UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 214, AFL-CIO Charging Party	Case No. CH-CA-50320

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JULY 15, 1996**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 12, 1996
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: June 12, 1996

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND

Respondent

and Case No. CH-CA-50320

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 214, AFL-CIO Charging Party	Case No. CH-CA-50320

William P. Krueger, Esquire
For the Respondent

Philip T. Roberts, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent violated §§ 16(a)(5) and (1) of the Statute by unilaterally offering separation incentives, under the Congressionally Authorized Voluntary Severance Incentive Plan (VSIP)[2], for the placement of Palace Acquire Interns. Respondent asserts that, although VSIP was enacted on October 23, 1992, the day after the Master Labor Agreement

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1 For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as, "§ 16(a)(5)."

2 5 U.S.C. § 5997; Res Exh. 1.

(MLA) had expired (Res. Exh. 4), it is so inextricably related to incentives under the Voluntary Early Retirement Act[3], which is specifically noted in the MLA, and to the provisions of Article 16, that it was an aspect of a subject covered by the agreement and therefore, notice to the Union was not required. Moreover, Respondent asserts that, because the MLA had expired, when it implemented its offer, it was not obligated to bargain mid-term on its decision to offer separation incentives.

This case was initiated by a charge filed on January 24, 1995 (G.C. Exh. 1(a)), but the Complaint and Notice of Hearing did not issue until January 12, 1996; the hearing was set for February 27, 1996; and a hearing was duly held on February 27, 1996, in Dayton, Ohio, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument, which Respondent exercised. At the conclusion of the hearing, March 27, 1996, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed an excellent brief, received on April 2, 1996, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

Findings

1. American Federation of Government Employees, Council 214, AFL-CIO (hereinafter, "Union") is the certified exclusive representative of a nationwide unit of employees appropriate for collective bargaining of the United States Department of the Air Force, Air Force Materiel Command (hereinafter, "Respondent") at facilities around the country.

2. Palace Acquire Interns (PAQs) are employees of the Air Force; they are college graduates, usually with superior grades (Tr. 27, 86); are recruited out of college to enter a two or three training course for placement in career positions (Tr. 28); and they are serviced by the base personnel office at the activity where they are physically located (Tr. 86-87). In August, 1993, Respondent had 38

3
5 U.S.C. § 8336(d)(2).

PAQs[4] who had completed their training; their training had already been extended about two years (Tr. 87); permanent positions were not available to place them; and it appeared that a RIF of interns was highly probable (Tr. 88). Accordingly, by memorandum dated August 31, 1993, Respondent requested the Department of the Air Force to grant it authority to offer separation incentives,

> ". . . to employees in skills that would enable the PAQ employee to move into a permanent position. . . . We also ask that we be given the authority to use the separation incentives at any installation in Air Force Materiel Command where we may find matching skills." (Res. Exh. 2).

3. By memorandum dated January 4, 1994, Air Force granted the authority to offer separation incentives, i.e., VSIPs, subject to the following qualifications:

> "1. The Office of the Assistant Secretary for Manpower, Reserve Affairs, Installations & Environment (SAF/MI) has approved the use of incentives for regular retirement eligibles . . . to create placement opportunities for PAQs who do not have permanent positions. HQ AFMC and HQ AMC can offer incentives at any time from the date of this letter through 30 April 1994. . . .
>
> "2. Incentives must be offered in 3 phases, as necessary, with Phase I . . . at the installation where the interns currently work. If all interns are not placed, Phase II will expand offers to other installations within the Command or to any AF installation within the commuting area . . . Phase III will include incentive offers at any CONUS base necessary to place remaining interns. . . .
>
> "3. Incentives must be funded within existing Command resources. . . ." (G.C. Exh. 2).

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These 38 interns were located at the following installations:

Hill AFB, UT	6
McClellan AFB, CA	6
Robins AFB, GA	4
Wright-Patterson AFB, OH	22

(Res. Exh. 2).

4. By the time the authority to offer separation incentives was granted (January 4, 1994) there were only 17 surplus PAQs and these were located at Wright-Patterson AFB and at Hill AFB (Ogden)(Tr. 103, 110). The incentives were offered at Wright-Patterson and at Hill but there were no acceptances (Tr. 104). Before Phase III could be implemented, extensions of the time to offer incentives had to be sought, first to May 31, 1994 (Res. Exhs. 5c-1 and 5c); then to July 31, 1994 (Res. Exhs. 5b-1 and 5a-1); and finally to September 30, 1994 (Res. Exhs. 5-c-1 and 5a). At the time Phase III incentives were offered, only 5 interns remained unplaced and incentives were offered to place four interns and one intern declined placement (Tr. 91, 107; Res. Exh. 6). Three were placed at McClellan (California) and one at Battle Creek (Michigan) (Tr. 91, 92).

5. No notice was given to the Union that incentives were to be offered and the Union learned of the incentive offering through one of the PAQs, Ms. Stephanie Lopez, who received a notification of proposed adverse action as a result of her having accepted a position at McClellan and then, in August 1994, recanted her acceptance (i.e., that she had refused to take a position at McClellan (Tr. 29, 30) in violation of her mobility agreement which is incidental to internship (Tr. 49)); however, it was ultimately decided that Ms. Lopez would not be removed and she was reassigned to a liaison position at Headquarters, DLA, Cameron Station (Tr. 47). In the course of defending against her proposed removal, Ms. Lopez, with the Union's assistance, made Freedom of Information Act requests (Tr. 30), which produced data showing the use of VSIPs to create openings for the placement of PAQs (G.C. Exhs. 2, 4, 5, 6, 7; Tr. 30, 31, 32, 35, 36, 38, 40, 41).

6. Article 16 of the MLA provided, in pertinent part, as follows:

"ARTICLE 16

"REDUCTION IN FORCE

"SECTION 16.01 NOTIFICATION REQUIREMENTS

"a. At the earliest possible date, and prior to notification of affected employees, the Employer will notify the Union of the proposed implementation date of a reduction in force and/or transfer of function in accordance with the following:

"(1) HQ AFLC will notify the Council President where 50 or more unit employees at any one activity are identified to be reduced in grade or separated by reduction in force procedures.

"(2) The Commander of a subordinate AFLC activity or designee will notify the appropriate local president of the Union at that activity where five or more unit employees are identified to be reduced in grade or separated by reduction in force procedures.

. . .

"SECTION 16.03: REDUCING IMPACT OF RIF

. . .

"b. The Employer shall request, when appropriate, that the OPM determine that the agency is undergoing a major reduction in force for the purpose of authorizing voluntary retirements under 5 USC 8336(d)(2).

"c. At such time as a reduction in force has been announced, the Employer shall meet individually with affected employees eligible for optional or involuntary retirement and who request it to explain its benefits.

. . . ." (Res. Exh. 4, Article 16, Secs. 16.01 and 16.03).

7. Mr. Walter A. Squires, Executive Assistant to the President of the Union (Tr. 26), stated that Respondent used an earlier EVSIP[5] announcement to ascertain interest in optional retirement (Tr. 60). Respondent presented no testimony as to what notice was given to which employees. Indeed, Mr. Harold J. Miller, Personnel Management Specialist, Headquarters, AMC stated when asked about notice,

". . . I can't answer that, Judge, because we transmitted the authority to them and they had local implementation." (Tr. 106).

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[5] Expanded Voluntary Separation Incentive Program, for California only (Tr. 82).

As Mr. Squires' testimony was unrefuted, it is conceivable that at McClellan Respondent referred to the EVSIP responses to determine interest of employees in VSIPs. Nevertheless, General Counsel's reliance on Mr. Squires' assertion (General Counsel's Brief, pp. 3, 5) is highly questionable. First, Respondent had no interest in general employee interest in optional retirement as it had sought authority to offer separation incentives, ". . . to employees in skills that would enable the PAQ employee to move into a permanent position . . . " and ". . . use the separation incentives . . . where we may find matching skills." (Res. Exh. 2) and was granted authority for, ". . . the use of incentives . . . to create placement opportunities for PAQs. . . ." (G.C. Exh. 2). Second, Ms. Susan I. Greemore, Equal Employment and Staffing Specialist at Headquarters AFMC, stated that General Counsel Exhibit 2, was, ". . . approval to our request to offer separation incentives in an effort to place. . . . (PAQs)" (Tr. 90); that this authority was used to place four interns (Tr. 91); and that, ". . . there were only actually five remaining to be placed. One ultimately declined placement. And there were only four left that we actually used the incentives to place." (Tr. 91). Mr. Miller, who drafted the request [Res. Exh. 2] (Tr. 102), stated that General Counsel Exhibit 2, granted authority, ". . . to offer separations to employees in order to create the position to place the PAQs (Tr. 103); that this particular VSIP offering was for the exclusive purpose of placing PAQs (Tr. 111-112); that pursuant to the authority granted, it could not offer any VSIP to downsize (Tr. 112). Nor could a VSIP be offered to a surplus employee (Tr. 95, 112). Third, solicitation first was required at Wright-Patterson AFB and at Hill AFB, where the then remaining PAQs were located, to which EVSIP was wholly inapplicable and the program was unknown to both Ms. Greemore (Tr. 92) and to Mr. Miller (Tr. 105-106). Further, the phase III solicitation was Air Force Materiel Command-wide and Army Materiel Command-wide. Indeed one PAQ was placed at Battle Creek, Michigan. To the extent it has any materiality, although wholly undeveloped on the record, I strongly suspect that Respondent identified the employees holding positions which matched the qualifications of the PAQs and offered a VSIP to those employees.

Conclusion

The Complaint alleges that:

> ". . . Respondent implemented separation incentives for the placement of Palace Aquire Interns (PAQs)" (G.C. Exh. 1(b)), Par. 11); that,

> "Respondent implemented the change described . . . without having provided AFGE Council 214 with notice and . . . opportunity to negotiate concerning the change to the extent required by the Statute" (G.C. Exh. 1(b), (Par. 12); and that,
>
> " . . . Respondent has refused to negotiate in good faith . . . in violation of 5 USC § 7116(a)(1) and (5)." (G.C. Exh. 1(b), Par. 13).

Respondent denied the allegations of Paragraph 11, 12 and 13 of the Complaint (G.C. Exh. 1(d)). Nevertheless, the record shows, without dispute, that Respondent did implement separation incentives for the placement of four PAQs without notice to the Union.

The statute authorizing voluntary separation pay, 5 U.S.C. § 5597, specifically provides that such pay (VSIP) shall be, "In order to avoid or minimize the need for involuntary separations. . . ." (Res. Exh. 1; 5 U.S.C. § 5597(b)) and conditions payments, inter alia, "to employees within such occupational groups or geographic locations, or subject to such other similar limitations or conditions, as the Secretary may require," (id., (c)(2)). Respondent exercised a management right under § 6(a)(1) and (2) of the Statute to request authority to pay separation incentives where it found matching skills to enable PAQs to move into permanent positions, and the Secretary further exercised a right of management, as directed by § 5597, to limit payment of separation incentives to regular retirement eligibles solely to create placement opportunities for PAQs. Cf., Headquarters, Defense Logistics Agency, Washington, D.C.,

22 FLRA 875, 880 (1986). Respondent had no duty to bargain

on the substantive decision to offer separation incentives.

The duty to bargain applies when management changes conditions of employment. Department of Health and Human Services, Social Security Administration, 24 FLRA 403, 405 (1986); U.S. Customs Service (Washington, D.C.); and U.S. Customs Service Northeast Region (Boston, Massachusetts), 29 FLRA 891, 898 (1987). The offering of separation incentives did not change the conditions of employment of the PAQs. Their conditions of employment encompassed placement in permanent positions after completion of training. Were conditions of employment of regular retirement eligible employees, with matching skills to the PAQs to be placed, changed by the offer of voluntary separation incentives? I do not believe so; however, General Counsel has asserted that the Union has an interest in making sure that the employees know what they get into by accepting a VSIP. Would conditions of employment be changed if there were retirement eligible employees, with matching skills to the PAQs to be placed, to whom separation incentives were not offered? Possibly. In this regard, General Counsel's suggestion that the Union has an interest in making sure that they were offered fairly is valid. Would conditions of employment of regular retirement eligible employees without matching skills be changed because they were not offered separation incentives? Emphatically, no, and General Counsel's plaint that there ". . . was never any general solicitation of volunteers for VSIPs. . . ." (General Counsel's Brief, p. 5), is wholly fallacious. The statute authorizing VSIP payments, as noted, specifically limits payments to ". . . such occupational groups . . . or . . . other limitations or conditions, as the Secretary may require." Here, the Secretary limited, ". . . the use of incentives for regular retirement eligibles . . . to create placement opportunities for PAQs. . . ." (G.C. Exh. 2). The VSIPs involved could not be offered to employees in general; could not be used except to create placement opportunities for PAQs, and, accordingly, could not be offered to employees without matching skills to the PAQs to be placed; and, of course, could not be offered to downsize nor could it be offered to a surplus employee. As pertains to the duty to bargain, "affect" and "change" are equivalent terms, so that an action which affects conditions of employment is subject to a duty to bargain even though, strictly speaking, there is not a change in conditions of employment, e.g., as here, if the VSIPs were not offered at a particular phase [level] to all employees with matching skills to the PAQs to be placed. Further, a "change" in conditions of employment requires bargaining only if the reasonably foreseeable effect of the change on conditions of employment is more than de minimis.

Department of Health and Human Services, Social Security Administration, 24 FLRA 403, 407-408 (1986); Veterans Administration Medical Center, Phoenix, Arizona, 47 FLRA 419, 422-423 (1993).

Assuming that conditions of employment were affected, Respondent asserts that, notwithstanding that the MLA expired the day before VSIP was enacted, VSIP is so inextricably related to incentives under the Voluntary Early Retirement Act, which is specifically noted in the MLA, and to the provisions of Article 16 of the MLA, VSIP was an aspect of a subject covered by the agreement. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004, 1016-1019 (1993); U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., 51 FLRA No. 103 (1996)(Slip opinion pp. 4-6). I do not agree with Respondent's assertions that notice of VSIPs was not required because there were not 50 or more at any activity (Res. Exh. 4, Art. 16, Sec, 16.01 a.(1)) nor as many as five at any one location (id. Sec. 16.01 a.(2)), for the reason that the notification requirements set forth in Sec. 16.01, specifically are directed to, and conditioned upon, the existence of a reduction in force and/or transfer of function. Here, there was neither. Indeed, as noted above, VSIPs could not be used to downsize nor could a VSIP be offered to a surplus employee. Accordingly, the notice provisions of Sec. 16.01 of the MLA had no application to the offer of VSIPs.

Section 16.03 c. of the Agreement had provided as follows:

> "c. At such time as a reduction in force has been announced, the Employer shall meet individually with affected employees eligible for optional or involuntary retirement and who request it to explain its benefits." (Res. Exh. 4, Article 16, Section 16.03 c.).

Even though the Agreement has expired, the parties have continued to observe its provisions. Further, although there was no reduction in force announced, the obligation that Respondent, upon request, meet individually with each employee eligible for optional or involuntary retirement to explain its benefits, certainly is broad enough to include VSIP, which is an optional retirement benefit, and foursquare within the expressed purpose of Section 16.03, namely to provide employees eligible for optional retirement information concerning that option. Consequently, General Counsel's assertion that the Union had an interest in

insuring that employees be informed about advantages and disadvantages of VSIP, had been resolved by the parties by their agreement,
which Respondent continues to observe, and Respondent was not obligated to bargain further on this matter.

Section 16.03 of Article 16 is entitled, "Reducing Impact of RIF" and subsection b. provides as follows:

> "b. The Employer shall request, when appropriate, that the OPM determine that the agency is undergoing a major reduction in force for the purpose of authorizing voluntary retirements under 5 USC 8336(d)(2)." (Res. Exh. 4, Art. 16, Sec. 16.03 b.).

I agree with Respondent that VSIP, like VERA, has as its purpose to avoid or minimize the need for involuntary separations due to a RIF; but I do not agree that because Section 16.03b. of the Agreement states that to reduce the impact of RIF, the Employer shall, in effect, ask OPM for authority to offer VERA, the Agreement also "covers" VSIPs. As noted, the VSIP statute was not enacted until after the Agreement had expired so that it could not by any stretch of the imagination have been contemplated when the Agreement was negotiated. Equally important, under 5 U.S.C. § 8336(d)(2), VERA applies, when authorized, to all employees in a geographic area; but 5 U.S.C. § 5597 permits the limitation of the payment of VSIPs, ". . . as the Secretary may require", including, but not limited to, employees within an occupa-tional group. Because the parties included VERA in the Agreement does not mean the VSIP, a very different benefit payable to selected occupational groups, which was enacted after the Agreement had expired, was also "covered by" the expired Agreement. There had been no opportunity to consider the impact and implementation of paying voluntary severance incentives to selected employees and, because entitlement for the benefit was wholly different than entitlement for VERA, it was not "covered by" the expired Agreement. Moreover, the Authority has held that when an agreement has expired, ". . . continuation of individual provisions, by operation of law
. . . has never been held to constitute a collective bargaining agreement." United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas, 51 FLRA No. 68 (1996)(Slip opinion, p. 8) (hereinafter, "INS, Del Rio"). A fortiori, there being no collective bargaining agreement, there was no "contract" to which VSIP could have been subject.

Respondent also argues that, ". . . the impact and implementation of VSIP can only be concluded to be a union initiated mid-term issue, and clearly precluded by INS. . . ." (Respondent's Brief, p. 9). It certainly is true that the Authority, in INS, Del Rio, supra, held that,

> "It is fundamental to the definition of 'mid-term' bargaining that it take place during the term of an existing collective bargaining agreement . . . the continuation of individual provisions, by operation of law, to govern aspects of the parties' relationship during a period following expiration of a term agreement, has never been held to constitute a collective bargaining agreement." (Id., Slip opinion at pp. 7-8).

However, I do not agree with Respondent's reliance on INS, Del Rio. As indicated above, INS, Del Rio, stands for the proposition that when a collective bargaining agreement has expired there is no collective bargaining agreement remaining which could preclude the obligation to bargain on the impact and implementation of a change of conditions of employment because "covered by", the agreement of the parties. The "mid-term" bargaining argument of Respondent is without merit inasmuch as the mid-term bargaining holding of INS, Del Rio, is wholly inapplicable to an agency's change of conditions of employment. Whether or not there is, or is not, a collective bargaining agreement, an agency's change of conditions of employment gives rise to an obligation to bargain on the impact and implementation of that change if it is more than de minimis. In INS, Del Rio, the agency changed nothing but, ". . . the Union requested, . . . 'mid-term bargaining in regards to the current policy of assigning Agents. . . .'" (id., Slip opinion, p. 3). Accordingly the Authority in INS, Del Rio, supra, had no occasion to consider, nor did it make any reference to, an agency's duty to bargain on the impact and implementation of a change of conditions of employment.

Consequently, as the availability of VSIPs concerned all employees of Respondent with skills matching the PAQs sought to be placed, the conditions of employment of employees at each phase (level) with matching skills would have been affected to the extent that each have an opportunity to be considered for a VSIP. If this impact were more than de minimis, Respondent violated its obligation to give the Union notice and opportunity to bargain inasmuch as the record does not show that Respondent

gave each employee with matching skills the opportunity, at each level, to be considered for a VSIP[6], and it is conceded that Respondent gave the Union no notice.

The Authority has set forth the standard to determine whether a change is de minimis. First, in Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA 827 (1985); and second, in Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986) where it stated, in pertinent part, as follows:

> ". . . In discussing the de minimis standard in Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, . . . [supra] the Authority identified a number of factors to be considered in determining whether a particular change in conditions of employment was more than de minimis. The factors identified were (1) the nature of the

[6] Respondent Exhibit 2 had stated, in part, that, "There are six Palace Aquires (PAQs) at Hill AFB who will need to be placed. However, Hill AFB will not be in a position to offer incentives at their location. . . ." (Res. Exh. 2); Res-
pondent Exhibit 5-b-1 had stated, in part, ". . . Wright-Patterson Air Force Base, Ohio, will be unable to place the PAQs. . . ."; and Respondent Exhibit 6 stated, in part, that, "b. Wright-Patterson AFB was able to place four without the use of incentives. . . .", and the attachment to Respondent
Exhibit 6 showed that three incentives were offered and accepted at McClellan AFB, and that one incentive was offered and accepted at Battle Creek, Michigan.

Specifically, as set forth hereinabove, Respondent presented no testimony as to what notice was given to which employees at any level, stating only that the authority granted was, ". . . transmitted . . . to them and they had local implementation." (Tr. 106).

Since the record does not show that Respondent at any level offered every employee with matching skills the opportunity to be considered for a VSIP, it is unnecessary to decide whether the failure to give the Union notice, standing alone, would constitute a violation where Respondent had, despite the absence of notice to the Union, fully complied with the only valid bargaining interest shown or asserted, namely, that VSIPs be offered to every employee with matching skills.

> change (for example, the extent of the change in work duties, location, office space, hours, loss of benefits or wages, and the like); (2) the duration and frequency of the change; (3) the number of employees affected or foreseeably affected by the change; (4) the size of the bargaining unit, and (5) the extent to which the parties established, through negotiations or past practice, procedures and appropriate arrangements concerning analogous changes in the past.
>
> . . .
>
> "We have reassessed and modified the recent de minimis standard. In order to determine whether a change in conditions of employment requires bargaining in this and future cases, the pertinent facts and circumstances presented in each case will be carefully examined. In examining the record, we will place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.
>
> "As to the number of employees involved, this factor will not be a controlling consideration. It will be applied primarily to expand rather than limit the number of situations where bargaining will be required. For example, we may find that a change does not require bargaining. However, a similar change involving hundreds of employees could, in appropriate circumstances, give rise to a bargaining obligation. The parties' bargaining history will be subject to similar limited application. As to the size of the bargaining unit, this factor will no longer be applied." (24 FLRA at 407-408).

The Authority consistently has followed this standard. U.S. Customs Service (Washington, D.C.); and U.S. Customs Service Northeast Region (Boston, Massachusetts), 29 FLRA 891, 898 (1987); Veterans Administration Medical Center, Phoenix, Arizona, 47 FLRA 419, 422-423 (1993).

Here, availability of VSIPs was: (a) a one time opportunity; (b) available only to provide for placement of PAQs; and (c) available only during a short time frame which

ended September 30, 1994. Respondent sought, and was granted, authority to pay VSIPs only to employees with skills matching the PAQs it sought to place; and Respondent offered only four VSIPs, inasmuch as, at the time they were offered and accepted, only five PAQs remained unplaced and one had declined placement. At the time it requested VSIP authority, four months before it was granted (Res. Exh. 2; G.C. Exh. 2), Respondent stated that, ". . . Hill AFB would not be in a position to offer incentives at their location. . . ." (Res. Exh. 2) and on May 31, 1994, Respondent stated: (a) ". . . Wright-Patterson Air Force Base . . . will be unable to place the PAQs"; and (b) "Request . . . extension to offer separation incentives . . . This will allow us time to advertise throughout the command . . . ." (Res. Exh. 5b-1).

Recognizing that, as the Authority has noted, a change in a condition of employment need not be substantial but need only be more than de minimis, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 45 FLRA 574, 575 n.2 (1992), the interest of all employees at each [level] phase with matching skills having an equal opportunity to be considered for a VSIP, standing alone, was more than de minimis; but having carefully examined all the facts and circumstances and equitable considerations, I conclude that the effect was not more than de minimis. Thus, although there is a dearth of evidence as to notice given at each phase [level], the record strongly implies that Respondent did advertise throughout the Command; and that it solicited interest of all employees with matching skills at Hill and Wright-Patterson AFBs. Thus, it would appear that Respondent did give all employees with matching skills within Materiel Command notice and an opportunity for consideration. When the VSIPs were offered at Phase III, there were only four offered. The interest of all employees with matching skills to have an opportunity to be considered for a VSIP, while more than de minimis, nevertheless, was slight. The authority to pay VSIPs has expired and the justification for VSIPs terminated with the placement of the four PAQ remaining to be placed.

If it should be determined, contrary to my conclusion above, that the change in conditions of employment was more than de minimis, nevertheless, I would deny General Counsel's request for a status quo ante remedy. A request for a status quo ante remedy must, as General Counsel states, be considered in light of the factors set forth by the Authority in Federal Correctional Institution, 8 FLRA 604 (1982). Here, while the Union (1) received no notice of Respondent's offering VSIPs, and therefore, (2) no opportunity to request bargaining over the impact and

implementation of the offer of VSIPs, (3) Respondent's conduct was not willful in light of its reliance on Article 16 of the MLA and decisions of the Authority, inter alia, in U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004, 1016-1019 (1993) and INS, Del Rio, 51 FLRA No. 68 (1996). Although I have rejected Respondent's interpretation and application of Article 16 and its reliance on Authority decisions, I can not conclude that its reliance had no colorable basis.

Further, while, if it were determined, contrary to my conclusion, that employees were adversely affected by the failure of Respondent to give the Union notice of the offering of VSIPs, (5) a status quo ante order would disrupt or impair the efficiency and effectiveness of Respondents's operations; would unfairly and impermissibly impact on those employees who received VSIPs and retired from federal service; and any order of the payment of a VSIP would be of doubtful validity under 5 U.S.C § 5596. Accordingly, I would grant only a cease and desist order and posting. No employee lost any pay or allowance or differential which would have been earned or received but for the failure to give the Union notice. Accordingly, a cease and desist order, and posting, would adequately protect employees from any future adverse effect of the failure to give the Union notice of a change of condition of employment.

For the foregoing reasons, it is recommended that the Authority adopt the following.

ORDER

The Complaint in Case No. CH-CA-50320 be, and the same is hereby, dismissed.

____

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 12, 1996
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. CH-CA-50320, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Mr. William P. Krueger
HQ AFMC/JAG
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Dated: June 12, 1996
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