DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, GENERAL COMMITTEE Charging Party	Case No. WA-CA-20937

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, 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 **November 29, 1993**, 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: October 29, 1993

Washington, DC

MEMORANDUM DATE: October 29, 1993

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION

Respondent

and Case No. WA-CA-20937

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, GENERAL COMMITTEE

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 is the Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

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

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, GENERAL COMMITTEE Charging Party	Case No. WA-CA-20937

Carroll S. Rankin, Jr.
Representative of the Respondent

Christopher M. Feldenzer
Counsel for the General Counsel

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1), (5), and (6) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1), (5), and (6), by implementing revised performance standards for bargaining unit employees while the Union's request for assistance with negotiations over the impact and implementation of the standards was pending before the Federal Service Impasses Panel.

Respondent's answer admitted all material allegations of fact, but denied any violation of the Statute.

On or about March 5, 1993, the General Counsel moved for summary judgment. The Regional Director transferred the motion to the Chief Administrative Law Judge pursuant to section 2423.22(b)(1) of the Regulations. The Chief Administrative Law Judge gave the parties until March 25,

1993 to respond to the motion noting, "The record will then be closed, absent special permission to file further materials." On March 24, 1993 Respondent filed its opposition to the General Counsel's motion, requesting that the General Coun-sel's motion be denied and that the complaint be dismissed. Respondent filed a memorandum together with twenty exhibits in support of its position. The General Counsel and the Charging Party did not move for permission to respond to the Respond-ent's opposition pursuant to the Chief Administrative Law Judge's order or otherwise object to the Respondent's memorandum or exhibits. The pleadings were assigned to the undersigned for disposition pursuant to section 2423.19(k) and section 2423.22(b)(3) of the Regulations.

Treating Respondent's request to dismiss with supporting exhibits as a cross-motion for summary judgment, and considering all the pleadings and exhibits, it appears that there are no genuine issues of material fact and that the General Counsel is entitled to summary judgment as a matter of law. Accordingly, I make the following findings of fact, conclusion of law, and recommendations.

Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE) is the certified exclusive representative of a nation-wide consolidated unit of employees appropriate for collective bargaining at Respondent. Council 215 is an agent of AFGE for representing unit employees at Respondent's Office of Hearings and Appeals. Local 1923 is an agent of AFGE for representing unit employees at Respondent's Headquarters. Council 220 is an agent of AFGE for representing unit employees at Respond-ent's Field Office Component. The National Council of Social Security Payment Center Locals is an agent of AFGE for repre-senting unit employees at Respondent's Program Service Centers. The National Council of Social Security Administration Field Assessment Locals is an agent of AFGE for representing unit employees at Respondent's Office of Program Integrity and Review. These agents of AFGE represent approximately 48,000 employees.

Based on direction from the Commissioner of Social Secur-ity, and using Union and employee input, Respondent updated all of its performance standards during 1991 to comply with 5 U.S.C. § 4302(b)(1). The "old" standards had been used for three years in a row (1989-1991).

Between February and March 1992, Respondent and the agents of AFGE noted above engaged in impact and implemen-

tation negotiations over Respondent's revisions to performance standards for bargaining unit employees.

Between March 6 and March 12, 1992, Respondent and AFGE's agents noted above reached impasse in their negotiations over the revised performance standards.

Between March 9 and April 2, 1992, each of AFGE's agents noted above filed a request for assistance with the Federal Service Impasses Panel (FSIP or Panel) concerning the negoti-ations. No performance standards were in effect from October 1, 1991 through May 31, 1992.

Respondent's official appraisal period is based on the fiscal year, from October 1 through September 30, and its minimum appraisal period is 120 days pursuant to 5 C.F.R. § 430.205(b). In order to comply with 5 C.F.R. § 430.205(a) and (b) (1992) standards had to be in place by June 1, 1992 to allow for a 120 day appraisal period for fiscal year 1992.

On June 1, 1992, Respondent implemented its revised performance standards.

The Panel issued its Decision and Order on September 30, 1992 in Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals, Headquarters Office, Field Office Component, Office of Program Integrity and Review, and Program Service Centers and Council 215, Local 1923, Council 220, National Council of SSA Field Assessment Locals, and National Council of Social Security Payment Center Locals, American Federation of Government Employees, AFL-CIO, Case Nos. 92 FSIP 95, 102, 104, 114, and 126 (1992) (HHS and Council 215).

Respondent implemented the Panel's decision on October 30, 1992.

Discussion and Conclusions

Respondent implemented its revised performance standards while an impasse in negotiations over the impact and implemen-tation of the standards was pending before the Panel. Accord-ingly, unless the Respondent can affirmatively support its assertion that the action was consistent with the necessary functioning of the agency, the Respondent's implementation violated section 7116(a)(1), (5), and (6) of the Statute. See Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA 466, 467-69 (1985) (ATF). As the Authority stated in ATF, 18 FLRA at 469:

> It should be emphasized that the foregoing policy requiring maintenance of the status quo to the maximum extent possible once the Panel's processes have been timely invoked would not preclude agency management from taking action which alters the status quo to the extent that such action is consistent with the necessary functioning of the Agency. Thus, such policy also is consistent with and furthers the intent of Congress set forth in section 7101(b) of the Statute that the provisions of the Statute be interpreted in a manner consistent with the requirement of an effective and efficient Government. [footnote omitted]

Among other arguments,[1] Respondent asserts that the necessary functioning of the agency required it to comply with the law and regulations essentially when and how it did so. Respondent claims it updated its performance standards during 1991 to comply with 5 U.S.C. § 4302(b)(1) which mandates that "each appraisal system shall provide for - (1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job perform-

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[1] Respondent's argument that the parties' agreement covered the matter was a threshold issue properly resolved at the time by the Panel in deciding what action to take or whether to retain jurisdiction over the dispute. In this case, the Panel noted that "the parties already have numerous contractual provisions in place on performance plans and standards that address many of the Union's concerns." See also Department of the Treasury, IRS, Nat'l Computer Ctr., Martinsburg, W. Va. and Chapter 82, Nat'l Treasury Employees Union, Case No. 87 F.S.I.P. 168 (June 29, 1988) (Panel, in part, ordered the union to withdraw one proposal relating to the assignment of overtime and holiday work as it appeared to be inconsistent with the parties' master collective bargaining agreement and, therefore, involved a question of contract interpretation more appropriately addressed in another forum. The Panel resolved other issues).

ance. . . ."[2] Respondent also points out that 5 U.S.C. § 4302(b)(2) required it to inform each employee "at the beginning of the appraisal period" of the standards that will be used to evaluate his/her performance.[3] Respondent's minimum appraisal period is 120 days pursuant to Office of Personnel Management (OPM) regulation 5 CFR § 430.205(b) (1992).[4] Therefore, in order to give most employees an annual rating in 1992, as required by OPM regulation 5 CFR § 430.205(a) (1992),[5] Respondent had to implement standards on June 1, 1992 to provide the minimum appraisal period of 120 days. Other periods could not have been implemented under the circumstances.

Respondent maintains that its only realistic choice other than the one it made was to violate the appraisal law by not evaluating employees at all for fiscal year 1992 and risk a deterioration of employee performance in an Agency

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5 U.S.C. § 4302(b)(1) and (2) provide:

> (b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for -
>
> > (1) establishing performance standards which will to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system:
> >
> > (2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position[.]

3
See note 2.
4
5 C.F.R. § 430.205(a) and (b)(1992) provide:

> (a) Appraisal period. Each agency appraisal system shall establish an official appraisal period for which rating of record shall be prepared. Employees shall generally be given a rating of record on an annual basis.
>
> . . .
>
> (b) Minimum appraisal period. Agency appraisal systems shall establish a minimum appraisal period of at least 90 days but not more than 120 days.

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See note 4.

whose primary function is to assure the financial security of millions of elderly, dependent, and disabled Americans. Respondent points out that the employee appraisals based on performance standards are the basis for all significant personnel management decisions, including training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees, 5 U.S.C. § 4302(a)(3). Not to have appraised employees on September 30, 1992 would not only have violated the law and regulations, but it would have seriously hindered the Agency's functions.[6] Respondent claims that using the three-year old standards would not have fulfilled the appraisal law's mandate to have standards that "to the maximum extent feasible permit the accurate evaluation of job performance" under 5 U.S.C. § 4302(b)(1) and would have allowed the Union to dictate which performance standards would be used, a right clearly accorded to management.

Respondent's position that it was required to have standards in place by June 1, 1992 to comply with the law and regulations is well taken. However, Respondent acknowledges that is could have used the 1989-1991 standards for the 120 day period. The use of the 1989-1991 standards for this period would have permitted the parties to adhere to established personnel policies and practices until the Panel took whatever action was deemed appropriate. Such action would have accommodated both the requirements of the Statute and the requirement of the appraisal law that performance standards permit accurate evaluation of job performance "to the maximum extent feasible." Accordingly, Respondent has not demonstrated that the action was consistent with the necessary functioning of the agency.

It is concluded that Respondent violated section 7116 (a)(1), (5), and (6) of the Statute, as alleged, by implementing revised performance standards for bargaining unit employees while the Union's request for assistance with the
negotiations over the impact and implementation of the standards was pending before the Federal Service Impasses Panel.

The General Counsel requests a remedy including

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5 C.F.R § 430.102 (1992) provides:

> Performance management is the systematic process by which an agency integrates performance, pay, and awards systems with its basic management functions for the purpose of improving individual and organizational effectiveness in the accomplishment of agency mission and goals.

status quo ante relief. The General Counsel requests rescission of all performance appraisals resulting from the illegally implemented standards and that any employee adversely affected by such implementation be made whole.

After taking into consideration the factors set forth in Federal Correctional Institution, 8 FLRA 604, 606 (1982), it is concluded that a status quo ante is not appropriate in this case. The Respondent has complied with the Panel's order subsequently issued on September 30, 1992. Cf. 56th Combat Support Group (TAC), MacDill Air Force Base, Florida, 44 FLRA 1098 (1992). In addition, Respondent has represented, without refutation, that (1) appraisals for an overwhelming majority of employees either stayed the same or improved; (2) that the number of appraisal grievances remained about the same in 1992 compared to 1991; (3) that approximately 500 more employees received awards based on the 1992 appraisals than the 1991 appraisals; and (4) that in excess of $1,000,000 more was given to employees in 1992 than in 1991. Respondent has also pointed out that a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the Agency's operations by requiring the (1) rescinding of the 1992 revised performance standards for over 48,000 employees and replacing them with the old standards; (2) rescinding the appraisals for all 48,000 employees and reissuing appraisals based on the old standards; (3) recovering over $22 million in award money based on the appraisals, which was paid out in November and December 1992; (4) reissuing award money based on the old standards; (5) rescinding all promotions (about 3,300) and reassignments (about 1,800) made in fiscal year 1993 based on the 1992 appraisals; and (6) rescinding all within-grade increases based on the level of competency determinations using the 1992 appraisal data (about 20,000).

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Health and Human Services, Social Security Administration, shall:

1. Cease and desist from:

(a) Unilaterally implementing revised personnel standards for bargaining unit employees while requests of agents of the American Federation of Government Employees, AFL-CIO, the exclusive representative of a unit of its

employees, for assistance with a negotiation impasse over the impact and implementation of the matter is pending before the Federal Service Impasses Panel.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Post at its facilities, where bargaining unit employees represented by Council 215, Local 1923, Council 220, and the National Council of Social Security Payment Center Locals, American Federation of Government Employees, AFL-CIO, are located, 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 Commis-sioner and shall be posted 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.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, October 29, 1993

GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement revised personnel standards for bargaining unit employees while requests of agents of the American Federation of Government Employees, AFL-CIO, the exclusive representative of a unit of our employees, for assistance with a negotiation impasse over the impact and implementation of the matter is pending before the Federal Service Impasses Panel.

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.

(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, Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CA-20937, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Carroll S. Rankin, Jr.
Office of Labor Management Relations
Social Security Administration
G-H-10 West High Rise
6401 Security Boulevard
Baltimore, MD 21235

Christopher M. Feldenzer, Esq.
Federal Labor Relations Office
1255 22nd Street, NW,
4th Floor
Washington, DC 20037

REGULAR MAIL:

President
American Federation of Government
Employees, General Committee
P.O. Box 1206
Birmingham, AL 35201

Dated: October 29, 1993
Washington, DC