UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE NAVY, NAVY EXCHANGE, NAPLES, ITALY AND U.S. DEPARTMENT OF THE NAVY, NAVY EXCHANGE SERVICE CENTER, NAPLES, ITALY AND U.S. DEPARTMENT OF THE NAVY, NAVY EXCHANGE, SIGONELLA, ITALY Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3712, AFL-CIO Charging Party	Case Nos. CH-CA-60197 CH-CA-60198 CH-CA-60199

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 **SEPTEMBER 23, 1996**, and addressed to:

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

SAMUEL A. CHAITOVITZ

Chief Administrative Law Judge

Dated: August 20, 1996
Washington, DC

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

MEMORANDUM DATE: August 20, 1996

TO: The Federal Labor Relations Authority

FROM: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE NAVY,
NAVY EXCHANGE, NAPLES, ITALY
AND U.S. DEPARTMENT OF THE NAVY,
NAVY EXCHANGE SERVICE CENTER,
NAPLES, ITALY AND U.S. DEPARTMENT
OF THE NAVY, NAVY EXCHANGE,
SIGONELLA, ITALY

Respondents

and Case Nos. CH-CA-60197
CH-CA-60198
CH-CA-60199

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3712, 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 NAVY, NAVY EXCHANGE, NAPLES, ITALY AND U.S. DEPARTMENT OF THE NAVY, NAVY EXCHANGE SERVICE CENTER, NAPLES, ITALY AND U.S. DEPARTMENT OF THE NAVY, NAVY EXCHANGE, SIGONELLA, ITALY Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3712, AFL-CIO Charging Party	Case Nos. CH-CA-60197 CH-CA-60198 CH-CA-60199

Rondy L. Waye
For the Respondents

Susanne S. Matlin, Esq.
For the General Counsel

Robert A. Hochberger, President
For the Charging Party

Before: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.* (the Statute).

Based upon unfair labor practice charges filed by the Charging Party, American Federation of Government Employees, Local 3712, AFL-CIO (the Union), a Consolidated Complaint

and Notice of Hearing was issued by the Regional Director for the Chicago Region of the Federal Labor Relations Authority. The consolidated complaint alleges that the Respondents, U.S. Department of the Navy, Navy Exchange, Naples, Italy (Naples), U.S. Department of the Navy, Navy Exchange Service Center, Naples, Italy (NESC), and U.S. Department of the Navy, Navy Exchange, Sigonella, Italy (Sigonella), violated section 7116(a)(1) and (5) of the Statute by giving bargaining unit employees bonuses instead of merit pay increases based on their annual performance ratings commencing in July 1995, without providing the Union with notice and an opportunity to negotiate over such change in pay practice. Respondents deny that a breach of the duty to bargain occurred in the circumstances of this case.

A hearing was held in Naples, Italy, on May 8-9, 1996, at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondents filed timely post hearing briefs which have been carefully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union, AFGE Local 3712, is the exclusive bargaining representative for certain non-appropriated fund employees located at NESC and the Navy Exchanges in Naples and Sigonella. There is no dispute that the Union was first certified as exclusive representative of the approximately 150 employees at the Naples facility sometime before management's decision to adopt a "pay for performance" plan in 1991. The Union thereafter became the exclusive representative for the 15-20 employees at NESC in late 1993, and for the 120 employees located at Sigonella in March 1994. A collective bargaining agreement covering the employees at Naples and NESC was negotiated and became effective on April 25, 1994, and a separate agreement containing similar provisions became effective for the employees at Sigonella on September 23, 1994. Both agreements were in effect at all times material herein.[1]

A. Respondents' Adoption of a "Pay for Performance" Plan

[1] At the time of the hearing, the parties were negotiating a consolidated agreement to cover the employees at all three locations.

Prior to October 1991, Respondents had no "pay for performance" plan to reward their employees whose work exceeded expectations. On October 16, 1991, the Navy Exchange Service Command Headquarters (NEXCOM)--which sets policy and provides guidance for all Navy Exchanges world-wide--issued its "Pay Banding" manual.[2] The manual announced that a new pilot program was being established which would place emphasis on employees' job performance in determining pay raises. As set forth in the manual, employees would be evaluated each year on their anniversary dates and would receive merit pay increases according to the following schedule: "outstanding" employees would receive merit pay increases of between 6-8%; "very good" employees between 3-5%; and "good" (i.e., fully successful) employees between 0-2%. At the end of the manual, in a section entitled "Performance Awards," which indicated that existing awards programs (such as Quality Increases and Superior Accomplishment Recognition Awards) would continue,[3] there was a statement that "[p]erformance awards may be given to Pay Banding associates in lieu of merit increases, **subject to prior authorization of NEXCOM.**" [Emphasis in original.]

The pilot Pay Banding program was implemented for the Respondents' employees in August 1992. At the time of the program's implementation, the Union was not yet the exclusive representative of the employees at NESC or Sigonella, but did represent the employees at Naples. According to Margie S. Hardin, who has been the Personnel Manager for the Respondents since 1989, she prepared and sent a memorandum along with a copy of the Pay Banding manual to the Union approximately 30 days before the program's implementation. Ms. Hardin neither testified concerning the contents of the memorandum nor submitted a

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[2] The Pay Banding program was instituted by NEXCOM in order to aid in recruiting and retaining the best employees; to reward employees performing their jobs at a high level; and to increase management's flexibility to set new employees' starting salaries in the middle of a pay grade rather than always at its initial step.

[3] The record evidence indicates that a Quality Increase is a within-grade step increase awarded regardless of the employee's eligibility based on time in grade, and that a SARA is a one-time award bestowed upon an employee for a "special act" of a non-recurring nature.

copy of the document itself.[4] Rather, she merely testified that the Union did not object to Pay Banding or seek to bargain about any issue surrounding its implementation. By contrast, the Union's president, Robert Hochberger, testified that to his knowledge the Union never had an opportunity to bargain over the implementation of the Pay Banding program.[5]

I conclude that the Union did not receive notice and an opportunity to bargain before the Pay Banding program was implemented for the Respondents' employees in August 1992. Thus, I find it improbable that Ms. Hardin's memorandum to the Union, embodying proof that the Respondents fulfilled their statutory bargaining obligations, would have been destroyed after two years, and at a time when no collective bargaining agreement covering the affected employees had yet been negotiated. I find it even more improbable given that another document dating back over four years was introduced at the hearing by the same witness who claimed to have routinely destroyed the memorandum in question after two years. I also found Ms. Hardin's recollection of events occurring over four years ago somewhat uncertain. For example, she testified that the Union was given notice of the new Pay Banding program about 30 days before it was introduced and the employees were given training concerning

[4] According to Ms. Hardin, a copy of the memorandum had been placed in her 1991 file, but was routinely purged after two years elapsed in accordance with general operating procedures. I note, however, that a training log dated May 4, 1992, concerning the implementation of the Pay Banding pilot program was retained for over four years and submitted by Ms. Hardin as an exhibit at the hearing in this case on May 8, 1996. I find it implausible that Ms. Hardin would retain a list of employees who had attended training on the new Pay Banding program, but would destroy a memorandum notifying the Union of such a major change in their conditions of employment.

[5] Hochberger did not become the Union's president until 1993, and therefore would not have been the recipient of Ms. Hardin's memorandum if it had been sent. Moreover, Hochberger's testimony that he discussed the matter with the Union president at that time--Maria Brissett, who is still employed at Sigonella--is hearsay and not entitled to great weight. However, his testimony along with certain inconsistencies and implausibilities in Ms. Hardin's testimony, persuade me that the Union was not given adequate notice and an opportunity to bargain over the new Pay Banding program.

how the program would work. Yet she later acknowledged that the training occurred in May 1992, well before the program was implemented in August 1992, and thus months before the Union was supposed to have been given notice of the new pilot program.

B. Respondents' Administration of Pay Banding Between August 1992 and July 1995

The record indicates, and the parties stipulated, that from the inception of the pilot Pay Banding program in August 1992, until July 1995, the Respondents' employees at all three facilities who qualified on the basis of their annual performance ratings were given merit pay increases within the percentage ranges set forth in the Pay Banding manual.[6] Thus, for example, Union president Hochberger received a 7% merit pay increase in March 1993 based on his "outstanding" rating; a 3.5% merit pay increase in March 1994 for his "very good" rating; and a 3% merit pay increase in March 1995 for again being rated "very good." No eligible employee at any of the three locations received a "bonus" or "performance award" in lieu of a merit pay increase during that period.[7]

The foregoing practice was consistent with a pamphlet entitled "Pay Banding in the Navy Exchange System," prepared and distributed by NEXCOM to all affected employees before the Pay Banding program went into effect. That pamphlet described Pay Banding as a "pay for performance" system under which covered non-appropriated fund employees such as those involved in this proceeding would receive "merit increases" as of the first pay period after their respective anniversary dates based on the ratings they achieved in their annual performance reviews. The amount of their merit increases was stated in terms of percentage ranges for each

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[6] The only exception occurred at Sigonella for a brief period of time from February to May 1995, when unit employees were denied merit pay increases and instead were made subject to the "new" Pay Banding plan which called for bonuses in lieu of merit pay. Through the terms of a settlement agreement that resolved a pending unfair labor practice case, the affected employees were given merit pay increases effective retroactively, and the "old" Pay Banding program was reinstituted for the Sigonella employees.

[7] Respondents testified that the terms "performance award" and "bonus" are synonymous and used interchangeably. In view of my ultimate disposition of this consolidated case, I need not determine whether the terms are synonymous.

possible performance rating. There was no mention of "bonuses" in connection with the Pay Banding system.[8]

The Pay Banding practice between August 1992 and July 1995 also was consistent with a provision in the collective bargaining agreement covering the employees at Naples and NESC which became effective on April 25, 1994. Thus, Article 8 ("Wages and Benefits"), Section 3, provides in pertinent part: "The Employer further agrees to maintain the status quo of the current pay system, which includes holiday pay, Sunday pay, *work performance review merit increases*, and wage rate schedule increases." [Emphasis added.] As noted above, when the parties negotiated the foregoing provision, the uniform practice concerning work performance review merit increases was that eligible employees would receive merit pay increases, the size of which being determined (within pre-established percentage ranges) by the employees' annual performance ratings.

C. Respondents Change the Practice of Awarding Merit Pay Increases in July 1995

According to the Respondents' witnesses, the practice of awarding eligible employees a percentage of their pay as merit increases each year raised labor costs beyond the point where they could be offset by sales increases. Consequently, the Respondents' managers discussed with Personnel Manager Hardin the possibility of requesting from NEXCOM, pursuant to the terms of the 1991 Pay Banding manual, the authorization to pay bonuses rather than merit increases to eligible employees. Ms. Hardin made the request on their behalf and received such authorization from NEXCOM by memorandum dated May 31, 1995.[9] Respondents

[8] The pamphlet did indicate, however, that the awarding of SARAs (and Quality Increases) would continue unchanged. As described in the pamphlet, SARAs were "cash awards given for outstanding accomplishments in special situations over a limited period." As such, the one-time cash payments given to SARA recipients for special acts were described as what we commonly understand to be "bonuses," although that term was not used.

[9] Although the General Counsel contends that the language of NEXCOM's memorandum did not clearly authorize the payment of bonuses, I conclude that it did. Thus, the purpose of the memorandum, as stated in paragraph 1, was "to grant blanket authorization [as requested by the Respondents] for all activities . . . to give performance awards to associates covered by the pay banding 'pilot' program, instead of merit increases." [Emphasis in original.]

exercised their authorization by granting bonuses to all employees who became eligible for merit pay increases in or after July 1995. Thus, if an employee (such as Angelo Pizzo) would have been given a 6% merit pay increase in November 1995 for having been rated "outstanding," he received a 6% bonus instead.[10] As a result, Pizzo and other similarly situated employees experienced the following adverse effects: the bonuses were one-time cash payments which did not increase the employees' hourly pay rates as merit increases would have; cost-of-living allowances (COLAs) and merit increases in the future therefore would be lower because they would be computed as a percentage of a reduced base; similarly, employees' retirement annuities (calculated in part on their highest three years' earnings) would be lower; and payments for

accrued annual leave when employees resigned or retired from federal service would be at lower hourly rates.

Respondents' change in practice from uniformly awarding merit pay increases to virtually always awarding performance bonuses as of July 1995 was concededly accomplished without notice to or bargaining with the Union. As explained by the Respondents' witnesses, they were advised by the Personnel Manager, Ms. Hardin, that no notice or bargaining was required because NEXCOM's 1991 Pay Banding manual always provided the option to award bonuses in lieu of merit pay increases and, therefore, no change in conditions of employment occurred when management exercised that option in July 1995. When asked about the contractual provision requiring the status quo to be maintained for unit employees concerning performance review merit pay increases, Ms. Hardin acknowledged the continuing vitality of the provision. However, she claimed that the status quo was being maintained by the substitution of bonuses for merit pay increases because the 1991 Pay Banding manual at all times allowed for that option to be exercised with the prior authorization of NEXCOM.

Conclusions of Law

A. Respondents Violated the Duty to Bargain

1. The applicable law

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[10] It appears that one or two unit employees received merit pay increases rather than bonuses after July 1995 for unspecified reasons, but that the almost universal practice was to award bonuses in lieu of merit pay increases as of July 1995.

The parties stipulated that all of the employees involved in this case are non-appropriated fund employees. As such, their pay and benefits are not specifically provided for by federal statute and therefore constitute negotiable conditions of employment under section 7103(a)(14) of the Statute. *See Fort Stewart Schools v. FLRA*, 495 U.S. 641, 648-50 (1990). *See also National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service*, 37 FLRA 147, 151 (1990); *International Association of Machinists, et al. and U.S. Department of the Treasury, Bureau of Engraving and Printing*, 43 FLRA 1202, 1214 (1992); *American Federation of Government Employees, Local 1857 and U.S. Department of the Air Force, Air Logistics Center, Sacramento, California,* 36 FLRA 894, 899-901 (1990)(involving pay and fringe benefits of NAFI employees).

By discontinuing the three-year practice of awarding merit pay increases to all unit employees whose annual performance ratings entitled them to such awards, and awarding the employees bonuses instead, the Respondents clearly changed their conditions of employment as that concept is commonly understood. That is, substituting bonuses for merit pay increases meant that the employees' hourly pay rates remained the same and that other benefits based on such hourly rates--such as COLAs, annual leave buyouts and retirement annuities--would be diminished accordingly. Therefore, unless otherwise excused, the Respondents had an obligation to notify the Union and bargain upon request concerning their decision to grant bonuses in lieu of merit pay increases to deserving employees. *92 Bomb Wing, Fairchild Air Force Base, Spokane, Washington (Fairchild AFB),* 50 FLRA 701, 704-05 (1995). It is undisputed that the Respondents implemented the change in conditions of employment as of July 1995 without notifying or bargaining with the Union. In these circumstances, the Respondents violated section 7116(a)(1) and (5) of the Statute unless their failure to notify and bargain with the Union is otherwise excused.

2. Respondents' defenses must be rejected

Respondents assert that no duty to bargain existed with regard to the substitution of bonuses for merit pay increases in July 1995 because the Union had been given notice of the Pay Banding program (which included the option of awarding bonuses) before its implementation in August 1992 and the Union neither objected to nor sought to bargain over any aspect of the Pay Banding manual's subject matter. I reject the Respondents' assertion for several reasons.

First, I have previously determined, based on credibility resolutions and other factors, that the Respondents, through Ms. Hardin, did not properly notify the Union and provide an opportunity for bargaining over the Pay Banding program. There is no evidence that such notice was given, and the explanation offered for the absence of evidence is contradictory and inherently suspect.[11]

Second, even if the Respondents had given notice of the Pay Banding program before they implemented it in August 1992, the Union was not then certified as the exclusive represen-tative of the employees located at NESC and Sigonella. Accordingly, whatever justification such notice to the Union might have afforded the Respondents with respect to the employees at Naples who were represented at that time, it provides none at all for the other employees who never had the opportunity to bargain through their exclusive representative concerning the establishment of or changes to the Pay Banding program directly affecting their conditions of employment.

Third, the Pay Banding manual cannot overcome the terms of the parties' collective bargaining agreement, specifically Article 8, Section 3. That is, the parties negotiated a contract provision in April 1994--at least 20 months after the Pay Banding program went into effect--which required management to maintain the status quo of the current pay system, including "work performance review merit increases[]." As the Respondents have stipulated, only merit pay increases were awarded to unit employees under the Pay Banding program until July 1995. Accordingly, when the parties negotiated the status quo provisions of Article 8, Section 3, and agreed to preserve "work performance review *merit increases*," they were reflecting the uniform practice of the Respondents until that time. Accordingly, I reject the Respondents' reliance on the Authority's decision in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993)(*SSA*). In *SSA*, the Authority held that an agency could refuse to bargain over a matter already "covered by" the parties' agreement; it did not authorize an agency to take unilateral action inconsistent with the terms of such agreement. Rather, in a companion case, *Internal Revenue*

[11] As the Respondents recognize, the attendance of Maria Brissett, the Union's president at the time, at a Pay Banding training session on May 4, 1992, would not satisfy the notice requirement to the Union. Rather, the training log was offered merely for the purpose of demonstrating that the Union was aware that a Pay Banding program was going to be started.

Service, Washington, D.C., 47 FLRA 1091 (1993), the Authority made clear that it would interpret a provision of the parties' negotiated agreement when relied upon as a defense to--or authorization for--unilateral action taken. Thus, the Respondents could have prevailed against the General Counsel's allegation that an unlawful unilateral change in conditions of employment occurred in July 1995 by showing that Article 8, Section 3 of the parties' agreement authorized such a change. Unfortunately for the Respondents, the language of that provision clearly supports the opposite conclusion.[12]

B. The Appropriate Remedy

Having concluded that the Respondents violated section 7116(a)(1) and (5) of the Statute as alleged in the complaint, I must next determine what remedy will effectuate the purposes and policies of the Statute in the circumstances of this case.

The General Counsel has requested a *status quo ante* order requiring the Respondents to reinstitute the practice of granting performance-based merit pay increases to all eligible employees; a make-whole order under which all employees who received bonuses in lieu of merit pay increases as of July 1995 would be compensated for the difference between the bonuses they received and the merit

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Similarly, the Respondents' reliance on *Defense Logistics Agency, Defense General Supply Center, Richmond, Virginia*, 20 FLRA 512 (1985)(*DLA*), is misplaced. In *DLA*, the Authority decided that a union had clearly and unmistakably waived its right to bargain over management's decision to remove certain employees from the flexitime program, where the applicable agreement contained a specific provision that the administration of its terms would be governed by all pre-existing published agency policies and regulations; one such regulation specifically provided for management's discretion in determining which employees should be removed from flexitime; and the union acquiesced on three prior occasions when management exercised that discretion to remove certain unit employees from flexitime. By contrast, the agreement in the instant case does not incorporate all pre-existing agency policies and regulations as limitations on the administration of the agreement's terms and the Union never acquiesced in the substitution of bonuses for merit pay increases because the Respondents never sought to do so prior to July 1995.

pay increases they should have received; and the standard orders requiring the Respondents to bargain upon request and to post appropriate notices to employees.

Respondents contend that, if a violation is found, a *status quo ante* remedy should be denied under the criteria set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982)(*FCI*), for determining when such a remedy is appropriate in a case involving a violation of the duty to bargain over impact and implementation. They further emphasize that a requirement to pay the affected employees pursuant to the General Counsel's request would harm the profitability of Respondents' business.

I conclude, in agreement with the General Counsel, that a *status quo ante* order and a make-whole remedy are appropriate in this case. As discussed above, the subject matter involved in this proceeding--whether the Respondents' non-appropriated fund employees should receive merit pay increases or bonuses in connection with their annual performance reviews--is a substantively negotiable condition of employment rather than a matter to be determined by management subject only to the duty to bargain over impact and implementation. Accordingly, the *FCI* criteria relied upon by the Respondents are inapplicable in this case. Rather, in cases where, as here, the violation found is a unilateral change in substantively negotiable conditions of employment, the Authority customarily grants *status quo ante* orders absent special circumstances. As the Authority has explained, such a remedy is necessary in order to avoid rendering the bargaining obligation meaningless. That is, if the only consequence of an agency's unilateral change in a substantively negotiable condition of employment were an order to bargain prospectively over the matter, there would be no incentive for that agency to meet its statutory obligation to provide the exclusive representative of its employees with notice and an opportunity to negotiate over the decision itself before any changes were effectuated. *See, e.g., Fairchild AFB,* 50 FLRA at 705; *Veterans Administration, West Los Angeles Medical Center, Los Angeles, California*, 23 FLRA 278, 281 (1986).

In the instant case, the only special circumstance raised by the Respondents, although not identified as such, is that the *status quo ante* and make-whole remedies requested by the General Counsel would harm the Respondents' profitability. Even if such a financial consequence would occur as a result of issuing the requested order, which is

not altogether clear from the record evidence,[13] this is not a special circumstance justifying the denial of *status quo ante* and make-whole relief. The Authority has adopted the following approach suggested in an opinion of the D.C. Circuit, *American Federation of Government Employees v. FLRA*, 785 F.2d 333, 337-38 (D.C. Cir. 1986):

> [T]he general argument that budget cuts (coupled with a claim that some disruption will result from *status quo ante* relief) is a legitimate reason for the FLRA to exercise its discretion to deny *status quo ante* relief will not be upheld. If the . . . argument were accepted, it could be stretched to preclude effective relief in any case where the employer is motivated by budgetary considerations. But economic hardship is a fact of life in employment, for the public sector as well as the private. Such monetary considerations often necessitate substantial changes. If an employer was released from its duty to bargain whenever it had suffered economic hardship, the employer's duty to bargain would practically be non-existent in a large proportion of cases. Congress has not established a collective bargaining system in which the duty to bargain exists only at the agency's convenience or desire, or only when the employer is affluent.

See Service Employees International Union, Local 556 and U.S. Department of the Navy, Navy Exchange, Pearl Harbor, Hawaii, 37 FLRA 320, 334-35 (1990).

The foregoing discussion is not intended to suggest that the collective bargaining process created by Congress for the federal service is indifferent to whatever financial hardships the Respondents may have been experiencing as a result of its Pay Banding program. If the Respondents truly needed relief from the cumulative effects of granting employees annual merit pay increases, there were ways to seek that relief under the Statute. Thus, the Respondents could have notified the Union of the problems they were experiencing and, as they belatedly did at the time of the hearing in this case, initiated negotiations over the matter. If the parties failed to reach an accord, the matter could be presented to the Federal Service Impasses Panel (FSIP) by either party for resolution under section

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[13] I note, for example, that the Respondents appeared to experience profits in certain years when the employees received merit pay increases and experienced losses after the practice was discontinued and bonuses were substituted.

7119 of the Statute. The Respondents' need for relief from the merit pay aspects of the Pay Banding system could have been presented to the FSIP, and the latter could have ordered the parties to place an appropriate provision in their agreement. The Respondents were not free to "correct" the system unilaterally.

Having found that the Respondents violated section 7116 (a)(1) and (5) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Department of the Navy, Navy Exchange, Naples, Italy; U.S. Department of the Navy, Navy Exchange Service Center, Naples, Italy; and U.S. Department of the Navy, Navy Exchange, Sigonella, Italy, shall:

1. Cease and desist from:

(a) Failing and refusing to provide the American Federation of Government Employees, Local 3712, AFL-CIO (the Union), the exclusive representative of certain of their employees, with prior notice of intended changes in the conditions of employment in the bargaining units represented by the Union and, specifically, any intention to award bonuses in lieu of merit pay increases in connection with the employees' annual performance reviews.

(b) Failing and refusing to bargain with the Union concerning the decision to award bonuses in lieu of merit pay increases to unit employees in connection with their annual performance reviews.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Reinstitute the practice which was in effect prior to July 1995 of awarding merit pay increases rather than bonuses to bargaining unit employees in connection with their annual performance reviews, and make whole all such employees for the difference between the bonuses they received and the merit pay increases they should have received.

(b) Give the Union notice of any intention to change the practice of awarding merit pay increases to bargaining unit employees in connection with their annual performance reviews and, upon request, bargain in good faith concerning the decision to effectuate such change.

(c) Post at their respective facilities in Naples and Sigonella, Italy, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the appropriate Director of each facility, and shall be posted at that facility and maintained 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 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, 55 West Monroe, Suite 1150, Chicago, Illinois 60603-9729, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

_____

SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

Dated: August 20, 1996
Washington, D.C.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of the Navy, Navy Exchange, Naples, Italy; U.S. Department of the Navy, Navy Exchange Service Center, Naples, Italy; and U.S. Department of the Navy, Navy Exchange, Sigonella, Italy, violated the Federal Service Labor- Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT fail and refuse to provide the American Federation of Government Employees, Local 3712, AFL-CIO (the Union), the exclusive representative of certain of our employees, with prior notice of intended changes in the conditions of employment in the bargaining units represented by the Union and, specifically, any intention to award bonuses in lieu of merit pay increases in connection with the employees' annual performance reviews.

WE WILL NOT fail and refuse to bargain with the Union concerning the decision to award bonuses in lieu of merit pay increases to unit employees in connection with their annual performance reviews.

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 Federal Service Labor-Management Relations Statute.

WE WILL reinstitute the practice which was in effect prior to July 1995 of awarding merit pay increases rather than bonuses to bargaining unit employees in connection with their annual performance reviews, and make whole all such employees for the difference between the bonuses they received and the merit pay increases they should have received.

WE WILL give the Union notice of any intention to change the practice of awarding merit pay increases to bargaining unit employees in connection with their annual performance reviews and, upon request, bargain in good faith concerning the decision to effectuate such change.

(Activity)

Date: 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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Chicago Region, whose address is: 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: (312) 353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SAMUEL A. CHAITOVITZ, Chief Administrative Law Judge, in Case Nos. CH-CA-60197, CH-CA-60198, and CH-CA-60199, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Rondy L. Waye, Labor Relations Specialist
Office Civilian Personnel Management
European Service Center
PSC 821, Box 121
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National President
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Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: August 20, 1996
Washington, DC