 19(a)(2) of the Order by suspending and ultimately discharging the Complainant, he found, additionally, that dismissal of these allegations based on Section 19(d) of the Order was warranted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE,  
REGIONAL OFFICE,  
JUNEAU, ALASKA

Respondent

and

Case No. 71-2975

RAYMOND L. BROWN

Complainant

DECISION AND ORDER

On July 29, 1975, Administrative Law Judge William Naimark issued his Report and Recommendation 1/ in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendation.

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

In footnote 6 of his Report and Recommendation, the Administrative Law Judge indicated that the Respondent had not asserted Section 19(d) of the Order 2/ as a defense to the allegation in the complaint that the Respondent had violated Section 19(a)(2) of the Order. Contrary to the Administrative Law Judge, I find that the Respondent, in fact, did contend that the issues involved in the Section 19(a)(2) allegation herein were subject to an appeals system; that it asserted that the appeals system

1/ The hearing in this case was held before Administrative Law Judge Thomas W. Kennedy on January 27 and 28, 1975. Subsequent to the close of the hearing Judge Kennedy passed away. Thereafter, Administrative Law Judge William Naimark was designated and assigned to prepare the Report and Recommendation in this matter.

2/ Section 19(d) provides, in relevant part: "Issues which can properly be raised under an appeals procedure may not be raised under this section."

had been invoked on these matters; that the issues, in fact, were considered under the appeals system; and, therefore, that under Section 19(d) of the Order these matters should not be considered in this proceeding. In this regard, the record revealed that after the Complainant had rested his case, the Respondent's counsel stated that:

...several of the items under question here should not be, since...Section 19-D [sic] of the Executive Order 11491 excludes them - excludes items which are appealable under the Statutory Appeals---the same facts are being appealed considered by an Administrative Judge of the U.S. Department of Agriculture at the present time. (Tr. p. 107)

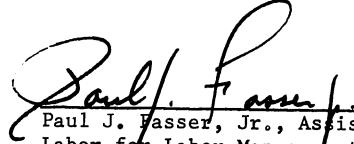
Further, the appeal, of which the Administrative Law Judge took judicial notice in footnote 5 of his Report and Recommendation, specifically considered, among other things, whether the Complainant's discharge was "...as a reprisal for his exercising his responsibilities as an official in the NFFE."

Under these circumstances, I find that the issues raised by the complaint, concerning whether the Complainant was discriminated against because of his union activities, were encompassed within the above-noted adverse action appeal. Accordingly, while I agree with the Administrative Law Judge's conclusion on the merits that the evidence herein did not support a finding that the Respondent violated Section 19(a)(2) of the Order by suspending and ultimately discharging the Complainant, I find additionally that dismissal of these allegations based on Section 19(d) of the Order was warranted.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-2975 be, and it hereby is, dismissed.

Dated, Washington, D.C.  
December 10, 1975

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

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



Judge Thomas W. Kennedy 1/ on January 27 and 28, 1974 in Juneau, Alaska.

.....  
In the Matter of

U.S. DEPARTMENT OF AGRICULTURE  
FOREST SERVICE  
REGIONAL OFFICE  
JUNEAU, ALASKA

Respondent

and

RAYMOND L. BROWN

Complainant  
.....

CASE NO. 71-2975

Frank C. Arnold  
Regional Personnel Officer  
Forest Service  
P.O. Box 1628  
Juneau, Alaska

For the Respondent

Raymond L. Brown  
P.O. Box 823  
Juneau, Alaska

Pro Se

BEFORE: THOMAS W. KENNEDY  
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on December 19, 1974, by the Assistant Regional Director for Labor-Management Services Administration of the U.S. Department of Labor, San Francisco Region, a hearing in the above captioned case was held before Administrative Law

The proceeding herein was initiated under Executive Order 11491, as amended (herein called the Order) by the filing of a complaint on May 31, 1974 by Raymond L. Brown, an individual, (herein called the Complainant) against U.S. Department of Agriculture, Forest Service, Regional Office, Juneau, Alaska (herein called the Respondent). It was alleged in said complaint that Respondent violated Section 19(a)(1) and (6) of the Order by (a) not consulting with Local 251, National Federation of Federal Employees re the effect of its decision to relocate the Chatham area headquarters from Juneau to Sitka, Alaska, (b) withholding information so that Local 251 did not know of the decision nor about the adverse impact created thereby, (c) placing Local 251's designated representative on AWOL on February 4, 1974 and separating him from service on March 18, 1974.

An amended complaint was filed by Complainant against Respondent on October 18, 1974 alleging violations of Section 19(a)(1)(2) and (6). The amended complaint alleged that Respondent failed to confer or consult with Local 251 NFFE by unilaterally changing the deadline by which employees affected by the move from Juneau to Sitka were required to report to the latter location; that Respondent discouraged membership in said local 251 by not locating temporary government housing for Raymond Brown, the Complainant and designated representative of Local 251, and by placing Brown on AWOL on or about February 4, 1974.

Respondent filed a response to the complaints in which it denied any obligation to consult as to this reassignment and, moreover, maintained Local 251 never requested consultation regarding same. Further, it averred that Brown was terminated for refusing to report to Sitka as directed - all of which was appealed by Brown through the statutory appeals system. Accordingly, Respondent denies it has violated the Order.

Both parties were afforded full opportunity at the hearing to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered.

1/ Judge Kennedy died subsequent to the close of the hearing herein. Thereafter the undersigned was duly designated and assigned to prepare a report and recommendation based on the entire record in this matter.

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

Findings of Fact

1. At all times material herein National Federation of Federal Employees, Local No. 251, Juneau, Alaska was the collective bargaining representative of all non-supervisory GS and WG employees in the Alaska Region.

2. Both Local 251 and Respondent were parties to a collective bargaining agreement covering the aforesaid employees, which agreement was executed on March 28, 1972 and effective by its terms for a period of two years from the date of its approval by the Director of Personnel, Office of the Secretary of Agriculture.

3. Complainant herein has been employed for approximately 26 years with the Forest Service, and in 1973 he worked as a Forester in the Forest Supervisor's Office of the Chatham area, North Tongass National Forest (Recreation Lands Division), Juneau, Alaska. For the past five years Complainant has been active on behalf of Local 251. Although he did not hold an office in said union, Complainant served as its designated representative at all times material herein.

4. In accordance with a proposed reorganization of the Alaska Region - as approved on July 25, 1972 - Regional Forester C.A. Yates announced a decision 2/ on April 23, 1973 that the area headquarters for the northern half of the Tongass National Forest would be located in Sitka rather than Juneau, Alaska.

5. Subsequent to this announcement Brown inquired of Ferdy Bouchard, Management representative, as to why the union was not consulted re the move. According to Brown's testimony, Bouchard replied that it was not a matter subject to consultation. However, Brown testified that the employer's representative assured him it would take one year to implement the move, and thus the employees could make proper arrangement for housing and the relocation. The decision was therefore accepted, according to Complainant, with no further protest.

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2/ This decision was contrary to a task force's earlier recommendation that the headquarters be retained in Juneau.

6. On June 1, 1973, Yates issued a directive that seven employees, including Complainant, would be reassigned 3/ to Sitka on September 2, 1973. It further recited that certain other named individuals would be reassigned to Anchorage and Petersburg on specified dates in August and September, 1973.

7. Complainant Brown wrote a letter dated August 20, 1973 to the area manager at Chatham (Vincent N. Olson), advising that he had made two trips to Sitka in an effort to locate housing and that no adequate facilities were available. Brown stated that the cost of building a house was prohibitive, and that he was unable to find accommodations to meet his needs by September 2.

8. In reply to Brown's letter, Olson wrote the Complainant on August 28, requesting that the employee give a date when he will be able to complete his move to Sitka. Further, he stated a woman called and informed him that he had a three bedroom house for rent, and Olson informed Brown the name of the woman and other details.

9. In a memo dated August 30, 1973 Brown requested that his reporting date be extended to June 30, 1973 in view of the acute housing problem in Sitka.

10. Olson wrote Yates a memo dated September 5, 1973 stating he did not believe that Brown made an objective effort to secure housing in Sitka and that the employee could not expect to find the same housing situation to prevail there as in Juneau. The manager commented that it was necessary to relocate Brown in Sitka so he could work more closely with the program manager and staff people. He also suggested the Complainant be granted till December 31, 1973 to make housing arrangements, but if he did not succeed by that date, the employee should be separated from service.

11. In a memo dated September 6, 1973 Yates advised Olson to accomplish the reassignment as soon as possible, and he stated that the effective date was changed to November 11, 1973. Yates also said that further extensions would be considered based on the degree of sincere effort to locate suitable housing and complete the move. Further, if plans were not firming up by November 1, efforts made to obtain accommodations should be documented.

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3/ A total of 13 employees were to be reassigned from Juneau to Sitka. By June 1, 1973 several individuals had already moved to the new location.

12. In reply to a letter he received from Senator Gravel protesting the move to Sitka, Regional Forester wrote Gravel on September 10, 1973 explaining the reason for relocating the headquarters, and stated that employees were being accorded time to move and find housing. He also remarked that he was sorry a few individuals were unhappy about the move and "involved the union"... that "less than ten employees out of 300 belong to the union".

13. Brown wrote Olson again on November 1, 1973 outlining his efforts to find housing in Sitka, mentioned his plans to build a house, and requested that his move be deferred until June 30, 1974.

14. On November 6, 1973 Olson wrote Yates recommending that the position held by Brown be eliminated to improve the efficiency of the organization and save expenses.

15. A further memo from Olson to Yates, dated November 15, 1973, referred to the tightness of housing in Sitka and suggested that employees scheduled to move there be given until January 15, 1974. Further Olson suggested that the employees be advised that if they fail to report by that date, they'll be deemed AWOL and subject to termination. In regard to Brown, he stated that consideration be given to relocating said individual to another position, although none was available in the Chatham area.

16. In reply thereto, Yates wrote a memo dated November 30, 1973 saying that the transfer of functions must be maintained, that consideration must be given to the effect on Brown's options to exercise discontinued service, and asserting it would not be practical to abolish the position itself.

17. A memo dated November 30, 1973 was written from Yates to Brown stating that the Regional Forester recognized the difficulty in moving to Sitka and the existent housing shortage. Yates reiterated that the program necessitated the transfer, but advised Brown <sup>4/</sup> that the effective date of the change in duty station would be February 3, 1974.

18. Brown wrote Yates on January 30, 1974 that since he was unable to locate housing in Sitka he would be unable to report by February 3, and Complainant requested he be returned to Region 2 if the employer could not keep him in Juneau.

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<sup>4/</sup> Other Foresters at Juneau who were granted an extension until February 3, 1974 to report to Sitka were James E. Knode, Gerald L. Schauwecker, and Thomas L. Williams.

19. Robert Stanaway, Personnel Officer, wrote Brown a memo dated January 31, 1974 that an employee in the Alaska region was permitted to exercise return rights if his requests were submitted by January 1, 1973. Further, that this return right provision was no longer in effect and there was no way to negotiate a reassignment.

20. Complainant did not report to Sitka but reported to Juneau, on February 4, 1974. Respondent placed him on AWOL status on that date.

21. Stanaway sent Brown a memo on February 12, 1974 notifying him that the employer proposed to separate the employee from Forest Service employment no earlier than 30 days after receipt of said notice. Further, Brown was advised that while he was on AWOL status as of February 4, he was being retained on the rolls as an employee.

22. As a result of a decision made by Stanaway on March 4, 1974, Complainant was removed from his position as a career forest service employee effective March 18, 1974.

23. Record facts show that in 1973 there were four residences maintained by Respondent in Sitka. Three were occupied by employees who had been located thereat, while the other dwelling was a ranger house set up as temporary shelter for those moving into the area. There was also a trailer for temporary summer crew. The ranger house was offered to Schauwecker since he had four small children, although this employee was at training school and did not report until a few weeks later. Knode, who was separated from his wife, took two days annual leave in order to arrange for moving his personal effects and had a temporary assignment in Juneau. He did not report on February 4, but did move into the bunkhouse upon arriving at Sitka. Williams was granted an extension to handle his personal problems and he had difficulty selling his house. He moved into the crewhouse at Sitka in August 1974. Ultimately, all employees who moved to Sitka found housing accommodations.

24. The record reflects that Respondent removed two employees, who were administrative assistants, from their employment for failure to accept a reassignment. Duane Sinclair was removed on August 14, 1973 for failure to report to Sitka as reassigned, and John W. Shay was removed on October 27, 1973 for the same reason.

25. The Federal Personnel Manual, Part 752(b), provides, in respect to removals and suspension of any employee, that he be kept on active duty in his regular position during the notice period, if at all practicable. The Forest Service Manual, Amendment 89, provides that employees who are absent from duty without authorization place themselves in a non-pay status. Stanaway testified, and I find, that Respondent decided that the provision placing an AWOL employee on a non pay status overrode the FPM section which provided that an employee, whom it is purposed to remove, be kept on active duty; and that, accordingly, Brown was not retained on pay status after February 4, 1974.

26. Pursuant to the Federal Personnel Manual, 771, subchapter 2, Brown filed on March 28, 1974 an adverse action appeal from the decision by Respondent to remove him from his Forest Service Employment. A hearing was held on August 7, 8, and 9, 1974, before an Administrative Law Judge of the Department of Agriculture. At the hearing Brown alleged racial discrimination, improper determination by Respondent re the reassignment, and that he was discriminated against for exercising responsibilities as an official of NFFE. The Judge issued a decision on February 28, 1975 recommending that the removal of Brown be sustained. This was affirmed by the Department of Agriculture on March 13, 1975. 5/

Conclusions

A. The Alleged Violation of 19(a)(6) by Respondent

Complainant insists that Respondent was under an obligation to consult and confer with Local 251 regarding the (a) impact upon employees of the reassignments to Sitka from Juneau, (b) implementation period for the move (c) extensions granted employees to report to the new location. Further, he contends the union was not supplied information re the move as required under the agreement - all in violation of the duty to bargain as required under the Order.

As I view the Order, which was patterned after the National Labor Relations Act, the obligation to confer and consult is owed by an employer to a labor organization which

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5/ The appeal procedure pursued by Brown was not made a part of the record herein. Facts with respect thereto are contained in the decision of the Administrative Law Judge rendered after the hearing before him and submitted by Respondent. Judicial notice has been taken by the undersigned of the appeal proceedings and the decision so rendered.

is the collective bargaining representative of its employees. Section 11 of the Order spells out this duty to bargain, and it clearly envisages the reciprocal part played by both the employer and the union. As such, I consider the obligation on the part of management to run to the labor organization and not to an individual. To permit individuals, as distinguished from the bargaining representative, to challenge an employer's refusal to consult or bargain would undercut the union and derogate from its authority as such a representative. Rights of representation would be rendered meaningless if employees could decide, on their own, whether the parties were bargaining properly under the Order and compel adherence to their own determinations.

In the case at bar the Complainant, as an individual, has charged Respondent with a failure to consult or confer with Local 251, NFFE in violation of 19(a)(6). The union made no appearance as a party herein and it indicated that it took no position with respect to the allegations in the complaint. Moreover, Local 251 made no objections to the reassignments, requested no information as the collective bargaining representative, and did not seek to bargain concerning the impact or effect of moving the headquarters from Juneau to Sitka. In this posture, I conclude that Complainant Brown may not challenge the fulfillment by Respondent of its obligation to bargain. The right to do so flows exclusively to Local 251 and it alone can obtain relief for a dereliction of this obligation to bargain. Accordingly, I would not find a violation of 19(a)(6) based on the complaint herein.

B. Alleged Discrimination Against Brown in Violation of 19(a)(2) of the Order. 6/

An employee is protected under the Order in the exercise of his right to engage in activity on behalf of a labor organization. Thus, section 1(a) thereof accords an employee the right to join or assist a union without fear of penalty

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6/ Although Respondent refers, in its brief, to the fact that Brown appealed his termination under the statutory appeals system, it has not raise Section 19(d) of the Order as a defense to this proceeding. Whether an appeal pursuant to FPM 771(2) before the agency warrants dismissal under 19(d) was not raised in Respondent's response nor at the hearing. In view thereof, and since it was not litigated before Judge Kennedy, I do not pass upon that issue.

or reprisal. Further, as its representative he may act for the organization in dealings with management - all without being discriminated against in order to discourage his membership in such organization. However, the protection afforded an employee under this section of the Order extends to discrimination based on his union activities. An employer may, without running afoul of the Order, treat an employee unfairly or disparately vis a vis others provided that its conduct is not as a result of the employee's action on behalf of a particular labor organization. Accordingly, to establish a violation of 19(a)(2) it is necessary to show, not only that an employee was discriminated against by an agency, but that such treatment was a result of his unionism.

Complainant maintains that he has been so discriminated against by being placed on AWOL status and then separated from his employment. He contends this was achieved and evidenced by (a) preferential housing being offered to other employees but not to him; (b) preferential leave interpretation made in favor of other individuals; (c) preferential job offers extended to other employees, and (d) preferential application of personal policies.

A careful reading of all the evidence herein convinces me that Respondent did not discriminate against Complainant Brown under the Order. While he may have disagreed with the employer's actions in respect to the reassignment from Juneau to Sitka, Brown's refusal to effect the move by February 3, 1974 was, in my opinion, the sole and proximate cause for the actions taken toward him by management.

Although Brown was a representative of Local 251, the record does not support a conclusion that management displayed any animus toward him based on his activities as the union representative. It was conceded by the Complainant, and the record reflects, that no restraints were placed on Brown's efforts to represent employees in grievance matters. Further, he was permitted to act as a union representative freely and there is no showing that he was ever admonished to curtail or restrict such activities.

Complainant's reference to the alleged preferential treatment toward others does not serve to establish discriminatory conduct toward him under the Order. Of the four employees who were to report by February 3, Brown was the only individual who refused to, and did not, move to Sitka.

While it is true that the others did not actually commence work at the new location on the designated date, there were extenuating reasons in each instance, i.e. taking of annual leave, being at a training session, and finishing up of incompletd work. Had Brown commenced his move to Sitka it may well be that a similiar request by him for annual leave to perfect the move would have been granted. In any event, he was granted two extensions along with others to move to Sitka, and thus was allowed five additional months in which to relocate to Sitka. His request for a further extension of time to move until June 30 was far beyond time accorded the other three men (Schauwecker, Knode, Williams). Neither do I agree that housing arrangement made for these three employees reflect disparate treatment as regards Brown or are supportive of discrimination. Since Schauwecker had four children it was understandable that he be furnished the government house, and it does not appear that management would have denied Brown the crewhouse accommodations. Moreover, while housing facilities were obviously difficult to obtain, all those reassigned from Juneau to Sitka did, in fact, move and find quarters.

Complainant does not attach much relevaney to the fact that Respondent placed two employees (Sinclair and Shay) on AWOL and then separated them for failing to report on re-assignment. He considers their cases dissimiliar since they were not involved in a "transfer of functions", their positions were to be abolished, and housing was not a factor. Nevertheless, Respondent treated two employees who were not union agents, or active on behalf of Local 251, in the same manner as it handled Complainant when they refused to report to their new duty stations, and, to that extent, I find that the action taken toward Sinclair and Shay is relevant herein.

Complainant attaches significance to the failure by Respondent to accept Olson's recommendation that Brown's job be abolished as well as his suggestion that the employee might not be needed in Sitka. Further, it is averred that management intended to get rid of Brown and then abolish the job; that it could not accomplish the latter and therefore it filled the position. Nothing in the record supports this conclusion or shows that Respondent was bent upon getting rid of Brown. Had the employer taken steps to terminate Brown apart from the orderly reorganization which involved reassignment, this argument might bear more consideration. Under the circumstances herein I do not find it persuasive. Moreover, I

reject the argument that the failure by Stanaway to follow the Personnel Manual regulations, in regard to notification to employees re the move, reflects a discriminatory motive on the part of Respondent. Such a failure may constitute a breach on the part of management, but unless, in the instance of Brown, it was committed to effect his separation because of his union activities, it does not tend to prove discrimination under the Order.

Accordingly, in view of the foregoing and based on the record herein. I conclude that Complainant Brown was placed on AWOL, and then suspended from employment, for his refusal failure to report on February 3, 1974 to Sitka from Juneau, in accordance with his reassignment. Further, I conclude that Brown's activity as a representative of Local 251 was not a factor involved in the action taken by management toward him. According, I find Respondent has not violated Section 19(a)(2) of the Order.

C. Alleged Acts of Interference in Violation of 19(a)(1)

Complainant, in his insistence that Respondent engaged in acts of interference, adverts to several instances where employees felt <sup>7/</sup> threatened or in "apprehension" as a result of statements made by Respondent. Apart from the fact that such evidence is heresay in nature, the employee's alleged fear of reprisal was based on his interpretation of the manner in which management treated Complainant. An evaluation of whether a statement is coercive in nature cannot rest upon a subjective determination, but must stand or fall on an analysis of the statement itself and whether it would tend to interfere with the rights of employees under the Order.

Upon reviewing the record I find no statements made by management which can be deemed coercive in nature. The inquiry by Respondent of Local 251 as to its reaction to the charge does not, in my opinion, constitute interference and is scarcely threatening by itself. Further, the comments by Yates to Senator Gravel - apart from not being made to employees or likely to come to their attention - do not reflect an intention to disparage the bargaining representative. Neither these comments, nor the remark allegedly made by

<sup>7/</sup> Statement by employees of their reactions to Respondent's remarks were rejected by Judge Kennedy at the hearing.

Stanway in 1971 <sup>8/</sup> that the union acted in bad faith, were of a coercive character but expressions of opinion which I do consider to constitute interference or a violation of 19(a)(1) under the Order.

Recommendations

Upon the basis of the foregoing findings and conclusions, the undersigned recommends that the complaint herein against U.S. Department of Agriculture, Forest Service, Regional Office, Juneau, Alaska, be dismissed.

  
WILLIAM NAIMARK  
Administrative Law Judge

Dated: July 29, 1975  
Washington, D.C.

<sup>8/</sup> This occurred more than six months before the charge was filed and would be barred from consideration under 203.2(a)(2) of the Rules and Regulations.



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

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,  
OFFICE OF THE SECRETARY, HEADQUARTERS  
A/SLMR No. 596

This case involved a petition for clarification of unit (CU) filed by the Activity-Petitioner seeking to exclude a Budget Analyst, GS-14, from the exclusively recognized unit, and a CU petition filed by the American Federation of Government Employees, Local 41, AFL-CIO (AFGE) seeking to include a Budget Analyst, GS-13, in the exclusively recognized unit. In this regard, the Activity-Petitioner contended that the Budget Analyst, GS-14, was a management official and that under Section 1(b) of the Order his functions as a Union chief negotiator raised a conflict or apparent conflict of interest with his official duties. Further, it asserted that the Budget Analyst, GS-13, was a member of the management negotiating team and, therefore, was a management official. The AFGE contended, on the other hand, that the aforementioned employees were not management officials and should be included in the exclusively recognized unit. The AFGE represents exclusively a unit of non-professional employees of the Activity.

The Assistant Secretary found that the two budget analysts were not management officials within the meaning of the Order. With regard to their official duties, he noted that the budget guidelines and analyses prepared by these employees do not extend beyond that of an expert rendering resource information with respect to previously established policy. Additionally, he noted that the employees' role in making recommendations does not extend to the point of active participation in the ultimate determination of policy. Further, noting that there was no evidence that the Budget Analyst, GS-13, actively engaged in the negotiating process on behalf of agency management, the Assistant Secretary found that, standing alone, the employee's mere designation as a member of the management negotiating team did not warrant her removal from the exclusively recognized unit.

Accordingly, the Assistant Secretary ordered that the AFGE unit be clarified by including in such unit the aforementioned budget analysts.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,  
OFFICE OF THE SECRETARY, HEADQUARTERS

Activity-Petitioner

and

Case No. 22-6269(CU)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 41, AFL-CIO

Labor Organization

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,  
OFFICE OF THE SECRETARY, HEADQUARTERS

Activity

and

Case No. 22-6291(CU)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 41, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

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

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

In Case No. 22-6269(CU), the Activity-Petitioner seeks to clarify the status of Joseph E. Cook, Budget Analyst, GS-560-14, requesting that he be excluded from the exclusively recognized unit represented by the American Federation of Government Employees, Local 41, AFL-CIO, herein called AFGE. 1/

1/ On January 24, 1973, the AFGE was certified as the exclusive representative in a unit of, "All nonprofessional General Schedule and Wage Grade employees of the Office of the Secretary, Department of Health, Education and Welfare, located in the Washington, D. C., Metropolitan Area.

Excluded: All professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, summer aides, supervisors, and guards as defined in Executive Order 11491, and employees in positions which are confidential with respect to labor relations matters."

In Case No. 22-6291(CU), the AFGE seeks to clarify the status of Jane Easton, Budget Analyst, GS-560-13, requesting that she be included in the exclusively recognized unit represented by the AFGE.

The Activity-Petitioner contends that Joseph E. Cook is a management official within the meaning of the Order and that under Section 1(b) of the Order his function as the AFGE's chief negotiator raises a conflict or apparent conflict of interest with his official duties. <sup>2/</sup> Further, the Activity-Petitioner maintains that Jane Easton, a member of the management negotiating team, is a management official within the meaning of the Order. Conversely, the AFGE contends that the aforementioned employees are not management officials within the meaning of the Order and should be included in the exclusively recognized unit.

The mission of the Activity is to provide leadership to the Department of Health, Education and Welfare (HEW) and, under the direction of the Secretary of HEW, to provide advice, assistance and services to the agencies and to the regional and field components of HEW.

#### Joseph E. Cook

Joseph E. Cook is employed as a Budget Analyst, GS-560-14, in the Budget Standards and Presentation Branch of the Division of Budget Review. The Branch has the responsibility for specifying the format of budget submissions of HEW agencies and for providing technical assistance regarding the budget. As a senior budget analyst, Cook has the responsibility of overseeing the effective presentation of HEW agency budgets within HEW and before the Office of Management and the Budget (OMB) and the Congress. Based on Congressional and OMB instructions and his knowledge of HEW programs, he drafts budget format guidelines which are to be followed by HEW agencies in preparing their budgets. In this connection, the record establishes that in drafting budget guidelines and in reviewing agency budget submissions for conformance to such guidelines, Cook makes no recommendations regarding program content, employment levels, spending levels, or other aspects of budget policy. Further, his written recommendations are submitted to the Division Director for review and frequent revision occurs. Additionally, the technical assistance he provides to OMB and to Congress does not extend to recommendations regarding budget policy.

Based on the foregoing, it is clear that Cook does not participate in the formation or determination of agency policy. Rather, his various functions are in the nature of an expert or resource person

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<sup>2/</sup> Section 1(b) provides: "Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, except as provided in section 24 of this Order, or by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee."

rendering resource information or recommendations with respect to existing policy. <sup>3/</sup> Under these circumstances, I find that Joseph E. Cook, Budget Analyst, GS-560-14, is not a management official within the meaning of the Order and should be included in the exclusively recognized unit.

#### Jane Easton

Jane Easton is employed as a Budget Analyst, GS-560-13, in the Division of Planning and Analysis of the Office of the Deputy Assistant Secretary, Finance. The Division has the responsibility within HEW for the review, analysis and appraisal of the financial elements of budget program execution and for the development and execution of policies relating to the expenditure and control of funds. In her capacity as senior budget analyst, Easton assists in developing budget guidelines and directives followed by HEW agencies operating under continuing resolutions, and reviews spending plans submitted by agencies for conformance to these guidelines. Such guidelines are based on the continuing resolutions and on past budget precedents. In this regard, the evidence establishes that her recommendations conform to previously established budget policy and she has no influence over spending levels, employment ceilings, program content or other aspects of budget policy. Further, her recommendations are reviewed by the project leader or by the Division Director. While the record reveals that she may be required to assess the outlay impact of Congressional budget actions, her recommendations in this regard are in the nature of technical assistance rather than policy recommendations. Additionally, the record reveals that her recommendations regarding the disposition of an agency budget underrun and the defining of the function of Regional Comptrollers were subject to review and did not extend to active participation in the determination of policy.

In connection with the performance of her day to day job functions, I find that the evidence establishes that Jane Easton acts as an expert or resource person rendering resource information or recommendations and does not participate in the ultimate determination of policy.

Further, in addition to her official duties, the record reveals that Jane Easton serves on the management negotiating team, apparently only as a resource person rendering budget information. There was no evidence that she was actively engaged in the negotiating process on behalf of agency management or that she was involved in the development

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<sup>3/</sup> Cf. United States Department of Health, Education and Welfare, Regional Office VI, A/SLMR No. 266 and Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

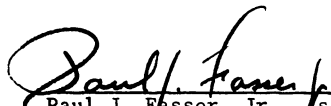
and implementation of management policies in connection therewith. Under these circumstances, I find that, standing alone, her mere designation as a member of the management negotiating team is not sufficient justification for removing her from the exclusively recognized unit. 4/

Under all of the above circumstances, I find that Jane Easton, Budget Analyst, GS-560-13, is not a management official within the meaning of the Order and should be included in the exclusively recognized unit.

## ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, Local 41, AFL-CIO, was certified on January 24, 1973, be, and hereby is, clarified by including in said unit Joseph E. Cook, Budget Analyst, GS-560-14, and Jane Easton, Budget Analyst, GS-560-13.

Dated, Washington, D. C.  
December 10, 1975

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

4/ This is not to say, however, that, in other circumstances, employees whose official duties are not managerial in scope may not, by reason of serving on management's negotiating team, be effectively removed from the bargaining unit thereby. Thus, in my view, where employees, in serving on management's negotiating team, are involved in the negotiating process, and are engaged in, or privy to, the development and implementation of management policies in connection with such negotiations there is a fundamental conflict of interest if such employees remain in the bargaining unit. Therefore, I believe such employees must be excluded from the unit as either management officials or confidential employees. On the other hand, where employees merely serve as resource persons to the management negotiating team, rendering technical data and information acquired as the consequence of the employees' official duties, and the employees are not involved in the actual negotiating process, I see no fundamental conflict of interest and, therefore, no justification for the removal of such employees from the bargaining unit.

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

BELLINGHAM FLIGHT SERVICE STATION,  
FEDERAL AVIATION ADMINISTRATION-N.W. REGION,  
DEPARTMENT OF TRANSPORTATION,  
BELLINGHAM, WASHINGTON  
A/SLMR No. 597

This case involved an unfair labor practice complaint filed by Robert J. Crane, an individual, alleging, in effect, that the Bellingham Flight Service Station, Federal Aviation Administration, (FAA), N.W. Region, Bellingham, Washington (Respondent) violated Section 19(a)(1) and (4) of the Order by declaring him absent without leave from his duty station on October 2 and 3, 1974, and by subsequently suspending him for three days based on this absence, even though he had appeared and had been declared a necessary witness by an Administrative Law Judge at a hearing held in San Juan, Puerto Rico on those dates.

In September 1974, Crane was informed by a former subordinate of his at his prior place of employment in San Juan, Puerto Rico, that he would be called as a witness at an unfair labor practice proceeding to be held in Puerto Rico. The Assistant Regional Director, LMS, New York, referred the request for Crane's appearance to the Administrative Law Judge in that proceeding. Alternative duty assignments in the event of Crane's absence were discussed with the Respondent and Crane notified the Respondent of his intention to appear at the Puerto Rico hearing. Specific authorization for Crane to appear was never received by the Respondent prior to the hearing, but Crane was never told specifically that he could not leave to appear at the hearing. When Crane appeared at the hearing in Puerto Rico, having paid his own expenses, the Administrative Law Judge therein, having been apprised of the circumstances of Crane's appearance, declared him to be a necessary witness within the meaning of Section 206.7 of the Assistant Secretary's Regulations. The representative of the FAA at the hearing took no exception to this ruling. Subsequently, Crane was declared absent without leave for the two work days he had been at the Puerto Rico hearing and he was suspended for an additional three days for his failure to report to work at that time. The Respondent's basic contention was that Crane was not authorized to leave for the Puerto Rico hearing and that the Administrative Law Judge's decision therein could not ex post facto relieve Crane of any culpability involved in his unauthorized absence.

The Administrative Law Judge noted that an employee may not properly appear at a hearing unless a "Request for Appearance of Witnesses" has

been issued by an Assistant Regional Director, a Hearing Officer, or an Administrative Law Judge pursuant to a timely motion. The Administrative Law Judge concluded, however, that if an employee makes an appearance at a hearing prior to the issuance of a Request, such employee "acts at his peril" and only a subsequent finding that the said employee was a necessary witness absolves the employee of any wrongdoing committed because such an appearance was not properly authorized.

Contrary to the Administrative Law Judge, the Assistant Secretary found that allowing employees to make judgements for themselves as to whether they are necessary witnesses pursuant to Section 206.7 of the Assistant Secretary's Regulations would be disruptive of the orderly processes required to implement properly the Executive Order even if some of those judgements ultimately were to be vindicated. He noted that the purposes of the Order would be better served if the parties adhere to the implicit mandate of Section 206.7 that prior approval of a "Request for Appearance of Witnesses" be obtained before any employee is granted such official time and expenses as are described in Section 206.7(g) of the Assistant Secretary's Regulations. However, given the circumstances herein and noting, among other things, the decision by the representative of the FAA not to take exception to the Administrative Law Judge's ruling with respect to Crane's appearance at the Puerto Rico hearing, the Assistant Secretary found that the Respondent's failure to abide by the ruling in that matter and the subsequent disciplining of the Complainant because of his absence for that purpose was in violation of Section 19(a)(4) of the Order. The Assistant Secretary also found, in agreement with the Administrative Law Judge, that such conduct interfered with, restrained, or coerced Crane in the exercise of his rights assured by the Order to join and assist a labor organization and, therefore, was violative of Section 19(a)(1) of the Order.

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

BELLINGHAM FLIGHT SERVICE STATION,  
FEDERAL AVIATION ADMINISTRATION, N.W. REGION,  
DEPARTMENT OF TRANSPORTATION,  
BELLINGHAM, WASHINGTON

Respondent

and

Case No. 71-3288(CA)

ROBERT J. CRANE  
FERNDAL, WASHINGTON

Complainant

DECISION AND ORDER

On August 12, 1975, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendation. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation, and the Complainant filed an answering brief to the Respondent's exceptions.

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

In reaching his disposition of the subject complaint, the Administrative Law Judge noted that an employee may not properly appear at a hearing unless a "Request for Appearance of Witnesses" has been issued by an Assistant Regional Director, a Hearing Officer, or an Administrative Law Judge pursuant to a timely motion. The Administrative Law Judge concluded, however, that if an employee makes an appearance at a hearing prior to the issuance of a Request, such employee "acts at his peril" and only a subsequent finding that the said employee was a necessary witness absolves the employee of any wrongdoing committed because such an appearance was not properly authorized.

Contrary to the Administrative Law Judge, I find that allowing employees to make judgements for themselves as to whether they are necessary witnesses at hearings within the meaning of Section 206.7 of the Assistant Secretary's Regulations would be disruptive of the orderly processes required to implement properly the Executive Order, even if some of those judgements ultimately were to be vindicated. Thus, in my view, the purposes of the Order would be better served if the parties adhere to the implicit mandate of Section 206.7 of the Regulations that prior approval of a "Request for Appearance of Witnesses" be obtained before any employee is granted such official time and expenses as are described in Section 206.7(g) of the Assistant Secretary's Regulations. <sup>1/</sup> However, given the particular circumstances herein—that the Complainant notified the Respondent of his intention to appear at the hearing in Puerto Rico; the discussion of alternative assignments in the event of the Complainant's absence from the Bellingham facility; the lack of specific instructions to the Complainant that he was not to leave the Respondent's facility to appear at the hearing in Puerto Rico; the finding by the Administrative Law Judge at the Puerto Rico hearing that the Complainant was a necessary witness within the meaning of Section 206.7 of the Assistant Secretary's Regulations; and the decision by the representative of the Federal Aviation Administration at the Puerto Rico hearing not to take exception to the ruling by the Administrative Law Judge therein with respect to the Complainant's

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<sup>1/</sup> On p. 11 of his Report and Recommendation, the Administrative Law Judge concluded that neither the Order nor the Assistant Secretary's Regulations affords an employee the right or privilege to be a witness at a hearing to which he is not a party unless a timely request for his appearance has been made and granted. My decision herein speaks to the rights of employees who are requested to appear as necessary witnesses pursuant to Section 206.7 of the Assistant Secretary's Regulations. Nothing herein should be construed as limiting the rights of employees who wish to appear as witnesses at such hearings of their own volition without seeking such emoluments as Section 206.7 of the Regulations may provide, or such witnesses as the parties may mutually agree are necessary.

appearance - I find, in agreement with the Administrative Law Judge, that the Respondent's failure to abide by the ruling of the Administrative Law Judge in the Puerto Rico hearing and its subsequent disciplining of the Complainant was in violation of Section 19(a)(4) of the Order. I also find, in agreement with the Administrative Law Judge, that such conduct interfered with, restrained, or coerced the Complainant in the exercise of his rights assured by the Order to join and assist a labor organization and, therefore, was violative of Section 19(a)(1) of the Order.

#### ORDER


Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Bellingham Flight Service Station, Federal Aviation Administration, Bellingham, Washington, shall:

1. Cease and desist from:
  - (a) Disciplining Robert J. Crane because of his appearance at a hearing held on October 2 and 3, 1974, in San Juan, Puerto Rico, under Executive Order 11491, as amended, wherein his appearance was ruled necessary by the Administrative Law Judge.
  - (b) Refusing to abide by the decision of the Administrative Law Judge made at a hearing held in San Juan, Puerto Rico, on October 2 and 3, 1974, under Executive Order 11491, as amended, that Robert J. Crane was a necessary witness and, as such, was to be granted official time for the period of his participation in such hearing including necessary transportation and per diem expenses.
  - (c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended.
  - (a) Change Robert J. Crane's work status on October 2 and 3, 1974, from absent without leave to official time status.
  - (b) Make whole Robert J. Crane for any loss of monies he may have suffered by reason of the failure of the Agency to abide by the ruling made by the Administrative Law Judge at a hearing held on October 2 and 3, 1974, in San Juan,

Puerto Rico, under Executive Order 11491, as amended, that Crane was a necessary witness.

- (c) Rescind its action suspending Robert J. Crane by letter dated November 13, 1974, expunge from its records any entries relating to such suspension, and make whole Robert J. Crane with respect to any monies withheld during the period of such suspension.
- (d) Post at its facility at Bellingham Flight Service Station, Bellingham, Washington, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chief of the Flight Service Station and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Chief shall take reasonable steps to insure that notices are not altered or defaced or covered by any other material.
- (e) Pursuant to Section 203.7 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.  
December 10, 1975

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

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT discipline Robert J. Crane because of his appearance at a hearing held on October 2 and 3, 1974, in San Juan, Puerto Rico, under Executive Order 11491, as amended, wherein his appearance was ruled necessary by the Administrative Law Judge.

WE WILL NOT refuse to abide by the decision of the Administrative Law Judge made at a hearing held in San Juan, Puerto Rico, on October 2 and 3, 1974, under Executive Order 11491, as amended, that Robert J. Crane was a necessary witness and, as such, was to be granted official time for the period of his participation in such hearing including necessary transportation and per diem expenses.

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 change Robert J. Crane's work status on October 2 and 3, 1974, from absent without leave to official time status.

WE WILL make whole Robert J. Crane for any loss of monies he may have suffered by reason of the failure of the Agency to abide by the ruling made by the Administrative Law Judge at a hearing held on October 2 and 3, 1974, in San Juan, Puerto Rico, under Executive Order 11491, as amended, that Crane was a necessary witness.

WE WILL rescind our action in suspending Robert J. Crane by letter dated November 13, 1974, expunge from our records any entries relating to such suspension, and make whole Robert J. Crane with respect to any monies withheld during the period of such suspension.

December 16, 1975

UNITED 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

THE ADJUTANT GENERAL,  
STATE OF ILLINOIS,  
ILLINOIS AIR NATIONAL GUARD  
A/SLMR No. 598

This case involved an unfair labor practice complaint filed by the Illinois Air Chapter, Association of Civilian Technicians, Inc. (ACT) alleging, in effect, that the National Guard Bureau (Agency) violated Section 19(a)(1) and (6) of the Order by refusing, pursuant to Section 15 of Executive Order 11491, as amended, to approve a negotiated agreement between the ACT and the Adjutant General, State of Illinois, Illinois Air National Guard (Activity), covering a unit of employees of the 182nd Tactical Air Support Group, a component of the Activity. Also involved was a separate complaint against the Activity alleging, in effect, that its refusal to implement the agreement, which conformed to the prior changes sought by the Agency, was in violation of Section 19(a)(1) and (6) of the Order.

On September 22, 1971, the Agency, pursuant to Section 15 of the Order, returned a negotiated agreement entered into by the ACT and the Activity, with a request that a number of specific changes be made. On February 23, 1973, the Agency again refused, pursuant to Section 15 of the Order, to approve a new version of the negotiated agreement which had been revised to bring it into conformity with the changes originally sought by the Agency. With respect to Article 18 of the revised agreement, concerning the wearing of uniforms by the civilian technician employees of the unit, the Agency requested two minor editorial changes so as to bring the Article into conformity with the language of the Agency regulation concerning this subject. On April 20, 1973, the Agency once more refused to approve the agreement, which, on March 26, 1973, had been revised by the parties to incorporate the specific changes sought by the Agency in its February 23, 1973, disapproval action. This final refusal of approval was based solely on the Agency's contention that Article 18 in the negotiated agreement concerning the wearing of uniforms "represents a total distortion of the purpose and usage" of the Agency regulation in that regard. The Activity then concluded that it could no longer agree to a provision which incorporated exceptions to the uniform wearing regulation. Thus, the agreement was never implemented.

The Administrative Law Judge concluded that when the Activity negotiated with the ACT regarding a permissible subject of

\_\_\_\_\_  
(Agency or Activity)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Signature)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

bargaining, i.e., the wearing of uniforms, it was bound by any agreement which incorporated such matters. With respect to the Agency, the Administrative Law Judge found that after it sought specific changes in the first two versions of the negotiated agreement in its review of the agreement pursuant to Section 15 of the Order, it was required to perform the ministerial act of approving the agreement after the agreement had been brought into conformity with the specific changes it had enumerated as necessary to bring the agreement into conformity with laws, regulations and policies.

The Assistant Secretary agreed with the conclusion of the Administrative Law Judge that the conduct of both the Agency and the Activity violated the Order. He noted that Section 15 of the Order clearly does not exist so that an agency may frustrate good faith bargaining between its activities and the exclusive representatives of its activities' employees. In this regard, when specific changes pursuant to Section 15 are sought by an agency to conform an agreement to agency regulations, and these have been made, the parties should be reasonably able to assume that the agreement meets the requirements of the regulations in all other respects. The Assistant Secretary noted that he could not but conclude that, when, as in the instant matter, the parties have twice modified their agreement to meet the Agency's specific directives, the Agency's final rejection was for some reason other than those specified in Section 15 of the Order. Thus, while an agency can properly give the negotiating parties specific instructions with respect to the changes necessary in order to bring their negotiated agreement into conformity with its regulations, in the Assistant Secretary's view, it manifests an intent to frustrate the bargaining relationship between its subordinate activity and an exclusive representative by subsequently rejecting the very changes it has indicated are required in order for the agreement to conform to its regulations. Accordingly, he concluded that the failure by the Agency to approve the March 26, 1973, version of the agreement constituted an undermining of the exclusive representative selected by the employees of the Activity and resulted in improper interference with, restraint, or coercion of unit employees by the Agency in the exercise of their rights assured under the Order in violation of Section 19(a)(1) of the Order.

The Assistant Secretary also noted that, while the Activity may have acted in apparent good faith by negotiating with the ACT so as to incorporate the changes sought by the Agency subsequent to the first and second rejections of the proposed agreement, it, nevertheless, clearly refused to implement the agreement when it had been brought into conformity with the changes sought by the Agency pursuant to its Section 15 review authority. As he viewed the parties' agreement, dated March 26, 1973, to constitute a valid and binding negotiated agreement which the Agency was obligated to approve, it thus followed that the Activity's failure to implement this valid agreement was violative of the Order, regardless of its motivation. Under such circumstances, the Assistant Secretary found that the Activity improperly refused to meet and confer

with the ACT in violation of Section 19(a)(6) of the Order by refusing to implement the agreement of March 26, 1973, and that such conduct resulted in improper interference with, restraint, or coercion of unit employees by the Activity in the exercise of their rights assured under the Order in violation of Section 19(a)(1).

Thus, the Assistant Secretary ordered that the Agency approve, and the Activity implement thereafter, the negotiated agreement of March 26, 1973.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

THE ADJUTANT GENERAL,  
STATE OF ILLINOIS,  
ILLINOIS AIR NATIONAL GUARD

Respondent

and

Case No. 50-9685(CA)

ILLINOIS AIR CHAPTER,  
ASSOCIATION OF CIVILIAN  
TECHNICIANS, INC.

Complainant

NATIONAL GUARD BUREAU  
WASHINGTON, D.C.

Respondent

and

Case No. 50-9686(CA)

ILLINOIS AIR CHAPTER,  
ASSOCIATION OF CIVILIAN  
TECHNICIANS, INC.

Complainant

DECISION AND ORDER

On May 8, 1975, Administrative Law Judge Milton Kramer issued his Report and Recommendations in the above-entitled consolidated proceeding, finding that the Respondents had engaged in certain unfair labor practices and recommending that they take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent, National Guard Bureau, hereinafter referred to as the Agency, filed exceptions and a supporting brief in behalf of itself and the Respondent, Adjutant General, State of Illinois, Illinois Air National Guard, hereinafter referred to as the Activity, with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject cases, including the Respondents' exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, except as modified below.

The record reveals that on June 9, 1971, the Illinois Air Chapter, Association of Civilian Technicians, Inc., hereinafter referred to as the Complainant, and the Activity signed a negotiated agreement covering a unit of employees of the 182nd Tactical Air Support Group, Peoria, Illinois, a component of the Activity. Thereafter, on September 22, 1971, the Agency, pursuant to Section 15 of Executive Order 11491, as amended, 1/ returned the agreement to the parties for "changes necessary in order to bring this agreement into conformance with applicable regulations, policies, and the Federal Personnel Manual, and before the agreement can be approved by the Chief, National Guard Bureau." Specific changes were requested in almost all of the articles of the agreement, including Article 18, which dealt with the wearing of uniforms by the employees in the unit, all of whom are civilian technicians. 2/ Negotiations were discontinued at that time as a result of the Assistant Secretary's Decision and Order in A/SLMR No. 105, wherein the Complainant's certification, for reasons not material herein, was revoked. Subsequently, pursuant to a Decision on Appeal of the Federal Labor Relations Council, the Complainant's certification was reinstated in January 1973. On January 19, 1973, the Complainant and the Activity signed a negotiated agreement which had been revised to bring it into conformity with the specific changes requested by the Agency in its September 22, 1971, rejection. However, on February 23, 1973, the Agency again refused, pursuant to its Section 15 authority, to approve the agreement. With respect to Article 18 of the revised agreement, the Agency requested that two minor editorial changes be made so that the Article would be brought into conformity with the language of an Agency regulation dealing with uniform wearing by civilian technicians. The regulation in question, Section 213.2, Paragraph 2-4, of the Technician Personnel Manual (TPM), provided that all civilian technicians employed by the National Guard must wear military uniforms even

1/ At all times relevant herein, Section 15 of the Order provided, in part:

Section 15. Approval of agreements. An agreement---is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved if it conforms to applicable laws, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities---

2/ The change requested in Article 18 consisted of deleting one phrase.

when in their civilian work status but that, "When the uniform is deemed inappropriate for specific positions and functions, adjutant generals may authorize other appropriate attire." Article 18 of the agreement between the Complainant and the Activity reflected the exceptions negotiated by them with respect to when certain employees could work without wearing military uniforms.

On March 26, 1973, the Complainant and the Activity signed a third agreement which incorporated the specific changes sought by the Agency in its February 23, 1973, disapproval action. Nevertheless, on April 20, 1973, the Agency again refused to approve the agreement, this time basing its rejection solely on its conclusion that Article 18 of the agreement, dealing with the wearing of uniforms, violated the Agency's regulation in this regard. The Agency stated that the revised agreement provision "represents a total distortion of the purpose and usage of that directive." As a result of the Agency's April 20, 1973, disapproval of the agreement, the Activity took the position that it could no longer agree to a provision which allowed for exceptions to the uniform wearing regulation. Thus, the agreement was never implemented.

The Administrative Law Judge concluded that the Activity had negotiated with the Complainant regarding a permissible subject of bargaining, i.e., the wearing of the uniform by civilian technicians, and determined that when an activity negotiates on a permissible subject and reaches agreement, it is bound by its agreement. In these circumstances, he found that the Agency had violated the Order by rejecting the proposed agreements of January 19, 1973, and March 26, 1973, after the agreement had been modified to meet the specific changes required by the Agency to bring it into conformity with its regulation. Thus, he concluded that although an agency has authority under Section 15 of the Order to approve or disapprove an agreement, once the changes an agency requires to bring an agreement into conformity with laws, regulations, and policies are, in fact, made, any subsequent review by the agency is a ministerial act and, if the agency then refuses to perform the ministerial act of approving the agreement, it violates the Order. Specifically, the Administrative Law Judge found that the Agency herein had exceeded the authority granted to it by Section 15 of the Order when it failed to approve the January 19, 1973, and March 26, 1973, versions of the agreement which had been brought into conformity with the precise changes sought by the Agency in its September 22, 1971, and February 23, 1973, disapprovals. He concluded that such conduct frustrated bargaining by the Activity in violation of Section 19(a)(6) of the Order and had a restraining influence on unit employees in the exercise of rights assured by the Order, in violation of Section 19(a)(1). In this regard, the Administrative Law Judge found it unnecessary to decide whether the second and third agreements were, in fact, violative of the Agency regulations, as the Agency disapprovals, limited to specific matter, in effect granted exceptions to the regulations.

I agree with the conclusion of the Administrative Law Judge that Respondents' conduct herein violated the Order. Clearly, Section 15 of the Order does not exist so that an agency may frustrate good faith bargaining between its activities and the exclusive representatives of its activities' employees. When an agency makes specific suggestions as to the changes necessary to bring an agreement into conformity with applicable laws, existing published agency policies and regulations, and regulations of other appropriate authorities, the negotiating parties should then be able reasonably to assume that the agreement meets such requirements in all other respects. And when, as in the instant case, the Activity and the exclusive representative have twice modified their agreement to meet the Agency's specific directives, I cannot but conclude that the Agency's rejection is for some reason other than those specified under Section 15 of the Order. <sup>3/</sup> Thus, while an agency may indicate to an activity, in the course of its Section 15 review of a proposed agreement, the specific changes it deems necessary to order to bring the negotiated agreement into conformity with agency regulations, in my view, the agency manifests an intent to frustrate the bargaining relationship between its subordinate activity and an exclusive representative by subsequently rejecting the very changes it has indicated are required in order for their agreement to conform to its regulations.

Accordingly, I conclude that the Agency's conduct in refusing to approve the March 26, 1973, agreement between the Complainant and the Activity, which the evidence reveals had been brought in into conformity with the precise changes indicated by the Agency in its February 23, 1973, rejection of a prior version of the agreement, constituted an undermining of the exclusive representative selected by the employees of the Activity and resulted in improper interference with, restraint, or coercion of unit employees by the Agency in the exercise of their rights assured under the Order in violation of Section 19(a)(1). <sup>4/</sup>

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<sup>3/</sup> It is clear that agency review is limited to the specific matters set forth in Section 15, and that where an activity and an exclusive representative reach agreement on matters which do not contravene any of the specific matters set forth in Section 15, the agency may not, as a part of its Section 15 review, seek modification of the agreement merely because it is dissatisfied with the nature of the agreement reached. See AFGE Council of Locals 1497 and 2165, and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48.

<sup>4/</sup> Under the circumstances, I find that the Agency had no obligation to meet and confer with the Complainant with respect to the negotiated agreement. Accordingly, I shall order that the complaint in Case No. 50-9685(CA), be dismissed insofar as it alleges that the Agency violated Section 19(a)(6) of the Order. See National Aeronautics and Space Administration (NASA), Washington, D.C., A/SLMR No. 457, reversed on grounds not material herein, FLRC No. 74A-95.

Further, while the Activity herein may have acted in good faith by negotiating with the Complainant so as to incorporate the changes sought by the Agency subsequent to the first and second rejections of the proposed agreement, it, nevertheless, clearly refused to implement the agreement when it had been brought into conformity with the changes sought by the Agency pursuant to its Section 15 review authority. Thus, as I view the agreement of March 26, 1973, to constitute a valid and binding negotiated agreement which the Agency was obligated to approve, it follows that the Activity's failure to implement this valid agreement was violative of the Order, regardless of its motivation. Under these circumstances, I find that the Activity improperly refused to meet and confer with the Complainant in violation of Section 19(a)(6) of the Order by refusing to implement the agreement of March 26, 1973. Further, I find that such conduct resulted in improper interference with, restraint, or coercion of unit employees by the Activity in the exercise of their rights assured under the Order in violation of Section 19(a)(1).

ORDER 5/

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

A. The National Guard Bureau, Washington, D.C., shall:

1. Cease and desist from:

Interfering with, restraining, or coercing unit employees of the 182nd Tactical Air Support Group, Illinois Air National Guard, who are represented exclusively by the Illinois Air Chapter, Association of Civilian Technicians, Inc., by refusing to approve, pursuant to Section 15 of the Order, the negotiated agreement of March 26, 1973, between the Illinois Air Chapter, Association of Civilian Technicians, Inc. and the Adjutant General, State of Illinois, Illinois Air National Guard.

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

(a) Approve the negotiated agreement of March 26, 1973, between the Illinois Air Chapter, Association of Civilian Technicians, Inc. and the Adjutant General, State of Illinois, Illinois Air National Guard.

5/ Contrary to the recommendation of the Administrative Law Judge I shall issue a remedial order requiring, among other things, that the Respondents cease and desist from the actions they have engaged in which were violative of the Order.

(b) Sign the notice marked "Appendix" described in paragraph B.2.(b) below.

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

B. The Adjutant General, State of Illinois, Illinois Air National Guard, shall:

1. Cease and desist from:

(a) Refusing to implement, after approval by the National Guard Bureau, the negotiated agreement of March 26, 1973, entered into with the Illinois Air Chapter, Association of Civilian Technicians, Inc.

(b) Interfering with, restraining, or coercing unit employees of the 182nd Tactical Air Support Group, Illinois Air National Guard who are represented exclusively by the Illinois Air Chapter, Association of Civilian Technicians, Inc., by refusing to implement the negotiated agreement of March 26, 1973, after approval by the National Guard Bureau.

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

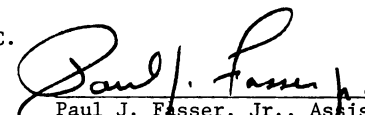
(a) Implement, upon approval by the National Guard Bureau, the negotiated agreement as agreed to on March 26, 1973, with the Illinois Air Chapter, Association of Civilian Technicians, Inc.

(b) Post at its 182nd Tactical Air Support Group Facility, Peoria, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chief, National Guard Bureau and the Adjutant General, State of Illinois and maintained by the Adjutant General for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Adjutant General shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint in Case No. 50-9686(CA), insofar as it alleges a violation of Section 19(a)(6) against the National Guard Bureau, be, and it hereby is, dismissed.

Dated, Washington, D.C.  
December 16, 1975

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

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

We hereby notify our employees that:

THE NATIONAL GUARD BUREAU WILL approve the negotiated agreement of March 26, 1973, entered into by the Illinois Air Chapter, Association of Civilian Technicians, Inc. and the Adjutant General, State of Illinois, Illinois Air National Guard.

THE NATIONAL GUARD BUREAU WILL NOT interfere with, restrain, or coerce unit employees of the 182nd Tactical Air Support Group, Illinois Air National Guard, who are represented exclusively by the Illinois Air Chapter, Association of Civilian Technicians, Inc., by refusing to approve, pursuant to Section 15 of Executive Order 11491, as amended, the negotiated agreement of March 26, 1973, entered into by the Illinois Air Chapter, Association of Civilian Technicians, Inc. and the Adjutant General, State of Illinois, Illinois Air National Guard.

THE ADJUTANT GENERAL, STATE OF ILLINOIS, ILLINOIS AIR NATIONAL GUARD, WILL implement, upon approval by the National Guard Bureau, the negotiated agreement of March 26, 1973, entered into with the Illinois Air Chapter, Association of Civilian Technicians, Inc.

THE ADJUTANT GENERAL, STATE OF ILLINOIS, ILLINOIS AIR NATIONAL GUARD, WILL NOT, after approval by the National Guard Bureau, refuse to implement the negotiated agreement of March 26, 1973, entered into with the Illinois Air Chapter, Association of Civilian Technicians, Inc.

THE ADJUTANT GENERAL, STATE OF ILLINOIS, ILLINOIS AIR NATIONAL GUARD, WILL NOT interfere with, restrain, or coerce unit employees of the 182nd Tactical Air Support Group, Illinois Air National Guard, who are represented exclusively by the Illinois Air Chapter, Association of Civilian Technicians, Inc., by refusing to implement the negotiated agreement of March 26, 1973, after its approval by the National Guard Bureau.

Dated \_\_\_\_\_  
Chief, National Guard Bureau

Dated \_\_\_\_\_  
Adjutant General, State of Illinois

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 10th Floor, Federal Office Building, 230 South Dearborn Street, Chicago, Illinois, 60604, telephone: 312-353-1920.



REPORT AND RECOMMENDATIONS

Statement of the Case

.....  
In the Matter of :  
: THE ADJUTANT GENERAL :  
: STATE OF ILLINOIS :  
: Respondent :  
: and : Case No. 50-9685  
: ILLINOIS AIR CHAPTER, ASSOCIATION :  
: OF CIVILIAN TECHNICIANS, INC. :  
: Complainant :  
: NATIONAL GUARD BUREAU :  
: WASHINGTON, D. C. :  
: Respondent :  
: and : Case No. 50-9686  
: ILLINOIS AIR CHAPTER, ASSOCIATION :  
: OF CIVILIAN TECHNICIANS, INC. :  
: Complainant :  
.....

Vincent J. Paterno  
President, A.C.T.  
348-A Hungerford Court  
Rockville, Maryland 20850  
For the Complainant  
Donald L. Breneman  
Labor-Management Relations Specialist  
National Guard Bureau  
2630 Fox Mill Road  
Herndon, Virginia 22070  
For the Respondent

Before: MILTON KRAMER  
Administrative Law Judge

These cases arise under Executive Order 11491, as amended. They were initiated by complaints dated July 3, 1973 and filed July 5, 1973 alleging violations by the Respondents of Sections 19(a)(1), (2), and (6) of the Executive Order. The violations were alleged to consist of the Complainant and the Activity (the Adjutant General, the Respondent in Case No. 50-9685) reaching a collective agreement including a provision concerning the wearing of the military uniform while performing civilian duties; the Agency (the National Guard Bureau, the Respondent in Case No. 50-9686) remanding the agreement with directions to make certain changes in such provision; the Complainant and the Activity making such changes; the Agency again remanding the agreement with directions to make other changes in such provision; the Complainant and the Activity making such changes; the Agency again remanding the agreement with directions to delete the provision; and the Activity refusing to abide by the agreement unless such provision were deleted.

Under date of July 27, 1973, received August 7, 1973, the Agency filed a response to the complaint in Case No. 50-9686. Under date of August 14, 1973 the Activity filed a response to the complaint in Case No. 50-9685.

By a decision dated July 15, 1974, the Acting Assistant Regional Director dismissed the complaints. The basis of the dismissal was a regulation of the Agency issued between the first and second agreements and a decision of the Federal Labor Relations Council <sup>1/</sup> which had held, after the complaints in these cases were filed, that the question of a requirement that civilian technicians wear their appropriate military uniforms while performing their civilian duties was not a subject of mandatory bargaining.

The Complainant appealed the dismissals to the Assistant Secretary. On October 10, 1974, the Assistant Secretary reversed the dismissals with respect to Sections 19(a)(1) and (6) of the Executive Order and affirmed the dismissals with respect to Section 19(a)(2).

On November 21, 1974, the Assistant Regional Director issued an Order consolidating these cases and the same day issued a Notice of Hearing to be held January 21, 1975 in Peoria, Illinois. Hearings were held in that city on January 21 and 22. The Complainant was represented by the President of its

<sup>1/</sup> National Federation of Federal Employees and New Mexico National Guard, FLRC No. 73A-13, September 17, 1973.

national organization. The Respondents were represented by the Labor-Management Relations Specialist of the National Guard Bureau. At the close of the hearing the time for filing briefs was extended to February 24, 1975. All parties filed timely briefs.

Facts

The Complainant was certified on July 23, 1970 as the exclusive representative of the nonsupervisors and nonmanagerial civilian technicians of the Respondents in the Illinois Air National Guard, 182d Tactical Air Support Group, at Peoria, Illinois. Pursuant to authority conferred on it by the Department of Defense, on July 21, 1971 the Department of the Air Force delegated to the Chief of the National Guard Bureau the Labor-Management Relations authority of the Department with respect to the National Guard. The Air National Guard at Peoria is under the jurisdiction of the Adjutant General, State of Illinois. Two other units of the Air National Guard are under the jurisdiction of that Adjutant General, one at Springfield, Illinois and the other at O'Hare Airport.

The National Guard Bureau Regulations provided: "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." 2/

Civilian technicians of the National Guard are in the "excepted service"

In June 1971 the 182d Tactical Air Support Group and the Complainant negotiated an agreement subject to the approval of the National Guard Bureau in accordance with Section 15 of the Executive Order. Included in the agreement was Article XVIII pertaining to the wearing of the uniform. Article XVIII in the June 1971 agreement provided:

"ARTICLE XVIII  
"UNIFORMS

"Section 1. All technicians who are members of the 182d Tactical Air Support Group will wear the appropriate military uniform in the performance of their technician duties with the following exceptions:

"a. On occasions when the military uniform is deemed inappropriate and specific instructions are issued by The Adjutant General of Illinois.

"b. Personnel employed in the following functional areas performing maintenance work of a nature other than administrative are authorized to wear the military uniform or civilian attire of 100% cotton material with matching headgear and with a standard patch bearing last name over the right breast pocket (as mutually agreed upon by the Agency and Union). There will

2/ NGR 51, ANGR 40-01, ch. 2, Sec. I, 2-5; Exh. J17.

be no mixture of military clothing authorized in conjunction with civilian attire except the wearing of approved parkas, field jackets and foul weather gear and only in the performance of official duties. Those individuals authorized civilian attire must present themselves in a clean and neat appearance.

"MILITARY UNIFORM OR CIVILIAN  
ATTIRE (Optional)

Transportation  
Organizational Maintenance  
Field Maintenance  
Communications and  
Electronics  
Munitions Management  
Ground Communications  
Miscellaneous Allowances  
Communications-Armament  
Electronics

MILITARY UNIFORM

Administrative Services  
Personnel  
Comptroller  
Base Supply  
  
BEMO  
Operations  
Civil Engineering  
Medical  
Security Police  
Ground Communications-  
Electronics Operations  
Synthetic Trainer  
Photographic  
Chief of Maintenance"

On September 22, 1971, the Respondent National Guard Bureau returned the agreement unapproved with directions to make about forty changes "necessary in order to bring this agreement into conformance with applicable regulations, policies, and the Federal Personnel Manual, and before the agreement can be approved by the Chief, National Guard Bureau." 3/ With respect to Article XVIII the only direction was:

"Article 18 - Section 1b. Delete 'except the wearing of approved parkas, field jackets, and foul weather gear, and only in the performance of official duties.' Air Force uniform regulations prohibit the mixing of any type of military gear with civilian clothing."

On October 29, 1971, the Assistant Secretary ordered the Area Administrator to revoke the certification of the Complainant as the exclusive representative of the technicians of the Illinois Air National Guard, 182d Tactical Air Support Group, and the Area Administrator did so. 4/ The Complainant appealed that Order to the Federal Labor Relations Council. On June 22, 1972 the Council notified the parties that it accepted the union's petition for review and on November 17, 1972 held that

3/ Exh. R-1.

4/ A/SIMR No. 105, Illinois Air National Guard, 182d Tactical Air Support Group.

the revocation of Certification of Representation should be set aside. 5/ On December 14, 1972 the Assistant Secretary vacated his decertification order and directed the Area Administrator to reinstate the certification. 6/ On December 29, 1972, the Area Administrator did so, and on January 5, 1973 the Adjutant General notified the Complainant that its exclusive recognition and representation rights were reinstated.

While Complainant's recognition and representation rights were in suspense, the Agency issued a new directive on September 7, 1972 which provided as follows:

"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."

Upon reinstatement of Complainant's exclusive recognition and representation rights, the Complainant and the Activity again negotiated and made what they believed were the changes in the agreement directed by the Agency and in conformance with the directive of September 7, 1972 which did not change the pre-existing regulation. 7/ They made precisely the directed change in Article XVIII. On January 19, 1973, they executed a new agreement and again submitted it to the Agency for approval. On February 23, 1973, the Agency again returned the agreement with directions for about ten changes. With respect to Article XVIII, it stated:

"Article XVIII - Section 1b-Delete those functional areas deemed appropriate for the wearing of the military uniform, as only those deemed inappropriate may be negotiated.

"-Section 1b-Additionally, as written is in violation of the intent of para. 2-4, TPM 213.2, in that there is no optional choice. Ref: DOD Directive 1426.1, sec. VII B2d." 8/

5/ FLRC No. 71A-59, Illinois Air National Guard, 182d Tactical Air Support Group.

6/ A/SLMR No. 225, Illinois Air National Guard, 182d Tactical Air Support Group.

7/ Exh. J17.

8/ Exh. R3.

The same day that the Agency disapproved the second agreement, it issued a "clarification" of the requirement that technicians wear the military uniform. 9/ It stated that after a thorough review of all considerations, it had been concluded that the existing regulation was appropriate and did not require change. It then set forth an extensive explanation of the purpose of the requirement. The second disapproval was made with knowledge of the clarification of the regulation. 10/

The Complainant and the Activity once again resumed negotiations in an effort to bring the agreement into compliance with the directions of the Agency. They entered into a third agreement on March 26, 1973 which they believed complied with the directions of the Agency in disapproving the second agreement. The third agreement was negotiated by the Activity and the Facility with consultation with the Office of Labor Relations of the Agency, 11/ and represented the Activity's understanding of the Agency's second disapproval. The witness at the hearing who testified on behalf of the Agency testified that the third agreement did comply with the directions of the Agency with respect to the changes necessary to obtain approval of the Agency, and I so find. 12/ Nevertheless, when the third agreement was submitted to the Agency for approval it was returned on April 20, 1973 without approval with the statement:

"2. Article XVIII, Section 1(b) violates Technician Personnel Manual (TPM) 213.2, paragraph 2-4 and represents a total distortion of the purpose and usage of that directive...." 13/

The Adjutant General understood that disapproval to mean that the agreement could be approved only "with deletion of Section 1(b) of Article XVIII in its entirety" 14/, so notified the Complainant, and that is the position of the Respondents.

The Complainant and the Activity conferred again after the third disapproval. The Complainant took the position that the third agreement was in effect.

9/ Exh. J18.

10/ Tr. 271.

11/ Tr. 216-17.

12/ Tr. 254-55, 270-71; see also Tr. 217.

13/ Exh. R-2.

14/ Exh. R-2.

Before 1969 there was no requirement of civilian technicians wearing the military uniform while performing civilian duties. Those at Peoria wore matching grey work pants and shirt. In that year there was first instituted a requirement that, with exceptions, the military uniform would be required. On December 23, 1969, the Adjutant General issued his Bulletin embodying that requirement, with exceptions. 15/ That Bulletin was not rescinded until May 9, 1973. 16/ The matter of such requirement has caused considerable dissatisfaction among technicians since its inception.

During the negotiations described above, civilian technicians of the Illinois Air National Guard at Springfield and O'Hare, doing the same work as their counterparts at Peoria, wore civilian work clothes of matching color shirt and trousers. Civilian technicians in some other states did not wear the military uniform. After the negotiation of the third agreement, and before its disapproval, representatives of the Complainant and the Facility went to Peoria clothing stores to select uniform light brown work clothes the technicians would obtain after the third agreement secured the expected approval, and made arrangements with a clothes rental company to furnish them to such of the technicians as chose to rent them instead of purchasing them.

Discussion and Conclusion

Plainly the action of the Agency in disapproving the negotiated agreement the second and third times was not cricket. It may even be characterized as dirty pool. But the question before me is not whether it was reprehensible or unlawful but whether it was unlawful because in violation of the Executive Order.

Section 15 of the Executive Order provides that a negotiated agreement with an exclusive representative is subject to the approval of the head of the agency. For the purposes of this case, the head of the agency is the Chief of the National Guard Bureau.

Section 15 provides further:

"An agreement shall be approved if it conforms to applicable laws, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities."

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15/ Exh. J14.

16/ Exh. J13; Tr. 170.

It is established by decision of the Federal Labor Relations Council that the regulation of the National Guard Bureau concerning the wearing of the military uniform by technicians while performing civilian duties is not unlawful and that therefore the subject is not one on which the agency or an activity is required to bargain with an exclusive representative. 17/ But that does not mean that it is unlawful to bargain about it or that an agreement on the subject is inherently invalid.

Thus the parties were permitted, although the Respondents were not obligated, to bargain concerning Article XVIII. The Adjutant General was permitted to bargain within the limits fixed by the regulations of the Bureau, and the National Guard Bureau was permitted to sanction an agreement reached by the Adjutant General without relevant limit since the only relevant restraint on the Adjutant General was a regulation of the Bureau to which, under Section 15 of the Order and the regulation itself, the Bureau could grant an exception. When an agency bargains on a non-mandatory but permissible subject, and reaches agreement, it is bound by the agreement. 18/

The Adjutant General three times bargained and reached agreement with the Complainant on Article XVIII, subject to approval. Thus it cannot be said that he refused to bargain or did not bargain in good faith. The National Guard Bureau sanctioned the Adjutant General bargaining on the subject. When it disapproved Article XVIII of the first agreement with the statement that only one change in that Article was necessary "to bring this agreement into conformance with applicable regulations, policies, and the Federal Personnel Manual, and before the agreement can be approved by the Chief, National Guard Bureau", 19/ it was approving that Article (if that one change should be made) either because it found it would be in conformity with "existing published agency policies and regulations" or because it "granted an exception to a policy or regulation" 20/ insofar as the Article would not be in such conformity after such change should be made.

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17/ National Federation of Federal Employees and New Mexico National Guard, FLRC No. 73A-13.

18/ Cf. the decision of the Administrative Law Judge in San Antonio Air Logistics Center, San Antonio Air Materiel Area (AFLC), Kelly Air Force Base, Case No. 63-5064(CA), April 22, 1975, at page 6.

19/ Exh. R1.

20/ E.O. 11491, Sec. 15.



When precisely that directed change was made in the second Article XVIII by the Complainant and the Activity, the authority of the Agency with respect to that Article was functus officio except perhaps for the ministerial act of signing an approval. The Chief had already held that with that change the Article would be in conformity and there was no intervening regulation between the first and second disapprovals to render it not in conformity. Section 15 of the Order directs that "an agreement shall be approved if it conforms" to the requirements which the Chief had already held it would conform when the directed change should be made. The second disapproval was therefore a violation of that command of Section 15 of the Order.

The situation is the same, mutatis mutandis, with respect to the third agreement. The testimony of both the Adjutant General's Personnel Officer and the Chief Technician, Labor-Management Relations Division of the National Guard Bureau, the only witnesses who testified on behalf of the Respondents, was to the effect that the third agreement complied with the directions of the Agency's second disapproval and met the conditions there specified for approval. The Agency violated Section 15 of the Executive Order when it refused to perform the ministerial act of approving the third agreement.

An agency may not play fast and loose with Section 15 of the Executive Order. It does play fast and loose when it disapproves an agreement on the basis that the agreement contains one provision not in conformity with regulations, disapproves it a second time when that provision is changed exactly as directed in the first disapproval on the ground that two other changes are necessary for approval, and disapproves it a third time when those two other changes are made,-- all without any intervening change in the regulations. Such conduct frustrates bargaining by the Activity in violation of Section 19(a)(6) of the Executive Order; and it has a restraining influence on unit employees in the exercise of rights assured by the Order, in violation of Section 19(a)(1).

It is not my function to decide whether the second and third agreements were in fact in violation of regulations as asserted in the second and third disapprovals. I conclude that insofar as, if at all, the second and third agreements (with respect to Article XVIII) were in violation of provisions other than those stated in the first and second disapprovals, respectively, those disapprovals granted exceptions to the regulations as contemplated in Section 15 of Executive Order 11491, as amended. <sup>21/</sup> Or it may be said that the Agency

<sup>21/</sup> Cf. New York Army and Air National Guard, A/SLMR No. 441; see also ALJ Decision in San Antonio Logistics Center, San Antonio Air Materiel Area (AFLC), Kelly Air Force Base, Case No. 63-5064(CA), April 22, 1975, at page 6.

is estopped or otherwise precluded from asserting that the second and third agreement, especially the third agreement, is not in conformity with regulations.

The original complaints alleged violations of Sections 19(a)(1), (2), and (6) of the Order. The Assistant Regional Director dismissed the complaints in their entirety. The Assistant Secretary reinstated the complaints with respect to Sections 19(a)(1) and (6) and affirmed the dismissals with respect to Section 19(a)(2). At the hearing the Complainant moved that I reinstate the complaints with respect to Section 19(a)(2). Under the circumstances such action would be beyond my jurisdiction; in these circumstances only the Assistant Secretary or the Federal Labor Relations Council could take such action.

#### The Remedy

Having held that the second and third agreements had had advance approval, it would be a meaningless gesture to hold simply that they were effective when executed, and such holding would be inadequate "to effectuate the policies of the order" as authorized by Section 203.25(b) of the Regulations. Both the second and third agreements provided that they should remain in effect for two years from the date of their approval by the National Guard Bureau. If those agreements were already approved when executed, the two years have already expired since the date of the execution of either of them. To be sure, an agency or activity may not unilaterally change working conditions without agreement or reaching impasse, even if the agreement was established pursuant to agreement and the agreement has expired. Working conditions, however established, may not be changed without agreement or unilaterally after impasse on negotiations.

But in this case the change in working conditions provided for in the contract was never put in effect. The civilian technicians continued to wear the uniform because of the Respondents' repudiation of the agreements, and so the existing working condition is wearing the military uniform. It can plausibly be argued that with the agreement having expired, requiring the civilian technicians to continue wearing the uniform would not be changing existing working conditions but would be continuing them.

On the other hand, it could just as well be considered that the existing working condition is not the wearing of the military uniform (by certain classes of technicians) but being authorized not to do so. Section (b) of Article XVIII in both the second and third agreements did not prescribe civilian attire for those classes of civilian technicians but

only authorized them to wear civilian attire (with restrictions not in controversy). In such view the existing working condition, at the expiration of either the second or third agreement, was being authorized not to wear the military uniform regardless of what the technicians were actually wearing. And it is such working condition that may not be changed except by agreement or unilaterally after impasse.

Section 203.25(b) of the Regulations provides that upon finding a violation of the Order the Assistant Secretary "may require the respondent to take such affirmative action as he deems appropriate to effectuate the policies of the order." Whether one subscribes to the belief that the existing working condition is wearing the military uniform or the belief that the existing working condition is being authorized not to do so, to effectuate the policies of the Order it is appropriate for the Assistant Secretary to order the Respondent National Guard Bureau now to perform the ministerial act of "approving" the third agreement. I use the word "approve" not in the sense of the fourth definition of that word in Webster's New International Dictionary, Second Edition:

"4. To have or express a favorable opinion of; to think well of...."

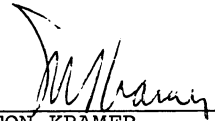
One cannot effectively order another to "approve" in that sense any more than one can effectively order another to love his neighbor or his work. Rather I here use the word "approve" in the sense of Webster's third definition:

"3. To sanction officially; to ratify; confirm...."

Accordingly, I recommend that the Respondents be ordered 22/ to post a notice on bulletin boards and other places where notices to civilian technicians of the Respondents' 182d Tactical Air Support Group are customarily posted. The notice should state that the Chief of the National Guard Bureau approves the third agreement on the date of posting and that Respondents recognize that the working conditions of that agreement are in full force and effect and will remain so for two years from such date unless changed before then by agreement. The notice should quote Article XVIII in its entirety,

22/ I am reluctant to recommend that the Adjutant General be ordered to do anything. His office bargained in obvious good faith and he did nothing wrong except upon direct orders from his superior. But his innocence and good faith does not change the fact that the technicians here involved were wronged as a result of his following orders and they are under his jurisdiction and full relief requires his participation in the remedy since he is the other party to the agreement.

and should be signed by the Adjutant General and by the Chief of the National Guard Bureau. A form of the recommended order and a form of the Notice are attached hereto. I see no desirable purpose that would realistically be served by the usual cease and desist order and no fruitful purpose to be served by requiring the notice to state that the Respondents will not do it again. In light of the history of the dissatisfaction the military uniform requirement has caused among National Guard technicians during the last five years, 23/ when the technicians of the 182d Tactical Air Support Group are informed that the March 26, 1973 agreement is in effect, they will have achieved their goal.

  
MILTON KRAMER  
Administrative Law Judge

Dated: May 8, 1975  
Washington, D. C.

23/ National Federation of Federal Employees and New Mexico National Guard, FLRC No. 73A-13, p.6.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 as amended and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations orders that the Adjutant General of Illinois and the Chief, National Guard Bureau, shall take the following actions in order to effectuate the purposes and policies of the Executive Order:

(a) Post at the facilities of the 182d Tactical Air Support Group copies of the attached Notice on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Adjutant General of Illinois and the Chief, National Guard Bureau, and shall be posted and maintained by them for sixty (60) consecutive days in conspicuous places where technicians of the 182d Tactical Air Support Group are employed, including all bulletin boards and other places where notices to technicians are customarily posted. They shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

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

PAUL J. FASSER, JR.  
Assistant Secretary of Labor  
for Labor-Management Relations

Dated:  
Washington, D. C.

N O T I C E   T O   T E C H N I C I A N   P E R S O N N E L  
182d Tactical Air Support Group

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 technician personnel that the Agreement between the Adjutant General of Illinois and the Illinois Air Chapter, Association of Civilian Technicians, Inc., signed on 26 March 1973, is approved by the Chief of the National Guard Bureau effective this day and will remain in effect for two years unless changed by agreement.

Article XVIII of that agreement provides as follows:

"ARTICLE XVIII

"UNIFORMS

"Section 1. All technicians who are members of the 182d Tactical Air Support Group will wear the appropriate military uniform in the performance of their technician duties with the following exceptions:

(a) On occasions when the military uniform is deemed inappropriate and specific instructions are issued by The Adjutant General of Illinois.

(b) Personnel employed in the following functional areas performing maintenance work of a nature other than administrative are authorized to wear civilian attire of 100% cotton material with matching head-gear and with a standard patch bearing last name over the right breast pocket (as mutually agreed upon by the Employer and Union). There will be no mixture of military clothing authorized in conjunction with civilian attire. Those individuals authorized civilian attire must present themselves in a clean and neat appearance.

"Transportation  
 Organizational Maintenance  
 Field Maintenance  
 Communications and Electronics  
 Munitions Management  
 Ground Communications  
 Miscellaneous Allowances  
 Communications-Armament-Electronics"

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,  
 AIRWAYS FACILITIES DIVISION,  
 ALASKAN REGION  
 A/SLMR No. 599

\_\_\_\_\_  
 Adjutant General of Illinois

\_\_\_\_\_  
 Chief, National Guard Bureau

Date:

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director of the Labor-Management Services Administration, U. S. Department of Labor, whose address is: Room 1033-B, 230 S. Dearborn Street, Chicago, Illinois 60604.

This case arose as a result of a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 3028 seeking an election in essentially a unit of all nonprofessional employees under the Airways Facilities Division Chief in the Alaskan Region of the Federal Aviation Administration (FAA). The Activity took the position that only a nationwide unit of Airways Facilities Division employees was an appropriate unit and, therefore, any petition seeking a smaller unit should be dismissed. However, if such a unit was found to be appropriate, the Activity contended that it should exclude the Airways Facilities Division employees located at the Alaskan Regional headquarters.

The Assistant Secretary found the claimed unit to be appropriate. He noted, among other things, that all of the employees sought were under the supervision of the Division Chief who had ultimate responsibility for personnel matters. He noted also that the claimed employees shared a common mission, in many instances similar job classifications and duties, similar working conditions, and that their personnel files were kept at the regional level. Moreover, he found that the unit sought would promote effective dealings and efficiency of agency operations as it was consistent with the FAA's delegation of negotiation authority and as it would reduce unit fragmentation.

With respect to the inclusion of certain headquarters employees of the Division, the Assistant Secretary concluded that such employees shared a community of interest with the field employees of the Division, noting, among other things, that substantial interchange and transfers had occurred between the employees of the regional headquarters and the field.

Accordingly, the Assistant Secretary directed that an election be conducted in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,  
AIRWAYS FACILITIES DIVISION,  
ALASKAN REGION

Activity

and

Case No. 71-3006(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 3028 1/

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 Daniel P. Kraus. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 2/

Upon the entire record in this case, including briefs filed by both parties, 3/ the Assistant Secretary finds:

1/ Noting the absence of any objections by the Activity, the name of the Petitioner appears as amended pursuant to a request made by the latter in its post-hearing brief.

2/ In its brief, the Activity renewed a motion, which was denied by the Hearing Officer at the hearing, to postpone the hearing and to consolidate the subject case with the proceedings in Case Nos. 30-5781(RO) and 22-5554(RO). In upholding the Hearing Officer's ruling denying the motion, it was noted that a similar request by the Activity was rejected by the Assistant Secretary on February 7, 1975, prior to the hearing in this matter. It was noted also that the petitions in Case Nos. 30-5781(RO) and 22-5554(RO) were not timely cross-petitions with regard to the petition in the subject case. See, in this regard, Section 202.5(b) of the Assistant Secretary's Regulations.

3/ The Petitioner filed an "Errata" to its post-hearing brief dated May 2, 1975, portions of which changed or added to the substance of its original brief. As it was filed after the date for filing a timely brief in this case, I have not considered those portions of such "Errata" which added to or changed substantively the post-hearing brief.

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

2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3028, hereinafter called AFGE, seeks an election in a unit consisting of all employees under the supervision of the Chief, Airway Facilities Division, Alaskan Region, Federal Aviation Administration (FAA), excluding all professional employees, managerial employees, confidential employees, temporary intermittent employees, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors and guards as defined in Executive Order 11491, as amended. The Activity takes the position that the petitioned for unit is inappropriate because, in its view, the employees involved do not share a community of interest separate and distinct from other field employees, and that only a nationwide unit of all Airway Facilities Division employees assigned to field locations will promote effective dealings and efficiency of agency operations. Alternatively, the Activity contends that should a regionwide unit be found appropriate, the regional headquarters personnel of the Division should be excluded because they do not share a community of interest with field personnel.

Within the FAA, the record shows a history of bargaining at all levels, from small field units to nationwide units. Among the employees sought herein, the record reflects that the AFGE was certified as the exclusive representative for five separate sector level units and for one additional unit which included certain employees assigned to the regional headquarters of the Activity. No negotiated agreements covering any of the employees in these exclusively recognized units existed at the time of the hearing in this matter.

The record reveals that the Airway Facilities Division is one of five major operating divisions in the FAA. It is responsible for the maintenance and installation of the equipment and facilities used by the FAA to provide a safe and expeditious flow of aircraft in the national airspace system. It also is one of the five operating divisions found in each of the geographical regions of the FAA, including the Activity. 4/

The Activity is headed by a Chief. The record reveals that while the Airway Facilities Service Office in Washington, D. C., gives the Chief certain clearly defined technical guidance, he generally has been delegated full responsibility for his division by the FAA Alaskan Regional Director. In this regard, he supervises three regional headquarters branches and six sectors in carrying out his responsibilities. The regional headquarters branches - Engineering, Planning/Establishment, and Maintenance Operations are subdivided further into sections and units. They are responsible for the staff work necessary to the

4/ The other four operating divisions found in each region are: Air Traffic, Flight Standards, Airports, and Aviation Medical.

Division's mission as well as for the installation of certain equipment and the field maintenance of the facilities which the sectors are incapable of performing. <sup>5/</sup> The majority of the employees in the three regional headquarters branches, other than those noted above, are located at the Alaskan Regional Headquarters where regional headquarters employees of the other FAA divisions also are located.

Of the six sector offices, two are located in the Anchorage area, two are located in the Fairbanks area, one is located in the King Salmon area, and one is located in the Juneau area. Each sector is headed by a Sector Manager who is responsible for his office and the various sector field offices, sector units, and sector field office units located under the jurisdiction of his sector.

There are 630 employees under the Chief of Airway Facilities Division in the Alaskan Region 80 of whom are assigned to the three regional headquarters branches. These employees are covered under many different job classifications, but the vast majority of employees assigned to both the headquarters and the field fall under the broad category of technician. In the field, the technicians are responsible for maintaining the electronic equipment found in the FAA facilities, while the technicians assigned to the regional headquarters may either install new equipment in the FAA facilities or perform staff functions related to installation and maintenance, such as technical assistance, review, planning, and design. Those technicians actually performing the maintenance and installation of equipment are required to maintain a certification based on national standards. The certification program is administered by the Sector Manager and usually consists of a combination of on-the-job training and testing. Those technicians performing staff functions at the regional headquarters, while not required to be certified, may maintain a certification from a previous position in which certification was required.

The majority of the technicians in the Alaskan Region fall under the specific classification of electronic technician. <sup>6/</sup> The record reveals that the FAA has received permission from the Civil Service

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<sup>5/</sup> At the hearing, the parties stipulated that headquarters employees, who specifically are assigned to the field crew of the Electronics Section of the Planning and Establishment Branch and to the Plant and Electronics Units of the Maintenance Projects Section in the Maintenance Operations Branch, should be included in any unit found appropriate, including a unit consisting solely of employees assigned to field locations, because such employees, while administratively assigned to the Regional Office headquarters, devote a substantial amount of their work time to field locations and they share common skills, training and general working conditions with employees who are assigned to, and work in, field locations in Alaska.

<sup>6/</sup> There are, in fact, over 230 electronic technicians found in the Alaskan Region at both headquarters and field locations. Other technician classifications include general facilities equipment technician and engineering technician.

Commission to write the classification guidelines for this classification of employees. However, while the guidelines must be used, the individual job description and classification for a specific electronic technician position is still prepared in the region.

Employees of various craft classifications are assigned both to the regional headquarters and to the sectors. Those in the sectors perform the daily required maintenance of the FAA facilities found in the sectors, while those assigned to the regional headquarters branches are part of field maintenance crews which perform facility maintenance and installation that is beyond the expertise of the sector employees. The record reveals that craft classifications are more numerous in the Alaskan Region than in other FAA regions because of the inability to contract out a substantial part of the facility maintenance in the many remote field offices found in Alaska. In addition, clerical and supply classifications are found at both regional headquarters and sector locations. However, several job classifications, such as program analyst, draftsman, and communication specialist, are found only among regional headquarters employees of the Airway Facilities Division and the other divisions of the FAA.

Interchange of employees between sectors does not occur on a regular basis. However, interchange does occur regularly between employees assigned to regional headquarters and the sectors. In this connection, the technicians performing installation functions assigned to the Planning and Establishment Branch and the craft employees assigned to the Maintenance Operations Branch perform their duties in the field whenever they are needed. In addition, those technicians assigned to the branches of the regional headquarters who are responsible for staff functions, rather than maintenance or installation, generally spend a portion of their time in the sectors gathering information or performing technical review.

The record reveals that transfers within the Airway Facilities Division occur on a regular basis at all levels and have occurred in the past between sectors, between regional headquarters and the sectors, and between regions. While transfers have occurred from one division to another involving regional headquarters employees, the evidence establishes that transfers between regional headquarters and the sectors have been more frequent. In this connection, the record reflects that it is not uncommon for employees of the Airway Facilities Division in the Alaskan Region classified as technicians to follow a field-to regional headquarters-to field job progression. In addition, specific examples were cited of clericals transferring from a sector to the regional headquarters office and of a draftsman in the regional headquarters who applied for and obtained a position as a technician in one of the sectors.

The area of consideration for promotions among the petitioned for employees is at the lowest level at which the Manpower Division of the Alaskan Region determines that a reasonable number of applicants would be available. Because of the small number of employees in the Alaskan Region relative to other FAA regions and the unavailability of trained personnel locally, the record reveals that the area of consideration in the Alaskan Region tends to be broader than in most regions and is regionwide or nationwide in most cases. With respect to reductions in force, the evidence established that, except in unusual cases involving large numbers of employees, the area of consideration would be the local commuting area for Wage Grade employees and for General Schedule employees, grades 1 through 6. For those General Schedule employees above grade 6 the area of consideration for a reduction in force would be regionwide.

The record reflects that the personnel policies affecting the petitioned for employees have been established agency-wide by the FAA. However, each region is responsible for developing its own program for administering these policies in the region. In this regard, the Alaskan Regional Director has delegated full authority for most personnel matters to the Airway Facilities Division Chief, who is assisted in these matters by the FAA Alaskan Regional Manpower Division, which keeps the personnel files of all employees in the region including Airway Facilities Division employees. The Regional Director retains the authority for the negotiation of agreements, and he is assisted in such matters by the Manpower Division which has a labor relations staff for that purpose. However, he must follow agency policy in his negotiations and the record reflects that the FAA's Office of Personnel and Training may intervene in the negotiations when it considers that its expertise is required.

Based on all of the above circumstances, I find that the petitioned for unit, consisting of all employees under the Chief of the Airway Facilities Division in the Alaskan Region, is an appropriate unit for the purpose of exclusive recognition. Thus, the evidence establishes that all of the employees are under the supervision of the Division Chief who has the ultimate responsibility for personnel matters involving the employees in the unit found appropriate. In addition, all of the employees share a common mission, in many instances similar job classifications and duties, similar working conditions, and all of their personnel files are kept at the regional level. It was noted also that the area of consideration for reductions in force involving a substantial number of employees in the unit found appropriate is regionwide and that, while the area of consideration for promotions is often nationwide, the evidence established that it was maintained at a regionwide or lower level whenever possible. Moreover, in my view, the unit found appropriate will promote effective dealings as the level of recognition will be consistent with the FAA's delegation of negotiation authority and the level at which the FAA has provided a specialized labor

relations staff. Further, efficiency of agency operations will be promoted as unit fragmentation will be reduced by including in one division-wide regional unit several less comprehensive units and certain unrepresented employees.

Contrary to the Activity's contention that the employees assigned to the three branches of the Airway Facilities Division who are located at the Alaskan Regional headquarters should not be included in the claimed unit because they do not share a community of interest with the employees assigned to field facilities, I find that such employees do, in fact, share a community of interest with the petitioned for employees of the Airway Facilities Division. Thus, both regional headquarters and field employees are under the supervision of the Chief of the Division and they share a common mission, in many instances similar job classifications and, generally, the same areas of consideration for promotions and reductions in force. In addition, the evidence establishes that substantial interchange and transfers have occurred between the employees of the regional headquarters and the field. Moreover, in my view, excluding from the unit the regional headquarters employees in question, and, at the same time, including those employees administratively assigned to a regional headquarters branch who spend most of their time in the field, as agreed upon by the parties (see footnote 5 above) would result in fragmentation as it would separate for the purpose of exclusive recognition employees at the same branch level who are under the same branch supervision.

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

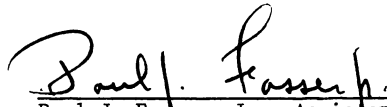
All employees under the supervision of the Chief, Airway Facilities Division, Alaskan Region, Federal Aviation Administration, excluding all professional employees, management officials, confidential employees, temporary intermittent employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in Executive Order 11491, as amended.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted, as early as possible, but not later than 60 days from the date below. The appropriate Area Director shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding

the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented by the American Federation of Government Employees, AFL-CIO, Local 3028.

Dated, Washington, D. C.  
December 18, 1975

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

December 18, 1975

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

FEDERAL AVIATION ADMINISTRATION (FAA)  
AND  
FEDERAL AVIATION ADMINISTRATION,  
EASTERN REGION  
A/SLMR No. 600

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This case involved representation (RO) petitions filed by the Federal Aviation Science and Technological Association/National Association of Government Employees, (FASTA/NAGE) and by the American Federation of Government Employees, AFL-CIO, Local 3341, (AFGE). The FASTA/NAGE sought an election in a unit consisting of all of the Activity's Airway Facilities Division employees assigned to field facilities. The AFGE sought an election in a unit consisting of the four technician classifications found among Airway Facilities Division employees in the Eastern Region of the Activity.

The Activity considered the unit sought by the FASTA/NAGE to be appropriate. In this regard, it agreed with the FASTA/NAGE that the Airway Facilities Division employees designated as Facilities and Establishment (F&E) and Field Maintenance Party (FMP) should be included in the unit because, although they are assigned administratively to the regional headquarters, they spend the majority of their time working in the field. With respect to the AFGE's petition, both the Activity and the FASTA/NAGE took the position that a unit at the regional level was inappropriate. In addition, both considered the unit claimed by the AFGE to be incomplete as it was not coextensive with the two existing units covering the Airway Facilities Division employees of the Eastern Region of the Activity. The AFGE contended, on the other hand, that a nationwide unit, as petitioned for by the FASTA/NAGE, would not be appropriate based on the regional organization of the FAA. Thus, the AFGE claimed that it petitioned for a unit at the regional level, which, in its view, was consistent with the previous bargaining history among Airway Facilities Division employees in the Eastern Region. However, if a nationwide unit was found to be appropriate, the AFGE took the position that the Airway Facilities Division employees located at the various regional headquarters should be included as they share a community of interest with the other Airway Facilities Division employees.

Under all of the circumstances, the Assistant Secretary found that a nationwide unit of all Airway Facilities Division employees, including employees designated as F&E and FMP and regional headquarters employees, share a clear and identifiable community of interest separate and distinct from all other FAA employees. Thus, they all share a common



mission and enjoy common overall supervision, personnel policies and practices, labor relations policies, and, essentially, similar job classifications, duties and working conditions. Further, it was noted that there is substantial interchange and transfer of such employees across regional boundaries and, generally, there is a common area of consideration for promotion and reduction-in-force procedures. Noting further that such unit will reduce fragmentation and that recognition is at the level at which personnel and labor relations policies are initiated, the Assistant Secretary found that such a unit will promote effective dealings and efficiency of agency operations.

With respect to the AFGE's petition, the Assistant Secretary noted that, while some inconsistency existed between the unit petitioned for by the AFGE and the two existing certifications covering the Eastern Region employees, the AFGE desired essentially to represent in one nationwide unit the employees currently represented by the FASTA/NAGE in two units, that the two units are covered currently by one negotiated agreement, and that the AFGE's petition seeks substantially the same number of employees included currently in the existing units. Therefore, the Assistant Secretary directed that a self-determination election be conducted among those employees currently included in the existing units.

The Assistant Secretary found that there were several existing bargaining units encompassed within the nationwide unit found appropriate wherein there was an exclusive bargaining representative, but no bar to an election. As to the employees in those units, the Assistant Secretary directed they be given self-determination elections as to whether or not they desired to be represented in their individual units. Finally, noting the existence of certain bargaining units in which petitions were pending at the time when the FASTA/NAGE petition was filed, and that the FASTA/NAGE petition was untimely filed with respect to those previously filed petitions, the Assistant Secretary ordered that the employees in those units be excluded from the nationwide unit found appropriate.

Accordingly, the Assistant Secretary directed that an election be conducted in the nationwide unit found appropriate, and further directed self-determination elections be conducted in the Eastern Region and in several other existing units encompassed within the nationwide unit.

A/SLMR No. 600

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION

Activity

and

Case No. 22-5554(RO)

FEDERAL AVIATION SCIENCE AND TECHNOLOGICAL  
ASSOCIATION/NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO

Intervenor

and

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

Intervenor

and

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES

Intervenor

and

INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE  
No. 2266 1/

Intervenor

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1/ The name of this labor organization appears as amended at the hearing.

Activity

and

Case No. 30-5781(RO)

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 3341

Petitioner

and

FEDERAL AVIATION SCIENCE AND TECHNOLOGICAL  
ASSOCIATION/NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES, LOCAL R2-10R

Intervenor

DECISION AND DIRECTION OF ELECTIONS

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

Upon the entire record in these cases, including briefs filed by the Federal Aviation Administration, herein called FAA, the American Federation of Government Employees, AFL-CIO, herein called AFGE, <sup>2/</sup> and the Federal Aviation Science and Technological Association/National Association of Government Employees, herein called the FASTA/NAGE, the Assistant Secretary finds:

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

2. In its petition in Case No. 22-5554(RO), the FASTA/NAGE seeks an election in a unit consisting of all General Schedule and Wage Grade employees of the FAA's Airway Facilities Division assigned to field facilities, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in Executive Order 11491, as amended, Airway Facilities personnel assigned to FAA

<sup>2/</sup> The AFGE filed an "Errata" dated August 6, 1975, to its post-hearing brief. As such "Errata" was filed untimely, that portion which substantively adds to or amends the post-hearing brief has not been considered.

regional offices, Washington Headquarters, the National Aeronautical Facilities Experimental Center, Atlantic City, New Jersey, the Aeronautical Center, Oklahoma City, Oklahoma, and the employees in exclusively recognized units subject to certification or agreement bars. <sup>3/</sup>

In Case No. 30-5781(RO), the AFGE seeks an election in unit consisting of all Electronic Technicians, GS-856 series, Engineering Technicians, GS-802 series, General Facilities and Equipment Technicians, WG-4740 series, and General Maintenance Mechanics, WG-4704 series, assigned to the Airway Facilities Sector Offices of the Eastern Region, Federal Aviation Administration, excluding all professional employees, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in Executive Order 11491, as amended, and all Airway Facilities Division employees assigned to the Eastern Regional Headquarters, Federal Building JFK Airport. <sup>4/</sup> The evidence establishes in this regard that the unit petitioned for encompasses essentially the same employees currently represented exclusively by FASTA/NAGE, Local R2-10R in two units each covering half of the Eastern Region. <sup>5/</sup>

<sup>3/</sup> The unit appears essentially as amended at the hearing where the parties stipulated that the Airway Facilities Division employees represented exclusively at the following locations should be excluded from any unit found appropriate based on agreement or certification bars: the St. Paul, Minnesota, Airway Facilities Sector; the Farmington, Minnesota, Airway Facilities Sector; the Minneapolis, Minnesota, Airway Facilities Sector; the Chicago Aurora Airway Facilities Sector; the Chicago Midway Airway Facilities Sector; the Chicago O'Hare Airway Facilities Sector; the Longmont, Colorado, Airway Facilities Sector; the Tampa, Florida, Airway Facilities Sector; the Oakland, California, Airway Facilities Sector; the McClellan Air Force Base Airway Facilities Sector; the Albuquerque, New Mexico, Maintenance Engineering Field Office; the Oklahoma City, Oklahoma, Airway Facilities Sector; the Tulsa, Oklahoma, Field Maintenance Party; the Eastern Region Headquarters; and the Pacific-Asia Region.

<sup>4/</sup> The unit appears essentially as amended at the hearing.

<sup>5/</sup> The first of these units, which was certified on May 12, 1971, includes all nonsupervisory Electronic Technicians and Wage Grade personnel under supervision of the Chief, Airway Facilities Division, Eastern Region employed in Airway Facility Sector Offices in the states of New York, Pennsylvania, New Jersey, and Delaware with the normal exclusions. The second unit, which was certified on October 13, 1971, as the result of a Decision, Order and Direction of Election of the Assistant Secretary in Department of Transportation, (cont'd)

The Activity takes the position that the unit petitioned for by the FASTA/NAGE in Case No. 22-5554(RO), as amended at the hearing, constitutes an appropriate unit. In this connection, the Activity indicates its support of the concept of a nationwide unit of its Airway Facilities Division employees working in its field organizations because, in its view, they share a clear and identifiable community of interest separate and distinct from other FAA employees as they all are engaged in the maintenance and/or installation of electronic equipment, which is an integral part of the national airspace system and which requires for its effectiveness uniform national standards. The Activity agrees with the FASTA/NAGE that Airway Facilities Division employees located at the various regional headquarters should not be included in the claimed unit because, in its view, regional headquarters employees share a community of interest with the regional headquarters employees of the FAA in other divisions. However, the Activity would include in the claimed unit the employees of the Airway Facilities Division designated as Facilities and Establishment (F&E) and Field Maintenance Parties (FMP) because they spend the majority of their time working at the field locations rather than at the regional headquarters where they are administratively assigned. With respect to the AFGE's petition in Case No. 30-5781(RO), the Activity takes the position that it should be dismissed because the unit petitioned for is at the regional level, at which level the Activity contends the employees do not share a separate and distinct community of interest and such a unit will not promote effective dealings and efficiency of agency operations. In addition, the Activity opposes the AFGE's petitioned for unit on the basis that limiting a unit in the Eastern Region to four classification series would exclude employees who should be in any unit found appropriate at the regional level.

The FASTA/NAGE also takes the position that a nationwide unit, as petitioned for in Case No. 22-5554(RO), is the only appropriate unit, despite the fact that it currently represents units of employees at the sector and regional levels. In this regard, the FASTA/NAGE claims that negotiations at these levels have not been effective, and that effective dealings will only be achieved through a nationwide unit. The FASTA/NAGE contends further that the unit as defined in its petition, while specifically excluding those Airway Facilities Division employees located at regional headquarters, should include both F&E and FMP employees because, while these employees are assigned administratively to regional headquarters, they spend the majority of their time working

5/ Federal Aviation Administration, Airway Facilities Division, Eastern Region, A/SLMR No. 94, includes all nonsupervisory Electronic Technicians, General Facilities Equipment Technicians, and other nonsupervisory Wage Grade employees employed in the Southern Branch of the Eastern Region with the exception of the state of Pennsylvania.

An agreement between the FAA and the FASTA/NAGE, Local R2-10R, which covered both of the above noted units apparently expired on June 19, 1974, and was, therefore, not raised as a bar.

in the field. With respect to the AFGE's petition in Case No. 30-5781(RO), the FASTA/NAGE also indicated that the unit description therein is inconsistent with the past bargaining history in that it excludes employees covered by current certifications.

The AFGE contends, on the other hand, that a nationwide unit as petitioned for in Case No. 22-5554(RO) is inappropriate based on the regional organization of the FAA. In addition, the AFGE contends that even if a nationwide unit was found to be appropriate, it should include the Airway Facilities Division employees assigned to the various regional headquarters, who have been excluded specifically by the FASTA/NAGE petition, because they share a community of interest with other Airway Facilities Division employees. The AFGE maintains that the unit it has petitioned for in the Eastern Region in Case No. 30-5781(RO) is a functionally appropriate unit in that it includes all the employees performing related electronic maintenance work who are engaged in an integrated work process under separate supervision from other Airway Facilities Division employees and that it would have petitioned for the headquarters employees if there was not a procedural bar. The AFGE asserts that the sector level is the level at which ineffective dealings have occurred in the past, and that, for this reason, it petitioned for a regionwide unit consistent with the past bargaining history in the Eastern Region in which two units covering the entire region have been represented by the same FASTA/NAGE Local under one negotiated agreement.

The AFGE also intervened on behalf of AFGE Local 2760, herein called Local 2760, with respect to the FASTA/NAGE petition in Case No. 22-5554(RO). In this connection, Local 2760 is the exclusive representative of a unit consisting of all Clerk-Stenos, Supply Clerks, and Supply Specialists assigned to the Albuquerque, New Mexico, Airway Facilities Sector (AFS), excluding all other nonsupervisory Class Act and Wage Grade employees, management officials, professionals, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in Executive Order 11491, as amended, the Administrative Officer, and secretary to the AFS Manager. 6/ The record reveals that this unit is covered by

6/ The AFGE apparently intervened to assure that the employees in the above-noted unit receive a self-determination election if a nationwide unit, as petitioned for by the FASTA/NAGE in Case No. 22-5554(RO), is found to be appropriate. The AFGE also contends that similar self-determination elections should be conducted in units currently represented by AFGE Locals 2606, 2473, 1858, and 2123. I am administratively advised that these units are as follows:

All Wage Grade employees assigned to the Field Maintenance Party of the Airway Facilities Field Office, Fort Worth, Texas, excluding all management officials, employees engaged in Federal personnel work except in a purely clerical capacity, guards and supervisors as defined in Executive Order 11491, as amended, professionals and clerical employees;

(cont'd)

an existing negotiated agreement which did not bar the petition in Case No. 22-5554(RO) because such petition was filed timely during the open period of the negotiated agreement.

The National Federation of Federal Employees, herein called NFFE, also intervened with respect to the FASTA/NAGE petition in Case No. 22-5554(RO). It took the position that a nationwide unit is not appropriate, and that only a regionwide or less comprehensive unit would be appropriate consistent with the FAA's regional organization. However, if a nationwide unit was found to be appropriate, the NFFE stated that it wished to participate in a self-determination election with respect to two units represented exclusively by NFFE Local 1388, which are described as:

All employees assigned to Airway Facilities Sector 29A, Miami Air Route Traffic Control Center, Miami, Florida, excluding management officials, professional employees, secretary to the Sector Manager, temporary employees, non-regularly employed part-time employees, non-United States national employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined by Executive Order 11491, as amended; and

All employees assigned to AFS headquarters 30A, AFS field unit 30-B, Bimini, British West Indies; AFS field office 30-C, Ft. Lauderdale, Florida, AFS Field Office 30-D, Key West, Florida; AFS Field Office 30-F, AFSR Radar, Richmond, Florida, AFS Field Office 30-G, Overseas Sector, Miami, Florida, and AFS Field Unit 30-H, Swan Island, Florida, excluding management officials, professional employees, secretary to the Sector Manager, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in Executive Order 11491, as amended, personnel assigned to the facilities for training purposes only.

6/ All Electronic Technicians assigned to the El Toro Marine Base Airway Facilities Sector, California, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order;

All personnel occupying the positions of Electronics Technician and Electro-Mechanical Technician who are assigned to Airway Facilities Sector 28400, Huntsville, Alabama, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order;

All General Schedule and Wage Grade employees assigned to the Atlanta, Georgia, Airway Facilities Sector 18200, Atlanta Municipal Airport, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, and guards and supervisors as defined in Executive Order 11491, as amended, and personnel assigned to receive training.

The International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 2266, herein called IAM, also intervened with respect to the FASTA/NAGE petition in Case No. 22-5554(RO). It took the position that based on the Assistant Secretary's decision in Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364, finding that a unit of Airway Facilities Division employees is appropriate at the sector level, a more comprehensive unit could not now be claimed as the only appropriate unit.

All of the parties to this proceeding agreed to accept the determination of the Assistant Secretary regarding the inclusion or exclusion of the employees of the Tulsa Airway Facilities Sector and also the Denver Airway Facilities Sector if a nationwide unit as petitioned for in Case No. 22-5554(RO) was found to be appropriate. The representative status of the Tulsa employees was decided in A/SLMR No. 364, but such matter was pending on appeal before the Federal Labor Relations Council at the time of the filing of the petition in Case No. 22-5554(RO). 7/ Also, the representative status of the Denver employees was pending before the Assistant Secretary in Case Nos. 61-2350(RA) and 61-2367(CA) at the time of the filing of the petition in Case No. 22-5554(RO). 8/ The record reveals that the petition in Case No. 22-5554(RO) was filed untimely with respect to possible intervention in these matters. Further, at the hearing, the FASTA/NAGE and the Activity took the position that the Airway Facilities Division field employees in the Alaskan Region should be included if a nationwide unit is found to be appropriate. It was noted, in this regard, that a petition in Case No. 71-3006(RO) had been filed previously with respect to the Alaskan employees at the time of the filing of the petition in Case No. 22-5554(RO), and that the latter petition was filed untimely with regard to a possible intervention in the former petition. 9/

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The FAA contends that its history of bargaining is best reflected as an evolution from smaller to larger units, and it notes, in this connection, that three national exclusive units have been certified recently within the FAA. 10/ The FAA contends that this evolution of

7/ See Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, FLRC No. 74A-28.

8/ See Denver Airway Facilities Hub Sector, FAA Rocky Mountain Region, DOT, Aurora, Colorado, A/SLMR No. 535.

9/ See Federal Aviation Administration, Airways Facilities Division, Alaskan Region, A/SLMR No. 599.

10/ The three nationally recognized units include all flight service specialists, which resulted from the Assistant Secretary's decision in Federal Aviation Administration, Department of Transportation, A/SLMR No. 122; all air traffic controllers, which resulted from the Assistant Secretary's decision in Federal Aviation Administration, Department of Transportation, A/SLMR No. 173; and all employees of the Flight Service Division, which unit was established pursuant to a consent election agreement.

what it considers to be an appropriate unit size is consistent with the evolution of Executive Order 11491, as amended. With respect to the Airway Facilities Division, in the past the FAA considered the sector level and, in some cases, less comprehensive units to be appropriate. In March 1974, the FAA consented to an election among all employees under the Chief of the Airway Facilities Division in the Pacific-Asia Region, which unit included regional headquarters employees. Also other nationwide units of Airway Facilities Division employees exist. However, the FAA now takes the position that a nationwide unit is the only appropriate unit which will promote effective dealings and efficiency of agency operations. With respect to the Eastern Region bargaining history, the record shows that FASTA/NAGE Local R2-10R has been recognized exclusively for two units covering all of the Airway Facilities Division field facilities under one negotiated agreement. In addition, the FASTA/NAGE Local R2-73 is the exclusive representative for a unit of all regional headquarters employees, which unit crosses division lines and is covered by a current negotiated agreement which constituted a bar herein. This unit, as defined, includes the F&E employees assigned to the Eastern Region Headquarters.

The mission of the FAA is to provide a safe and expeditious flow of aircraft in the national airspace system. In accomplishing this mission the FAA has been organized along geographical lines into twelve defined regions, each headed by a regional director. The employees covered by the FASTA/NAGE petition in Case No. 22-5554(RO) are those assigned to the field facilities of the Airway Facilities Division, which is one of the five operating divisions found in each region, with the exception of the Europe, Africa, and Middle East Region, which has no Airway Facilities Division employees. The mission of the Airway Facilities Division is to maintain and install the equipment and facilities of the FAA within the region involved. In each region the Division is headed by a Chief who reports to the Regional Director from whom he receives his administrative direction. He also receives certain defined technical direction from the Airway Facilities Service Office in Washington, D. C., which, otherwise, has no line authority over the Airway Facilities Division Chiefs in each region.

Under each Division Chief are several sectors, which compose the field organization of the Airway Facilities Division in the region, and several branches located at the regional headquarters. The geographical configuration of the sectors and their sub-elements <sup>11/</sup> in each region is determined by the maintenance needs of that region, as well as by standardized models, from which only limited deviation is allowed. Such models have been developed by the Airway Facilities Service Office to serve as guidelines in determining the sector structure. Each sector is headed by a manager who is responsible for the maintenance of the FAA facilities and equipment in his sector based on standards

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<sup>11/</sup> These sub-elements include sector field offices, sector field units, and sector field office units.

set nationally to provide consistency throughout the FAA. However, because of the integrated communication network among the FAA facilities, which does not necessarily follow the geographical boundary of the particular sector or region involved, individual employees may at times be under the temporary supervisory control of a manager in another sector who may also be in another region. This situation may exist for a period of time based on the maintenance needs of the communications network.

The Airway Facilities Division Branches, which generally are located at the regional headquarters, perform the staff support functions necessary to the division's primary mission. In this regard, two organizationally distinct employee groupings, F&E and FMP, normally are assigned to one of the regional headquarters branches but, in fact, they perform their work in the field.

While various job classifications are found among the over 8000 employees covered by the petition in Case No. 22-5554(RO), the vast majority fall under two classifications - Electronic Technician, GS-856 series and General Facilities Equipment Technician, WG-4740 series. These two classifications, which comprise over 90 percent of the employees sought by the FASTA/NAGE, are related functionally in that the performance of their duties requires uniformity on a national basis. Thus, the employees in both classifications are involved in maintenance and installation of equipment and are required to be certified based on national standards. Further, the technical handbooks used by the employees in these classifications have been developed nationally to provide uniformity in the maintenance of the equipment from one region to another, and their certifications are obtained either by training at the FAA Academy, Oklahoma City, Oklahoma, or by a combination of on-the-job training and testing administered locally. The employees in both classifications are often required to work round-the-clock shifts in the performance of their duties. In addition, the employees in the Electronic Technician classification receive "time and a half" for overtime performed in equipment maintenance and installation based on a law covering only such FAA employees. Finally, the FAA has been given permission to prepare its own classification guidelines for the technician positions by the Civil Service Commission and, therefore, all position descriptions written locally must be based on these nationally established guidelines.

Because of the existence of a large number of employees in these two classifications who perform similar duties with similar skills that generally are transportable, there is a substantial amount of transfer from one location to another among the claimed employees. The record reflects, in this regard, that the area of consideration for promotions involving these technician positions is determined by the number of applicants available and, frequently, is nationwide to assure a sufficient number. While such area of consideration can be as small as sectorwide, it appears that generally it tends to be at the region-wide or nationwide levels. Also, technician employees often request

that their names be placed on the availability list in another region and be considered along with employees in that region for vacancies that arise. With respect to reductions-in-force, the record reveals that the area of consideration in this regard generally is nationwide; however, it may be larger in the case of a large scale reduction.

With respect to other employee job classifications in the petitioned for Airway Facilities Division, the record reflects that clerical and supply specialist classifications are found in each field office and that they perform a supportive function for the technicians. Other classifications frequently found in field offices include general maintenance mechanics and engineering technicians, both of whose duties include assisting the technicians described above in performing their maintenance functions. Also, computer operators and teletype repairers are found at most air route traffic control centers. Other than the clericals, all of the employees in these additional classifications also must perform their duties in accordance with strict nationally developed technical standards.

In each region, the Regional Director is assisted with respect to personnel actions, grievances, and labor relations by the Regional Manpower Division. While the authority for most personnel matters rests with him, the record reflects that, consistent with the FAA policy of delegating such authority to the lowest possible level, the Regional Directors in each region have developed their own regional promotion plans, including the delegation of such authority to the sector level where possible. However, all promotions must follow the FAA and Civil Service guidelines in such matters. The Regional Manpower Division also assists the Regional Director, who is the only official in the region with the authority to negotiate agreements, in the handling of labor relations matters. However, the record reflects that labor relations policy is set at the Agency level and that the Office of Labor Relations in Washington, D.C., would be involved directly in any negotiations at the regional level. In addition, the FAA's Office of Labor Relations trains supervisory officials in the implementation of negotiated agreements. The FAA contends, in this regard, that the reduced fragmentation which would be the result of a residual nationwide unit, as petitioned for by the FASTA/NAGE in Case No. 22-5554(RO), would limit the number of negotiated agreements and, thereby, would increase its efficiency in training its local officials in the implementation of such agreements. In addition, it claims that it would be able to negotiate more effectively because policy with respect to personnel and work practices is developed at a national level.

#### F&E and FMP Employees

Questions were raised prior to the hearing with regard to the status of these two groups of employees. As stated above, both the FASTA/NAGE and the Activity consider both the F&E and FMP employees to be included properly in the unit as petitioned for because, although they

are assigned administratively to the regional headquarters, they spend the majority of their time working at field locations. With respect to the F&E employees, the record reveals that generally they are technicians who travel throughout a region performing the routine installation of equipment. 12/ The record discloses that these F&E teams receive their first level supervision from the member of their team holding the job order for a specific installation of equipment and, therefore, their first level of supervision changes periodically. The next level of supervision for these employees is found in the branch at regional headquarters to which they are assigned administratively. At no time do they receive any supervision from the sector managers.

FMP employees are drawn from the various crafts and perform the needed maintenance for the FAA facilities. The record indicates that in some regions the FMP has been dismantled and its employees placed in the sectors under the sector managers. However, where it still exists as a distinct employee grouping, the record reveals that the supervisor of the FMP reports administratively to a regional headquarters branch. 13/ In the case of both F&E employees and FMP employees, administrative matters, such as time and leave statements, are handled through the regional headquarters branch to which they are assigned.

#### Regional Headquarters Employees

The record reflects that these employees are assigned generally to five branches located at the various FAA regional headquarters. 14/ The evidence establishes that the majority of the Airway Facilities Division regional headquarters employees are either technicians, engineers, or clericals and that they provide the staff support necessary to the division's mission. While the technicians are not required to be certified as they perform no maintenance duties, many have retained their certifications from past positions held in the field in which certification was required. Many of the regional headquarters technicians also are required to spend a portion of their time at field locations in the performance of their duties. Transfers involving employees of both the technician and clerical classifications occur frequently between the regional headquarters and the field. In fact, the record reveals that transfer from the field to regional

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12/ The record reflects that, in the case of major equipment changes, special teams of F&E employees are drawn from the regions to perform such installations on a nationwide basis.

13/ The record is not clear as to which regions have dismantled their FMP's and dispersed the FMP employees among the sectors.

14/ The number of branches may vary depending on the size and needs of the region, as long as all the functions prescribed in the Standard Regional Organization chart are performed.

headquarters and eventually back to the field is a common form of career progression for employees in the technician classification. 15/

Working conditions, such as work location and hours of work, for all regional headquarters employees, regardless of division, are essentially the same. However, many of the Airway Facilities Division field employees also work a standard work day and, generally, at least one field sector office in each region will be located geographically close to or in the same location as the regional headquarters.

The history of bargaining within the FAA reflects that both units of regional headquarters employees across division lines and division-wide units, including regional headquarters employees, were in existence at the time of the filing of the petitions in this proceeding. In this connection, the AFGE noted that as recently as March 1974, the Activity consented to an election in the Pacific-Asia Region in which AFGE was certified as the exclusive representative in a unit consisting of all Airway Facilities employees under the supervision of the Division Chief, including, in effect, the headquarters employees.

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The AFGE's petitioned for unit consists of all of the employees in four technician classifications found in the Eastern Region, which classifications the record reveals include 1069 of the 1146 non-professional employees eligible for inclusion in a nationwide unit. The existing certifications, each covering half of the Eastern Region, exclude the Engineering Technician classification included in the AFGE's petition, and include all Wage Grade employees, as distinguished from merely including the two technician Wage Grade classifications specified in the AFGE's petition. The number of employees sought by the petition and those currently covered by the existing certifications is, however, substantially the same with the following classifications of employees being excluded by both the existing certifications and the instant petition: clerical, supply, and computer operator.

Under all of the above circumstances, I find that a nationwide, residual unit of all Airway Facilities Division employees located in the regions, including employees assigned to F&E and FMP work groups and Airway Facilities Division regional headquarters employees, share a clear and identifiable community of interest separate and distinct from all other FAA employees. Thus, all Airway Facilities Division employees share a common mission and enjoy common overall supervision, personnel policies and practices, labor relations policies, and, essentially, similar job classifications, and duties. Further, there is substantial interchange and transfer of such employees across

15/ Transfers also occur between the regional headquarters employees of the Airway Facilities Division and the other FAA divisions located at the regional headquarters.

regional boundaries and, generally, there is a common area of consideration for promotion and reduction-in-force procedures. Further, I find such unit will promote effective dealings and efficiency of agency operations. In this latter regard, it was noted that such a unit will reduce further fragmentation and proliferation of bargaining units within the Activity, and that recognition would occur at the same level in the Activity's organization where personnel and labor relations policies are initiated. Moreover, contrary to the position taken by the Activity and the FASTA/NAGE, I find that Airway Facilities Division employees located at the various regional headquarters should be included in the unit found appropriate. Thus, as noted above, these employees share in a common mission and have common overall supervision with the other Airway Facilities Division field employees. Further, similar job classifications are found both in the field and at the regional headquarters among Airway Facilities Division employees and both groups perform their tasks under the technical standards developed nationally. In addition, while some transfer and interchange occurs across divisional lines at the regional headquarters, there is a substantially higher degree of transfer and interchange between field and regional headquarters personnel of the Airway Facilities Division. In concluding that the inclusion of headquarters Airway Facilities Division employees was warranted, it was noted also that the parties agreed, and I find, that F&E and FMP employees should be included in the claimed unit. In my view, to include these employees who are administratively assigned to the regional headquarters, and to exclude, at the same time, the other regional headquarters employees of the Airway Facilities Division would result in unit fragmentation and would not promote effective dealings and efficiency of agency operations. 16/ Moreover, it was noted that as recent as March 1974, the Activity has taken the position that Airway Facilities Division employees assigned to regional headquarters should be included in units encompassing employees assigned to the field. 17/

With regard to the employees in units located at the Tulsa Airways Facilities Sector, the Denver Airway Facilities Sector, and the Airways Facilities Division, Alaskan Region, I find that valid questions concerning the representation of employees at these locations existed at the time of the filing of the petition in Case No. 22-5554(RO), which covered, among others, the same employees, and that the latter petition was filed untimely for the purpose of intervention in any

16/ See Federal Aviation Administration, Airways Facilities Division, Alaskan Region cited above.

17/ On March 14, 1974, in the Pacific-Asia Region, the FAA consented to an election among all employees under the Chief, Airway Facilities Division, including employees assigned to regional headquarters.

election held at these facilities. Therefore, I find that the employees covered by the previously filed petitions should be excluded from the unit found appropriate in Case No. 22-5554(RO).

As to the various exclusive bargaining units in which no bar to the petition in Case No. 22-5554(RO) exists, it has been held previously in similar situations that where existing, and otherwise appropriate units, would be encompassed within a more comprehensive unit sought, the employees in such existing units should have the opportunity to vote in a self-determination election. <sup>18/</sup> Therefore, noting that none of the parties herein contended that such units are inappropriate, I shall order that the employees in these units be afforded a self-determination election.

With regard to the petition in Case No. 30-5781(RO), covering certain employees in the Eastern Region, Airways Facilities Division, the unit sought is not exactly coextensive with the existing exclusively recognized units. However, noting the clear desire of AFGE Local 3341 to represent in one regionwide unit essentially the same employees currently represented in two units by FASTA/NAGE, Local R2-10R, the fact that such employees have been covered under a single negotiated agreement, and that the AFGE's petition herein seeks substantially the same number employees as are currently included in the existing bargaining units, I shall direct a self-determination election in a regionwide unit which is coextensive with the existing two units represented by FASTA/NAGE, Local R2-10R of Northern and Southern field employees of the Airway Facilities Division, Eastern Region.

Accordingly, based on the foregoing, I find that the following described units (set forth below as voting groups) consist of employees who share a clear and identifiable community of interest, separate and distinct from other employees of the Federal Aviation Administration and that such units will promote effective dealings and efficiency of agency operations and are appropriate for purpose of exclusive recognition under Executive Order 11491, as amended. Therefore, I shall direct elections among the following:

Voting group (a): All Electronic Technicians and Wage Grade personnel under the Chief, Airway Facilities Division, Eastern Region employed in Airway Facility Sector Offices, excluding all professional employees, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in Executive Order 11491, as amended, and clerical employees, supply employees, and computer operators;

Voting group (b): All Clerk-Stenos, Supply Clerks, and Supply Specialists assigned to the Albuquerque, New Mexico, Airway Facilities

<sup>18/</sup> See Federal Aviation Administration, Department of Transportation, A/SLMR No. 122 and Federal Aviation Administration, Department of Transportation, A/SLMR No. 173.

Sector, excluding all other Class Act and Wage Grade employees, management officials, professionals, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors, as defined in Executive Order 11491, as amended, Administrative Officer, and secretary to the AFS Manager;

Voting group (c): All Wage Grade employees assigned to the Field Maintenance Party of the Airway Facilities Field Office, Fort Worth, Texas, excluding all management officials, employees engaged in Federal personnel work except in a purely clerical capacity, guards and supervisors as defined in Executive Order 11491, as amended, professionals and clerical employees;

Voting group (d): All Electronic Technicians assigned to the El Toro Marine Base Airway Facilities Sector, California, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order;

Voting group (e): All personnel occupying the positions of Electronics Technician and Electro-Mechanical Technician who are assigned to Airway Facilities Sector 28400, Huntsville, Alabama, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order;

Voting group (f): All General Schedule and Wage Grade employees assigned to the Atlanta, Georgia, Airway Facilities Sector 18200, Atlanta Municipal Airport, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, guards, and supervisors as defined in Executive Order 11491, as amended, and personnel assigned to receive training;

Voting group (g): All employees assigned to Airway Facilities Sector 29A, Miami, Air Route Traffic Control Center, Miami, Florida, excluding management officials, professional employees, secretary to the Sector Manager, temporary employees, non-regularly employed part-time employees, non-United States national employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined by Executive Order 11491, as amended;

Voting group (h): All employees assigned to AFS headquarters 30A, AFS field unit 30-B, Bimini, British West Indies; AFS field office 30-C, Ft. Lauderdale, Florida, AFS Field Office 30-D, Key West, Florida, AFS Field Office 30-F, AFSR Radar, Richmond, Florida; AFS Field Office 30-G, Overseas Sector, Miami, Florida, and AFS Field Unit 30-H, Swan Island, Florida, excluding management officials, professional employees, secretary to the Sector Manager, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in Executive Order 11491, as amended, and personnel assigned to the facilities for training purposes only;



Voting group (i): All employees of the Airway Facilities Division, located in the regions of the FAA, excluding all employees in voting groups (a), (b), (c), (d), (e), (f), (g), and (h), professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in Executive Order 11491, as amended, Airway Facilities employees assigned to the Washington Headquarters, the National Aeronautical Facilities Experimental Center, Atlantic City, New Jersey, the Aeronautical Center, Oklahoma City, Oklahoma, and the Airway Facilities Division employees represented exclusively at the following locations: the St. Paul, Minnesota Airway Facilities Sector; the Farmington, Minnesota Airway Facilities Sector; the Minneapolis, Minnesota Airway Facilities Sector; the Chicago Aurora Airway Facilities Sector; the Chicago Midway Airway Facilities Sector; the Chicago O'Hare Airway Facilities Sector; the Longmont, Colorado Airway Facilities Sector; the Tampa, Florida Airway Facilities Sector; the Oakland, California Airway Facilities Sector; the McClellan Air Force Base Airway Facilities Sector; the Albuquerque, New Mexico Maintenance Engineering Field Office; the Oklahoma City, Oklahoma Airway Facilities Sector; the Tulsa, Oklahoma Field Maintenance Party; the Eastern Region Headquarters; the Pacific-Asia Region; the Tulsa, Oklahoma Airway Facilities Sector; the Denver, Colorado Airway Facilities Sector; and the Alaskan Region.

The employees in the various voting groups shall indicate their desires by casting their votes as follows: In voting group (a) for the FASTA/NAGE, AFGE Local 3341, or neither; in voting group (b) for the FASTA/NAGE, AFGE Local 2760, or neither; in voting group (c) for the FASTA/NAGE, AFGE Local 2606, or neither; in voting group (d) for the FASTA/NAGE, AFGE Local 2473, or neither; in voting group (e) for the FASTA/NAGE, AFGE Local 1858, or neither; in voting group (f) for the FASTA/NAGE, AFGE Local 2123, or neither; in voting groups (g) and (h) for the FASTA/NAGE, NFFE Local 1388, or neither; and in voting group (i) whether or not they wish to be represented by the FASTA/NAGE. If a majority of the employees voting in voting groups (a) - (h) selects the labor organization which is seeking to represent them separately or the incumbent exclusive representative, they will be taken to have indicated their desire to constitute a separate appropriate unit. In such circumstances, the Area Director 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 in any or all of voting groups (a) - (h) does 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 (i). 19/

19/ If the votes in voting groups (a), (b), (c), (d), (e), (f), (g), and/or (h) are pooled with the votes of voting group (i), they are to be tallied in the following manner: In voting groups (a), (b), (c), (d), (e), (f), (g), and/or (h), the votes for the AFGE or for (cont'd)

Elections by secret ballot shall be conducted among employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Directors shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

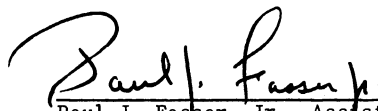
Those eligible to vote in voting groups (a), (b), (c), (d), (e), (f), (g), and (h), shall vote whether they wish to be represented for the purpose of exclusive recognition by the Federal Aviation Science and Technological Association/National Association of Government Employees; by the American Federation of Government Employees, AFL-CIO, Local 3341 /Voting group (a)/, Local 2760 /Voting group (b)/, Local 2606 /Voting group (c)/, Local 2473 /Voting group (d)/, Local 1858 /Voting group (e)/, Local 2123 /Voting group (f)/; by the National Federation of Federal Employees, Local 1388 /Voting groups (g) and (h)/; or by no labor organization. Those eligible to vote in voting group (i) shall vote whether or not they wish to be represented for the purpose of exclusive recognition by the Federal Aviation Science and Technological Association/National Association of Government Employees.

19/ the NFFE, the labor organizations seeking separate units, shall be counted as part of the total number of valid votes cast but neither for nor against the FASTA/NAGE, the labor organization seeking to represent the nationwide unit. All other votes are to be accorded their face value. I find that, under the circumstances, any unit resulting from a pooling of votes as described above constitutes an appropriate unit for the purpose of exclusive recognition under the Order.

20/ The record is unclear as to whether the units found appropriate would render inadequate either the showing of interest of the FASTA/NAGE or the AFGE. Accordingly, before proceeding to the elections in the subject cases, the appropriate Area Directors are directed to reevaluate the showing of interest. If it is determined that the FASTA/NAGE's showing is insufficient, then the petition in Case No. 22-5554(RO) should be dismissed. If the AFGE's showing of interest is insufficient, then the petition in Case No. 30-5781(RO), involving employees of the Eastern Region, should be dismissed.

Because the above Direction of Elections is more restrictive than those sought by either the FASTA/NAGE or the NLRB, I will permit either to withdraw its petition if it desires to do so prior to an election in the units found appropriate in the units upon notice to the appropriate Area Directors within 10 days of the issuance of this decision. If either labor organization desires to proceed to an election, because the units found appropriate are more than the units originally petitioned for, I direct that the election be held as soon as possible, shall post copies of a Notice of Election which shall be furnished by the appropriate Area Director in the units where notices are normally posted affecting the employees in the units found appropriate. Such notice shall conform in all respects with the requirements of Section 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, any labor organization which desires to appear in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any hearing requested will be granted solely for the purpose of appearing before the Board on behalf of the employees in the units found appropriate.

Dated, Washington, D. C.  
December 18, 1975

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

February 10, 1975

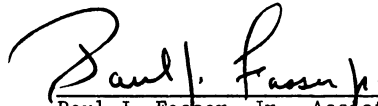
DEPARTMENT OF LABOR  
LABOR-MANAGEMENT RELATIONS  
THE ASSISTANT SECRETARY  
EXECUTIVE ORDER 11491, AS AMENDED

objections to conduct  
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Because the above Direction of Elections are in units different than those sought by either the FASTA/NAGE or by the AFGE, I shall permit either to withdraw its petition if it does not desire to proceed to an election in the units found appropriate in the subject cases upon notice to the appropriate Area Directors within 10 days of the issuance of this decision. If either labor organization desires to proceed to an election, because the units found appropriate are different than the units 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 Directors, in places where notices are normally posted affecting the employees in the units found appropriate. Such notice shall conform in all respects to the requirements of Section 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, any labor organization which seeks to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any timely intervention will be granted solely for the purpose of appearing on the ballot among the employees in the units found appropriate.

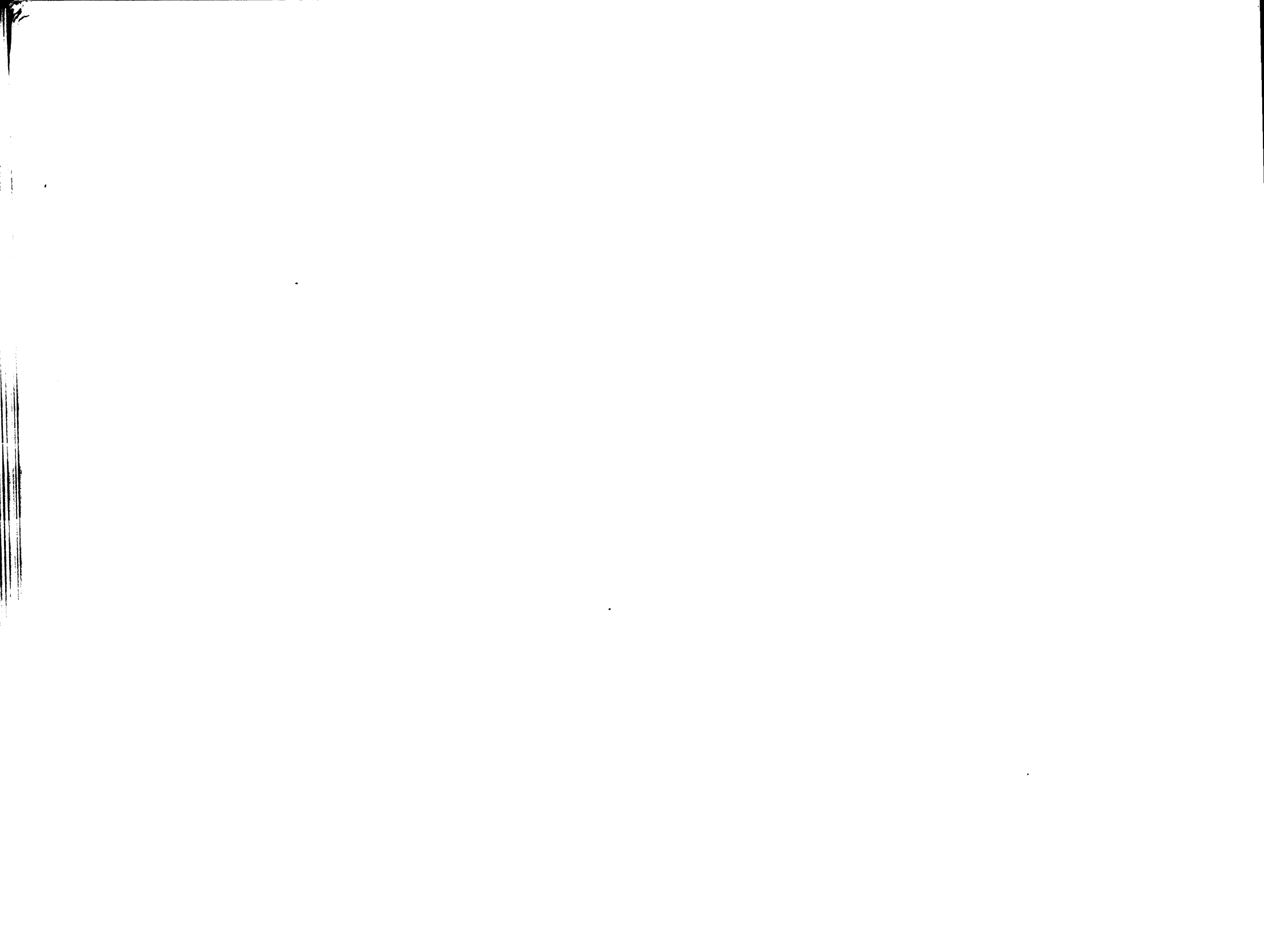
Dated, Washington, D. C.  
December 18, 1975

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

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

No. 58

January 1, 1975 through December 31, 1975



February 10, 1975

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 58

Problem

A party to an election filed objections to conduct allegedly affecting the results of the election based on an event occurring prior to the filing of the election petition. The question raised was whether an objection based on conduct occurring prior to the filing of the election petition should be considered in determining whether the election should be set aside.

Decision

Conduct occurring prior to the filing of the election petition may not be considered as grounds for setting aside the election. This decision would not preclude the filing of a timely charge and complaint under Section 19 of the Order without regard to the filing date of the election petition.

