UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: June 7, 1999

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
WASHINGTON, D.C.

Respondent

and Case No. SF-CA-30165
(55 FLRA No. 19)
(55 FLRA 69)

NATIONAL BORDER PATROL COUNCIL,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision on Remand, the service sheet, and the transmittal form sent to the parties. Also enclosed is the Record sent to this office on January 12, 1999.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C. Respondent	
and NATIONAL BORDER PATROL COUNCIL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No. SF-CA-30165 (55 FLRA No. 19) (55 FLRA 69)

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been presented to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision on Remand, 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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 7, 1999**, and addressed to:

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

GARVIN LEE
OLIVER Administrative Law
Judge

Dated: June 7, 1999
Washington, DC

OALJ 99-30

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C. Respondent	
and NATIONAL BORDER PATROL COUNCIL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No. SF-CA-30165 (55 FLRA No. 19) (55 FLRA 69)

William M. Petty
For the Respondent

R. Timothy Shiels, Esq.
For the General Counsel

Deborah S. Wagner, Esq.
For the Charging Party

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION ON REMAND

Statement of the Case

On January 12, 1999, the Authority issued its Decision and Order in the above-captioned proceeding. In that decision, the Authority (Member Wasserman dissenting) announced that it would no longer follow previous decisions which held that an agency violates section 7116(a)(6) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(6), by implementing a change in conditions of employment while the matter is pending before

the Federal Service Impasses Panel (FSIP or the Panel), unless the agency establishes that the implemented change was consistent with the necessary functioning of the agency. Instead, the Authority stated, henceforth it would determine whether an agency which implements a change in conditions of employment has violated section 7116(a)(6) of the Statute based on whether maintenance of the status quo has been directed by impasse procedures or decisions. 55 FLRA 69, 78. The Authority noted that the record before it was unclear whether impasse procedures were violated or whether the Panel had directed the Respondent to maintain the status quo in this case; whether the modified rule announced herein for determining section 7116(a)(6) violations should be applied retroactively; and whether it would be appropriate or feasible for the General Counsel to be permitted to re-litigate this complaint as an independent--rather than a derivative--violation of section 7116(a)(5). Id. at 79 and n.20. Accordingly, the Authority remanded the complaint to the undersigned for further action consistent with its decision. Id. at 79.

Pursuant to the Authority's remand, on January 21, 1999, I ordered the parties to submit and exchange their positions with respect to what, if any, further proceedings are necessary in this case. Consistent with the terms of my Order, the General Counsel and the Union submitted their positions by February 15, and the Respondent submitted its position on February 24, 1999. On March 2, 1999, I held a telephone conference with the parties to discuss future action to be taken in this case in light of the Authority's remand of January 12, 1999 and the parties' responses to my Order dated January 21, 1999. As reflected in my Order dated March 3, 1999, the parties and the undersigned agreed that if the case were not settled by March 19, 1999, the parties would submit a stipulation by April 16, 1999, concerning the actions taken by the Panel following the Union's request for assistance, particularly whether maintenance of the status quo was directed by impasse procedures or decisions. It was further agreed that the parties would submit their briefs by May 21, 1999, addressing (a) whether the Authority's modification concerning the elements necessary to establish a violation of section 7116(a)(6) should be applied to this case in which it arose; (b) whether it would be appropriate to find an independent violation of section 7116(a)(5); and (c) whether any modification of the previously recommended remedy should be made in the event that a violation or violations is/are found.

On April 16, 1999, the parties submitted a "Stipulation of Fact" in this matter, together with a series of Joint

Exhibits. Thereafter, each of the parties submitted a timely and helpful brief addressing the issues identified by the Authority in its remand and by my Order dated March 3, 1999. Such briefs have been carefully considered.

The Parties' Stipulation of Fact [1]

1. The facts, as found by Administrative Law Judge Garvin Lee Oliver in his April 28, 1995 Decision, are accurate, to the extent that they are not modified or in conflict with the facts set forth in this stipulation, and to the extent that no exception has been taken by any Party to a particular fact in a previous filing in Case No. SF-CA-30165 with the Authority.

2. All references to exhibits that were placed into the record shall be as follows: Exhibits of the General Counsel shall be referred to as "G.C. Exhibit" followed by the appropriate number; exhibits of Respondent shall be referred to as "R. Exhibit" followed by the appropriate number.

3. All references to exhibits attached to this Stipulation of Fact[], and thereby incorporated into this stipulation, shall be as "Joint Exhibit" followed by the appropriate number.

4. Use of the phrase "Manual" in this stipulation refers to the Air Operations Manual which Respondent, by letter of September 23, 1992, notified the Union that said Manual would be implemented on October 1, 1992.

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[1] The parties' stipulation includes references to a number of Union requests for Panel assistance which are not directly related to the Respondent's promulgation of the Air Operations Manual ("Manual") that led to the unfair labor practice dispute in this case. Accordingly, the provisions of the Stipulation of Fact set forth herein are limited to those pertaining to the Manual, and correspond to the numbered paragraphs of the Stipulation jointly submitted by the parties. Similarly, any references to the joint exhibits attached to the Stipulation of Fact will be to the number ascribed to the document by the parties.

5. Use of the phrase "Manual dispute" in this stipulation refers to the dispute that led to the filing of the underlying unfair labor practice charge in Case No. SF-CA-30165 concerning the Manual.

6. Following the Federal Service Impasses Panel (FSIP) receipt of the Charging Party's September 11, 1992 request for assistance concerning the Manual dispute, the FSIP notified the Charging Party and Respondent, by a September 15, 1992 letter (G.C. Exhibit 16) that it had received the request for assistance. At the same time the FSIP docketed the matter as Case No. 92 FSIP 238.

7. By letter to the FSIP dated September 25, 1992 (Joint Exhibit 1), the Respondent challenged the Charging Party's request for assistance.

10. On November 16, 1992, the Charging Party and Respondent met with Donna DiTulio of the FSIP to discuss the Manual. . . .

13. On December 15, 16, and 17, 1992, the Charging Party and Respondent met with Mediator Elayne Tempel of the Federal Mediation and Conciliation Service to discuss ground rules for negotiations concerning the matters pending before the FSIP in Case No. 92 FSIP 238 . . . . At the conclusion of the December 17, 1992 meeting, the Mediator declared the Charging Party and Respondent at impasse.

14. By letter of January 12, 1993 (Joint Exhibit 6), the FSIP ordered the Charging Party and Respondent to meet in an informal conference with Staff Associate Jesse Etelson to discuss ground rules for negotiating over the substantive issues raised in Case No. 92 FSIP 238[.]

15. The informal conference was held on January 14, 1993. No agreement was reached at that meeting.

16. In accordance with the directive of the FSIP, the Charging Party submitted its final position to the FSIP by letter dated January 26, 1993 (Joint Exhibit 7), setting out in detail its position on each of the ground rules issues.

17. In accordance with the directive of the FSIP, the Agency submitted its final position to the FSIP by letter dated January 27, 1993 (Joint Exhibit 8), setting out in detail its position on each of the ground rules issues.

18. On May 13, 1993, the FSIP issued its Decision and Order in Case No[]. 92 FSIP 238[.] (G.C. Exhibit 19).

19. At no time, concerning the Manual dispute, did the FSIP issue an order or procedure requiring Respondent to maintain the status quo with regards to the implementation of the Manual.

Contentions of the Parties

A. Respondent

Respondent asserts that the Authority's modified approach to alleged section 7116(a)(6) violations should be applied to this case on remand because the Authority's decision so indicated; the law in effect when a case is decided rather than when the alleged violation occurred must be applied; and the Authority has applied such rules retroactively in the past. Further, the Respondent contends that it would be inappropriate to re-litigate this case on the basis of a new theory--an independent section 7116(a)(5) violation--when the complaint never alleged such a violation; the omission was a deliberate litigation strategy rather than a mere accident; and affording the General Counsel a second opportunity would be fundamentally unfair because no respondent ever has been given a comparable opportunity to raise new defenses after its original defenses were rejected. Finally, the Respondent urges rescission of the previously recommended status quo ante order since no violation of section 7116(a)(6) occurred and the Union's invocation of the Panel's services never has required an agency to maintain the status quo.

B. General Counsel

The General Counsel concedes that, under the Authority's revised analytical framework articulated in this case, there would be no violation of section 7116(a)(6), but urges that the new rule should be applied prospectively under Chevron Oil Company v. Huson, 404 U.S. 97, 106-07 (1971)(Huson), to avoid prejudice to the Union which did all it could to preserve its right to bargain over the Air Operations Manual. With regard to the section 7116(a)(5) allegation, the General Counsel argues that my previous decision in this case (at n.14) confirms the existence of such a violation due to Respondent's issuance of the Manual before the bargaining process had been completed, and quotes from the Authority's decision herein to the same effect. In addition, the General Counsel notes that employees' working conditions were changed when the new Manual was issued, and that the Respondent has not demonstrated that such action was consistent with the necessary functioning of the agency as required. Finally, the General Counsel acknowledges that the complaint herein alleged a "derivative" violation of section 7116(a)(5), but contends that an "independent" section 7116(a)(5) violation may properly be found, citing the Authority's recent decision in Air Force Flight Test Center, Edwards Air Force Base, California, 55 FLRA 116 (1999)(Edwards AFB), because that issue was fully and fairly litigated. As to the remedy, the General Counsel seeks rescission of the Manual as well as a make-whole order.

C. Union

The Union also concedes that applying the Authority's new framework would require a finding that no violation of section 7116(a)(6) occurred in this case. However, citing the Supreme Court's decision in Huson and several appellate court decisions to the same effect, the Union contends that the new rule should not be applied retroactively because the parties thought the old rule would apply; the Respondent was not legally authorized to implement the Manual when it did, and therefore it would be inconsistent with the purposes underlying section 7116(a)(5) of the Statute to apply the new rule retroactively; and retroactive application would allow the Respondent to escape liability for its violative conduct under the Statute. Apart from the section 7116(a)(6) allegation, the Union contends that a section 7116(a)(5) violation should be found because paragraph 13 of the complaint in this case alleged that the Respondent unilaterally implemented a change in working conditions by issuing the Air Operations Manual, and because the new framework reaffirms that the section 7116(a)(5) proscriptions against such unilateral changes remain in

effect. Finally, with regard to remedy, the Union asserts that a status quo ante order is appropriate under Federal Correctional Institution, 8 FLRA 604, 606 (1982), noting particularly the Respondent has not demonstrated that rescission of the Manual--even though it has been in effect for years--would disrupt agency operations.

Conclusions

As previously indicated, the Authority's decision in this case changed the analytical framework for determining whether an agency has violated section 7116(a)(6) of the Statute by making changes in conditions of employment while those matters are pending before the FSIP. The first question that must be decided on remand is whether the Respondent violated section 7116(a)(6) under the Authority's revised approach announced herein. If not, the second question aptly posed by the Authority is whether the revised approach should be given retroactive effect in this case or whether, instead, the pre-existing rules should be applied. A third (and separate) question is whether the complaint in this case can be read to encompass an alleged independent violation of section 7116(a)(5) or, in the alternative, whether the General Counsel should be permitted to re-litigate the case on that theory in view of the change in legal precedent notwithstanding that the complaint herein alleged only a derivative violation of section 7116(a)(5). Fourth, if the Respondent is found to have violated section 7116(a)(5), section 7116(a)(6), or both, the final question is whether the previously recommended remedy should be modified in any respect. These questions are addressed below.

A. Respondent Did Not Violate Section 7116(a)(6) Under the Authority's Revised Analytical Framework Adopted Herein

Under the Authority's revised analytical framework set forth above, an agency violates section 7116(a)(6) of the Statute by changing conditions of employment while such matters are pending before the Panel only if maintenance of the status quo has been directed by impasse procedures or decisions. It is no longer sufficient that one or both of the negotiating parties has requested the Panel's assistance in resolving an alleged impasse in bargaining. In paragraph 19 of their stipulation quoted above, the parties have agreed that "[a]t no time, concerning the Manual dispute, did the FSIP issue an order or procedure requiring Respondent to maintain the status quo with regards to the implementation of the Manual." Accordingly, application of the revised analytical framework adopted by the Authority in

this case would require dismissal of the section 7116(a)(6) allegation of the complaint.

B. The Authority's Revised Analytical Framework Should Be Applied Retroactively to the Circumstances of this Case

Having determined that application of the Authority's revised analytical framework would result in dismissal of the section 7116(a)(6) allegation, I now must consider whether it is appropriate to apply the revised approach in this case--i.e., to give it "retroactive" effect.

In Social Security Administration, 52 FLRA 1159 (1997)(SSA), the Authority revised its analytical framework for determining when an agency has violated section 7116(a)(3) of the Statute and then applied its new analytical framework in concluding that no violation had occurred. See 52 FLRA at 1180-81. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the Authority's conclusions in this respect. National Treasury Employees Union v. FLRA, 139 F.3d 214, 220 (D.C. Cir. 1998)(NTEU v. FLRA). However, in the same case, where the Authority announced its adoption of a private sector rule on solicitation but chose not to give it retroactive effect and therefore not to find a violation of section 7116(a)(1)(see 52 FLRA at 1189 n.25), the Court reversed and remanded to the Authority for further consideration. NTEU v. FLRA, 139 F.3d at 219. In remanding this aspect of the case, the Court stated:

> A declaration to the effect that an employer committed an unfair labor practice, when based upon a newly-adopted standard, is indeed retroactive but only in the way familiar to private sector labor law and indeed inherent in both administrative and common law adjudication. See, e.g., Consolidated Freightways v. NLRB, 892 F.2d 1052, 1058 (D.C. Cir. 1989)("new rules announced in agency adjudications may be applied retroactively absent any 'manifest injustice'"); Daily News of Los Angeles v. NLRB, 73 F.3d 406 (D.C. Cir. 1996)(upholding NLRB decision finding newspaper liable for unfair labor practice by overruling prior Board decision); 13A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3535 n.20 ("[o]rdinarily the litigants in the case producing a new rule of law are controlled by the new rule"). . . . To the extent that the FLRA,

> upon further recon-sideration, adheres to the [newly-announced] standard . . ., therefore, it may not decline to find a violation merely because it had not yet adopted that standard when the [employer] denied the NTEU's requests for permits.

Id. 2 The SSA case is still pending before the Authority on remand from the Court in NTEU v. FLRA.

In U.S. Department of Commerce, Patent and Trademark Office, 53 FLRA 858 (1997), the Authority raised an issue concerning the propriety of retroactively applying changes in decisional law and gave the parties an opportunity to address that issue. In doing so, the Authority cited court precedent in the private sector as follows:

> Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972)(in determining whether to give retroactive effect to rules adopted in the course of agency adjudication, it is appropriate to consider, inter alia, the extent to which the party against whom the rule is to be applied relied on the former); New England Telephone and Telegraph Co. v. FCC, 826 F.2d 1101, 1110 (D.C. Cir. 1987), cert. denied 490 U.S. 1039 (1989)("under certain circumstances, an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy.").

53 FLRA at 878.3 Although the Authority did not specify what standard it would adopt in deciding whether to apply a particular change in decisional law retroactively, the

2 As the Court recognized, the NLRB, under settled doctrine pertaining to retroactivity, generally applies a new rule of law to the parties in the case in which it is announced and to all pending cases, unless retroactive application would create a "manifest injustice." See Saipan Hotel Corporation, 320 NLRB 192 n.2 (1995); Pattern Makers (Michigan Model Mfrs.), 310 NLRB 929, 931 (1993)(Pattern Makers); Hickman Harbor Service, 266 NLRB 476, 477 (1983), enforced in pertinent part, 739 F.2d 214 (6th Cir. 1984).

3 The Authority subsequently decided the case in a manner that made it unnecessary to resolve the issue of retroactivity. See U.S. Department of Commerce, Patent and Trademark Office, 54 FLRA 360, 387-88 (1998).

private sector cases referred to above contain some of the factors considered by the NLRB in deciding that question on a case-by-case basis. Thus, the NLRB considers the following factors in determining whether to depart from its general rule of retroactive application in order to avoid working a manifest injustice: "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines, and any particular injustice to the losing party under retroactive application of the change of law." See Pattern Makers, 310 NLRB at 931. See also NLRB v. Bufco Corp., 899 F.2d 608, 609 (7th Cir. 1990).[4] I conclude, based on the Court's guidance in remanding the SSA case to the Authority in NTEU v. FLRA and the Authority's independent reference to private sector precedent on the issue of retroactivity, that the approach adopted by the NLRB with judicial approval should govern the disposition of the same issue in this and future cases arising under the Statute.

In applying the foregoing analytical framework herein, I further conclude that the general rule of retroactivity should prevail. That is, I find that retroactive application of the revised approach to alleged violations of section 7116(a)(6) announced by the Authority in this case would not work a manifest injustice. In so concluding, I note that the Respondent did not rely on preexisting law in taking the action which led to the issuance of the section

[4] In my judgment, the three factors identified by the Supreme Court in Huson, 404 U.S. at 106-07, and relied upon by the General Counsel, are substantially the same factors applied by the NLRB. They are:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, . . . or by deciding an issue of first impression. . . . Second, . . . "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

7116(a)(6) complaint in this case. If anything, established precedent would have had a discouraging effect on the Respondent's decision to issue and implement the Air Operations Manual following the Union's request for Panel assistance in resolving an alleged impasse in negotiations on that issue. While the Respondent is the beneficiary of the Authority's change in decisional law governing the analysis of section 7116(a)(6) allegations, in my view this is not a reason for departing from the general rule that the Authority applies the law in effect at the time it decides the case, even when such law has just been established and therefore could not have been known to the parties when they took their respective actions. See Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA 532, 544 (1988), affirmed on other grounds sub nom. National Association of Government Employees, Local R7-23 v. FLRA, 893 F.2d 380 (D.C. Cir. 1990); U.S. Department of the Treasury, 27 FLRA 919, 923 (1987).

By the same token, the Union did not detrimentally rely on preexisting law in deciding upon its course of action herein. Thus, the record indicates that the Union sought to bargain in response to the Respondent's announced intention to issue the Manual and thereafter requested the Panel's assistance in resolving the parties' bargaining dispute. The only foreseeable change in the Union's behavior if it had known that the Authority would revise its analytical framework under section 7116(a)(6) might have been to ask the Panel to issue an order requiring the Respondent to maintain the status quo pending the resolution of the parties' bargaining dispute. However, it is entirely speculative to surmise what action the Panel might have taken in response to such a hypothetical Union request. I note in this regard, as did the Authority's majority opinion herein (55 FLRA at 73-74), that the Panel has long maintained that labor organizations file requests for Panel assistance in order to delay management's implementation of changes in working conditions irrespective of whether the parties have reached an impasse in negotiations (citing Order Denying Request for General Ruling, 31 FLRA 1294 (1988)), and that such unnecessary or premature filings "deflect[] Panel resources away from the central task of resolving impasses" (55 FLRA at 77). It is entirely possible, therefore, that the Panel would not wish to encourage a continuation of such filings by granting subsequent union motions for interim status quo orders preventing agencies from implementing announced changes in employees' working conditions. At this time, the Panel has not indicated when--if ever--it will explicitly require maintenance of the status quo, and there is no way to

anticipate the circumstances under which the Panel might deem it appropriate to do so (55 FLRA at 79 n.18).

In any event, the facts as I have previously found them clearly demonstrate that the Union was well aware of Respondent's announced intention to implement the Manual by a date certain. Thus, management notified the Union on September 4, 1992, that it would implement the Manual on September 14 if the parties had not reached an agreement on negotiations by that date. This notice prompted the Union to file an emergency request for assistance with the Panel on September 11, which request the Panel acknowledged to the parties by letter dated September 15. Nevertheless, the Respondent notified the Union on September 23 that the Manual would be implemented on October 1. Under these circumstances, the Union was clearly on notice that the mere filing of its request for Panel assistance was not going to deter the Respondent from issuing the Manual imminently, and therefore the Union could have sought a specific status quo order from the Panel to prevent the Respondent from proceeding with its stated plans to implement the Manual while the matter was pending before the Panel. Based on these facts, I cannot conclude that the Union detrimentally relied on preexisting law in failing to request a specific status quo order from the Panel in this case.

With respect to the second factor in determining whether retroactive application of the revised analytical framework in section 7116(a)(6) cases would cause a manifest injustice, i.e., the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines, again I conclude that such factor favors retroactive application in this case. As the Authority's majority opinion sets forth at some length, there is no need or justification for labor organizations to continue their longstanding practice of filing requests for assistance with the Panel in order to prevent agencies from implementing changes in working conditions. Rather, the law is well-settled that agencies are not free to implement changes in conditions of employment until the bargaining process--including impasse procedures and decisions--has been completed. If an agency does so, it thereby commits a violation of section 7116(a)(5) of the Statute and may be required to rescind such action and return to the status quo ante. 55 FLRA at 72, 75-76, 78. To the extent that the Authority's decision clarifies that labor organizations should not (because they legally need not) file protective requests for Panel assistance in order to prevent agencies from prematurely changing conditions of employment, and seeks to stop the diversion of Panel resources from the resolution of actual bargaining impasses, such purposes

would be attenuated by the application of preexisting law to this case. Conversely, the retroactive application of the Authority's revised analytical framework in section 7116(a)(6) cases to the instant dispute would reinforce the Authority's decision and the purposes of the Statute which support it.

Finally, I find no particular injustice to the losing party by virtue of retroactively applying the change of law. As set forth above, the Union could have sought to protect its interests in this case by requesting a status quo order from the Panel. In my judgment, it was not reasonable under the circumstances for the Union to rely on the Respondent's voluntary adherence to the rules as they existed at that time. In addition, the Union could have filed an unfair labor practice charge which alleged an independent section 7116(a)(5) violation as a result of the Respondent's issuance of the Manual before the bargaining process had been completed. Although the Union's charge did allege an independent violation of section 7116(a)(5), the conduct described to support that charge was the failure to furnish information requested by the Union.[5] Similarly, the General Counsel could have issued a complaint which alleged an independent (rather than merely a derivative) section 7116(a)(5) violation. As I have previously found, such an allegation was not contained in the complaint.[6] Moreover, the parties did not litigate this case as if an independent

[5] That allegation was never incorporated into the General Counsel's complaint herein.

[6] As the Authority's majority opinion notes, the General Counsel has issued complaints in cases similar to this one which alleged both a violation of section 7116(a)(6) due to an agency's failure to cooperate with Panel procedures or decisions and a separate allegation that the unilateral implementation of a change in working conditions while the matter was pending before the Panel constituted an independent violation of the agency's duty to bargain in good faith under section 7116(a)(5). 55 FLRA at 77. See also U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, 55 FLRA No. 74 (May 7, 1999)(BIA)(General Counsel's complaint alleged--and parties litigated case on basis--that agency violated section 7116(a)(6) and independently violated section 7116(a)(5) by refusing to consider requests for flexiplace work arrangements while issue of flexiplace was pending before Panel, and Authority found section 7116(a)(5) violation without reaching section 7116(a)(6) issue since remedy would remain unchanged). See BIA, 55 FLRA No. 74, slip op. at 9.

violation of section 7116(a)(5) had been alleged, and the General Counsel never sought to amend the complaint to include such an allegation.

For all of the foregoing reasons, I conclude that the Authority's modified analytical framework "to be applied in this and future cases for resolving complaints alleging violations of section 7116(a)(6) based on implementation of changes in conditions of employment" (55 FLRA at 75) should be applied retroactively herein.

C. The General Counsel Should Not Be Permitted to Relitigate this Case as if an Independent Rather than a Derivative Section 7116(a)(5) Violation Had Been Alleged in the Complaint

The third question raised by the Authority for consideration on remand is whether the complaint in this case properly can be interpreted as encompassing an independent section 7116(a)(5) allegation and, if not, whether the General Counsel nonetheless should be allowed to re-litigate the case on that theory herein. I conclude, in accordance with my previous findings in this case, that the complaint alleged only a derivative violation of section 7116(a)(5) attributable to the Respondent's issuance of its Air Operations Manual while the matter was pending before the Panel.[7] Although the Respondent and the Union sought to demonstrate on the record that the other was responsible for the breakdown in negotiations, it is clear that the complaint did not allege a "course of conduct" violation against the Respondent for events occurring before the Union sought the Panel's assistance. Similarly, the parties did not litigate this case as an independent section 7116(a)(5) complaint and the General Counsel never sought to amend the

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7 The General Counsel's brief on remand (at 13) acknowledges that "[t]he Complaint drafted the 7116(a)(5) allegation in a form often referred to as a 'derivative' allegation." Accordingly, to the extent that the Union contends otherwise (see Union's brief on remand at 9 and n.4), such argument is rejected.

complaint to so allege.[8] Respondent's brief on remand suggests certain reasons why the General Counsel failed to do so. I cannot and will not second-guess the General Counsel's litigation strategy or thought processes in this regard. However, I will hold the General Counsel responsible for the specific content of his complaint.

I am well aware that the same evidence introduced by the General Counsel to support a violation of section 7116 (a)(6) in this case under preexisting law also might support a finding that the Respondent violated section 7116(a)(5) under established law which requires that no changes in conditions of employment are to be made until the entire bargaining process (including timely-invoked impasse resolution procedures) are completed. However, the General Counsel also was (or should have been) well aware of these fundamental principles under section 7116(a)(5), but failed to allege an independent violation of the duty to bargain in good faith herein. As previously noted, both by the Authority in its decision remanding this case and in the recent BIA decision (n.6, supra), the General Counsel has alleged independent violations of section 7116(a)(5) in the past under similar circumstances, and could have done so here. Moreover, even though the evidence in the record might support a prima facie finding of an independent section 7116(a)(5) violation, the Respondent had no notice that the General Counsel was alleging such a violation (because he was not) and therefore was deprived of a reasonable opportunity to submit exculpatory evidence in that regard.[9] Accordingly, I conclude that the complaint

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[8] Indeed, in opposing the Respondent's exceptions to my decision before the Authority, the General Counsel argued that the conduct of the parties prior to the Union's request for Panel assistance was irrelevant "inasmuch as the only allegation was that Respondent violated the Statute by implementing the Manual while the matter was pending before the Panel." General Counsel's Opposition to Respondent's Exceptions to the Decision of the Administrative Law Judge at 8.

[9] Therefore, contrary to the General Counsel's assertion, I hold that an independent section 7116(a)(5) violation may not properly be found herein because, unlike the circumstances in Edwards AFB, that issue was not fully and fairly litigated. See discussion at n.10, infra.

must be dismissed in its entirety.[10]

ORDER

The complaint in Case No. SF-CA-30165 is hereby dismissed.

Issued, Washington, D.C., June 7, 1999

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[10] I do so reluctantly because the Respondent's issuance of its Air Operations Manual before the entire bargaining process had been completed might well have been inconsistent with the duty to bargain in good faith under the Statute and yet will result in no remedial order requiring a return to the status quo ante. That is, dismissal of the complaint herein necessarily requires rescission of my previously-recommended remedial order. Nevertheless, I find this result compelled by the Authority's decisions which emphasize the importance of a complaint's allegations to the concepts of due process and administrative regularity. See American Federation of Government Employees, Local 2501, Memphis, Tennessee, 51 FLRA 1657, 1660-61 (1996); U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 46 FLRA 1375, 1384 (1993)(Authority will not review allegations that are not included in complaint unless such issues have been "fully and fairly litigated"). In this case, the parties did not objectively understand that an independent allegation of an unlawful refusal to bargain was being litigated (because in fact it was not), and the Respondent had no reasonable opportunity to present relevant evidence which might have excused its issuance of the Manual when it did--such as the Union's waiver of its right to bargain or the parties' agreement covering the matter. Although the General Counsel suggests that the Respondent failed to demonstrate that its issuance of the Manual was consistent with the necessary functioning of the agency, such defense would have excused the Respondent's conduct under preexisting law with respect to the section 7116(a)(6) allegation, but was not--and is not--the only defense available to management concerning an independent section 7116(a)(5) allegation. While it may be cold comfort to the Union in this case, I note the Authority's observation (55 FLRA at 79 n.19) that "surely complaints issued following this decision will be pled and prosecuted so as to fully enforce agency obligations to bargain in good faith and to cooperate in impasse procedures and decisions."

GARVIN LEE
OLIVER Administrative Law
Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION ON REMAND issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. SF-CA-30165, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

William M. Petty, Esq.
Respondent Representative
U.S. Department of Justice
Immigration and Naturalization Service
Human Resource Division
800 K Street, NW, Room 5000
Washington, DC 20536
Certified Mail No. P 855 724 023

R. Timothy Shiels, Esq.
Counsel for the General Counsel
Federal Labor Relations Authority
901 Market Street, Suite 220
San Francisco, CA 94103
Certified Mail No. P 855 724 024

Deborah S. Wagner, Esq.
Attorney for Charging Party
1500 W. Cañada Hills Drive
Oro Valley, AZ 85737
Certified Mail No. P 855 724 025

REGULAR MAIL:

National President
National Border Patrol Council
American Federation of Government
Employees, AFL-CIO
29529 Primrose Drive
Campo, CA 91906

Dated: June 7, 1999
Washington, DC