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

DEPARTMENT OF THE AIR FORCE LOWRY AIR FORCE BASE DENVER, COLORADO Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1974, AFL-CIO Charging Party	Case No. 7-CA-1379

Major Glen H. Schlabs
For the Respondent

Barrie M. Shapiro, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1/], and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., was initiated by a charge filed on August 13,

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

1981 (G.C. Exh. 1(a)) which alleged violations of §§ 16(a)(1), (5), and (8) of the Statute. The Complaint and Notice of Hearing issued on February 27, 1982; the Complaint alleged violations of §§ 16(a)(1) and (5) only; and the Notice of Hearing scheduled this case, together with several other wholly unrelated cases, for hearing on April 19, 1982, pursuant to a calendar call procedure. Thereafter, Respondent filed a Motion for Postponement asserting a conflict, because of a prior scheduled training course, and by Order dated March 9, 1982 (G.C. Exh. 1(f)) hearing herein was fixed for April 23, 1982, pursuant to which a hearing was duly held on April 23, 1982, before the undersigned in Denver, Colorado.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded full opportunity to present oral argument. At the close of the hearing, at the request of the General Counsel, joined in by Respondent, and for good cause shown, June 8, 1982, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended by Order dated May 25, 1982, to June 22, 1982. Both Respondent and General Counsel timely filed excellent and comprehensive briefs, received on June 22, 1982, which have been carefully considered. Upon the basis of the entire record,[2/] I make the following findings and conclusions.

THE ISSUES

On August 7, 1981, Respondent confirmed in writing that, pursuant to

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2/ Counsel for Respondent each filed Motions to Correct Transcript. Neither filed any opposition to the other's motion and, finding each motion wholly meritorious, each motion is hereby granted. In addition, on my own motion, I have made corrected the same misspelling of Judge Naimark's name on page 22, lines 20 and 24, that Respondent noted at page 23, line 21. The transcript is hereby corrected as follows:

Page	Line	From	To
1	20	Barry	Barrie
16	23	Payments	proposals
22	20 and 24	Neimark	Naimark
23	21	Neimark	Naimark
42	10	"Gere"	"GERR"
86	6	wasn't	was
98	2	form	forum
107	14	Shapiro	Schlabs
112	10	equably	equitably
126	1	is	his
131	24	in	and

§ 17(b) and (c) of the Statute, its obligation to bargain did not extend to Section 2, A through K and to Section 4.b.2. of the Union's proposals (G.C. Exh. 7), as these proposals were inconsistent with the provisions of Air Force Regulations 40-452 which was controlling and binding on Respondent and Respondent refused to negotiate as to these two proposals. The Union, American Federation of Government Employees, AFL-CIO, Local 1974 (herein also referred to as "Local 1974" or the "Union"), did not seek a determination by the Authority that no compelling need exists for AFR 40-452 and Respondent, on October 1, 1981, implemented a Job Performance Appraisal System which, in part, incorporated the provisions of AFR 40-452 as to matters also covered by Union proposals Section 2, A through K and Section 4.b.2.

The issues are, therefore:

1. Whether Union proposals Section 2, A through K and Section 4.b.2 were incompatible or irreconcilable with the related provisions of AFR 40-452; and

2. If they were incompatible or irreconcilable with ARF 40-452, whether a compelling need determination may be made in an unfair labor practice proceeding before an Administrative Law Judge.

FINDINGS

1. The Department of the Air Force is a primary national subdivision of the Department of Defense and is an agency within the meaning of § 3(a)(3) of the Statute (Tr. 108). There is no exclusive representative representing a majority of Air Force personnel in an appropriate bargaining unit agency wide (Tr. 109).

2. Pursuant to Section 4302 of the Civil Service Reform Act, 5 U.S.C. § 4302, and OPM's implementing regulations, 5 C.F.R., Part 430, the Department of the Air Force, through its Human Resources Lab, developed a performance appraisal system (Tr. 192). After approval by OPM, the performance appraisal program was issued October 1, 1980, as AFR 40-452 (Res. Exh. 1). Consistent with Section 4302(b) of the Civil Service Reform Act and OPM Regulation, 5 C.F.R. § 430.301, which required that each agency implement a performance appraisal system not later than October 1, 1981, AFR 40-452 required that the performance appraisal system set forth therein, for all non-general managers, be implemented October 1, 1981 (Res. Exh. 1, Par. 1-5 b). AFR 40-452 mandates the use of Air Force Form 1282 as the rating device (Res. Exh. 2, Dec. 1980) for all employees except general managers (Res. Exh. 1, Pars. 1-7 s, 2-7, 2-8, 2-10). Together, AFR 40-452 and AF Form 1282 comprise the Job Performance Appraisal System (JPAS) (Res. Exh. 1, Par. 2-10).

3. Lowry Air Force Base (Lowry) is an activity under the command of

the United States Air Force Air Training Command (ATC) (Tr. 170). ATC is a major command under Headquarters, United States Air Force.

4. Local 1974 is the recognized exclusive representative of an appropriate unit of non-professional civilian employees at Lowry. Local 1974 and Respondent executed a collective bargaining agreement in August 1979 (G.C. Exh. 2). The agreement contains an article on Merit Promotion (G.C. Exh. 2, Art. 20). One of the ranking factors in Article 20, determining whether an employee is placed in the final round of competition for promotion, is the Supervisor's Appraisal of Employee's Current Performance. The supervisor's appraisal differs from the performance rating system mandated by the Performance rating Act of 1950, which had three rating levels, outstanding, satisfactory, and unsatisfactory, but which had no effect on the merit promotion article of the parties' collective bargaining agreement (Tr. 163, 230). JPAS replaced the system mandated by the 1950 Act and, likewise, has no effect on the parties' merit promotion article (Tr. 163, 230).

5. Lowry has six separate bargaining units represented by separate exclusive representatives, including AFGE Locals 1974 and 2040. All six are in the same competitive area for RIF purposes; however, only five of them, including AFGE Locals 1974 and 2040, contain employees that would be within the same competitive levels for purposes of RIF (Tr. 164-165). OPM regulations require, or permit, employees receiving certain over-all performance appraisal ratings to be awarded years of constructive service for retention purposes during a RIF. OPM requires, however, that when these procedures granting constructive service are used they be "uniformly and consistently appplied in any one reduction in force." 5 C.F.R. §§ 351.504, 351.705(b)(2).

6. JPAS replaced a performance appraisal system containing, as noted above, three possible ratings: outstanding, satisfactory, and unsatisfactory (Tr. 132). This former appraisal system was uniform throughout the Air Force. Now, all Air Force federal wage system employees and general schedule employees are covered by JPAS, except senior executives, general managers under merit pay, GS-13's through 15's, and local nationals overseas (Tr. 109). Personnel subject to JPAS number slightly over 200,000, of whom about 152,000 are in 217 different bargaining units represented by exclusive representatives (Tr. 109).

7. By letter dated March 31, 1981 (G.C. Exh. 3), Respondent gave notice to all unions, i.e. the six exclusive representatives at Lowry, that AFR 40-452, JPAS, must be implemented by October 1, 1981, and invited comments regarding the impact or implementation of JPAS. By letter dated April 14, 1981, Local 1974 requested negotiations "on the Implementation of the JPAS." (G.C. Exh. 5).

8. The first bargaining session between Respondent and the Union occurred on, or about, June 11, 1981, when the parties negotiated ground rules (G.C. Exh. 6, Tr. 42, 168). Mr. Dariel Case, President of Local

1974, was chief spokesman for the Union and, at the commencement of negotiations, Mr. Jack Powell was chief spokesman for Respondent, but was soon succeeded as chief spokesman by Mr. Larry Brock who acted as Respondent's chief spokesman for the remainder of the negotiations (Tr. 44). A total of 17 bargaining sessions, each of which lasted about 6 hours, were held, the last 11 with the assistance of a FMCS mediator (Tr. 173).

9. On June 11, the Union submitted proposals. Mr. Brock, from the first session, advised Mr. Case that certain of the Union's proposals conflicted with AFR 40-452. As a base level negotiator, Mr. Brock was not empowered to declare a union proposal non-negotiable without the advice of Headquarters Air Force. Mr. Brock sought the advice of Headquarters Air Force through ATC and Headquarters concurred that the Union's proposals involved herein, i.e., Section 2, A through K and Section 4.b.2, were non-negotiable (Tr. 171, 226). Thereafter, on July 2 and July 7 or 9, Mr. Brock told Mr. Case that the Union's proposals conflicted with the corresponding position of AFR 40-452 and that those portions of AFR 40-452 were non-negotiable on compelling need grounds (Tr. 172-173). On July 30, 1981, the Union requested, in writing, a formal non-negotiability declaration (Res. Exh. 3) and on August 7, 1981, Mr. Brock responded with Respondent's formal declaration of non-negotiability (G.C. Exh. 7). On August 13, 1981, the Union filed the Charge in this case, however, the parties continued to negotiate and on August 18, 1981, agreed that they were at impasse (Tr. 176). At the request of the Federal Mediator, the parties met again on September 8, 1981, and once again agreed that they were at impasse (Tr. 177). No negotiability appeal was filed by the Union (Tr. 177).

10. By letter dated September 15, 1981, Respondent notified the Union of its intention to implement, as the JPAS, all of the language that the parties had agreed to during negotiation plus Respondent's last best offer on all areas where the parties did not agree. Attached to that letter was a compendium of the material which Respondent would implement on October 1, 1981 (Res. Exh. 4, Tr. 178). The Union made no request for FSIP intervention, even with regard to those items not affected by Respondent's non-negotiability declaration.

11. In the meantime, by July 1, 1981, two of the six bargaining units at Lowry had agreed to implement AFR 40-452 as proposed (Tr. 164) and two other of the six bargaining units had so agreed by September 9, 1981 (Tr. 165).

12. The Federal Labor Relations Authority has not determined that there is no compelling need for AFR 40-452, nor has the Secretary of the Air Force notified the Federal Labor Relations Authority in writing that no compelling need existed for AFR 40-452 (Tr. 170).

13. The pertinent provisions of AFR 40-452, with regard to which the Union's Proposals Sections 2, A through K and Section 4.b.2. were held

non-negotiable, and the corresponding provision as proposed by the Union are set forth below. To more readily distinguish the provisions of AFR 40-452 from the provisions of the Union's proposals, all underscoring which would, normally, be used to indicate bold face type has been eliminated, and the Union's proposals are underlined in whole:

(i) "c. Job Performance Element. A significant requirement of the job, derived by analysis of the job. A job performance element may be an important duty or responsibility of the position, or it may be a specific project or task consistent with or directly drawn from the duties and responsibilities in the position description." (AFR 40-452, par. 1-7 c).

"A. A job element is any major component of an employees's job that has been included in the official position description which can be objectively measured. (Union Proposal, Section 2 A).

(ii) "d. Critical Element. A job performance element of an employee's job of sufficient importance that performance below the minimum performance standard established by management requires remedial action and denial of merit pay or a within-grade increase, and may be the basis for removing, reassigning, or demoting the employee. Such action may be taken without regard to performance on other job performance elements." (AFR 40-452, Par. 1-7 d).

"B. A critical element is a job element which is of such importance that if it is not performed adequately, acceptable performance of the job as a whole is not possible." (Union Proposal, Section 2 B).

(iii) "e. Non-critical Element. A job performance element which has not been designated as critical but which is nevertheless an important part of the position and is considered in determining the overall performance level. Performance below the minimum standard established by management requires counseling and denial of merit pay or within-grade increases and denial for merit promotion consideration." (AFR 40-452, Par. 1-7 e).

"C. A non-critical element is a job element that is not critical, but is important enough to require measurements based on objective criteria." (Union Proposal, Section 2 C).

(iv) "f. Performance Standard. A description of the minimum level of accomplishment necessary for satisfactory performance. Performance standards are expressed in terms of qualitative or quantitative objectives, specific actions, project assignments, or other requirements related to job performance elements. There may be more than one standard set for a single job performance element." (AFR 40-452, Par. 1-7 f).

"D. A performance standard is a statement of objective requirements measuring various levels of achievement for cirtical and non-critical elements. All performance standards must be fair, equitable, objective, valid, reliable and job related. (Union Proposal, Section 2 D).

[Respondent's last offer, as implemented, provided, in part, as follows:

"Section 1. General. The Air Force Job Performance Appraisal System (JPAS) as applied to bargaining unit employees will be fair, objective, equitable, and job related. . . ." (Res. Exh. 4, Attachment, Section 1)].

(v) "n. Superior Rating. The overall rating assigned when an employee exceeds the performance requirements of all the job performance elements of the work plan." (AFR 40-452, Par. 1-7 n).

"E. Outstanding - The employee has significantly exceeded the established performance standard. The rating is of exceptionally high quality. The Employee's performance is beyond the requirements of the position." (Union Proposal, Section 2 E).

(vi) "o. Excellent Rating. The overall rating assigned when an employee meets or exceeds the performance requirements of all the job performance elements of the work plan and exceeds

the performance requirements of the job performance elements which represent at least 50 percent of the relative weight in importance of the work plan." (AFR 40-452, Par. 1-7 o).

[Union Proposal contains no comparable provision].

(vii) "p. Fully Successful Rating. The overall rating assigned when an employee meets the performance requirements of all the job performance elements of the work plan." (AFR 40-452, Par. 1-7 p).

"F. Satisfactory - The employee has met the established standard. The Employee requires an average degree of supervision and normal problems are satisfactorily solved. Assignments are complete and prepared as compared to the average employee." (Union Proposal, Section 2 F).

[The Regulation defines "Satisfactory Performance" but not as a rating, as follows:

"h. Satisfactory Performance. A level of job performance which is neither higher nor lower than would be expected from a majority of personnel in a similar position. The employee typically performs at a satisfactory level when schedules are met on time, production is at a satisfactory level, and mission requirements are achieved. A level at which job performance standards are written and a level of performance which results in a fully successful rating." (AFR 40-452, Par. 1-7 h)].

(viii) "q. Minimally Acceptable Rating. The overall rating assigned when an employee meets the performance requirements of all critical job performance elements of the work plan, but does not meet the performance requirements of one or more non-critical job performance elements." (AFR 40-452, Par. 1-7 q).

"G. Marginal - The employee has barely met the established standards while overall performance meets the requirements of the position.

There are noted deficiences with room for improvement and more direct supervision may have been required." (Union Proposal, Section 2 G).

(ix) "r. Unacceptable Rating. The overall rating assigned when an employee does not meet the requirements of one or more critical job performance elements of the work plan." (AFR 40-452, Par. 1-7 r).

"H. Unacceptable - The employee has failed to meet the established standards, one or more critical elements and has failed to complete assignments in an acceptable manner." (Union Proposal, Section 2 H).

(x) "s. Work Plan. The written job performance elements and standards developed for the employee at the beginning of or during the appraisal period and documented on AF Form . . . 1282, Job Performance Appraisal. . . ." (AFR 40-452, Par. 1 s).

"I. Work Plan - The written critical or non-critical elements identified in the major components of an employee's official position description and recorded an AF Form 1282." (Union Proposal, Section 2 I).

(xi) "j. Performance Appraisal. A systematic comparison of an employee's performance of duties and responsibilities with performance standards." (AFR 40-452, Par. 1-7 j).

"J. Performance Appraisal - A comparison of an employee's accomplishment of assigned duties and responsibilities with management - established performance standards." (Union Proposal, Section 2 J).

(xii) "Training the Employee. Performance appraisals must be used as a basis for determining the training needs of employees (see AFRs 40-410, 40-411, and 40-418).

"a. Employees may receive training to improve performance and develop new skills. The performance appraisal should help identify remedial or developmental training necessary for an employee to meet or exceed a specified

performance standard. Supervisors should make every effort to determine whether training will assist an employee's performance.

"b. Developmental training is provided for employees to expand the scope or depth of their jobs or to enable them to assume additional duties and responsibilities. Within available resources, the interests and desires of each employee may influence the type and amount of developmental training, along with evidence that the employee is fully meeting or exceeding present performance standards." (AFR 40-452, Par. 5-4).

"K. Training - To improve performance and acquire new skills and to identify remedial or developmental training required for an employee to meet or exceed a specified performance standard." (Union Proposal, Section 2 K).

(xiii) "g. Performance Requirements. The aggregate of the performance standards set for a job performance element." (AFR 40-452, Par. 1-7 g).

[Overall ratings: Superior; Excellent; Fully Successful; Minimally Acceptable; and Unacceptable are contained in AFR 40-452, Par. 1-7 n. through r. set forth above].

"4.b.2. Overall Rating. The range of rating for overall performance shall be one of the four (4) ratings defined below [in actuality, defined in Union Proposal, Section 2 E through 2 H, set forth above]. The overall rating shall be arrived at considering the total performance of the employee by using only the rating elements as prescribed in Section 4 B [sic] 1 above and the definitions of the ratings below. The ratings are:

"(a) Outstanding
"(b) Satisfactory
"(c) Marginal
"(d) Unacceptable

"A rating other than (b) satisfactory shall be documented in writing and made part of the employee's personnel file. Each employee will be given a copy of

the rating and any written documentation." (Union Proposal, Section 4.b.2.).

CONCLUSIONS

This case involves bargaining by an activity, not an agency, pursuant to notice to implement, as to bargaining unit employees, an agency-wide regulation. As a subordinate activity of the agency, there is no question that Respondent was bound by, and subject to, Air Force Regulation 40-452. Indeed Respondent's notice of March 31, 1981 (G.C. Exh. 3), so stated; Headquarters Air Force confirmed the non-negotiability of the Union's proposals here in question;[3/] Respondent on various occasions orally advised the Union that the provisions of AFR 40-452, which corresponded to the Union's proposals in question, were non-negotiable on compelling need grounds; and on August 7, 1981, Respondent, pursuant to the Union's request, gave its formal written declaration of non-negotiability (G.C. Exh. 7).

There is no dispute that, in any event, Respondent was obligated to bargain pursuant to § 6(b)(2) and (3); National Treasury Employees Union, 3 FLRA No. 119, 3 FLRA 768, 778 (1980); nor is there any assertion that there was any failure to bargain per se, in accordance with § 6(b)(2) and (3), on what is euphemistically termed impact and implemention, although, as noted below, bargaining on Union proposals to the extent not inconsistent with such regulation, may, in reality, be bottomed on the obligation of § 6(b)(2) and (3). Nevertheless, in the context of a controlling Government-wide or agency-wide regulation, the Authority has held that there is an obligation to bargain on Union proposals to the extent that ". . . they are not incompatible or irreconcilable with those regulations." American Federation of Government Employees, AFL-CIO,

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3/ Respondent's contention that "Lowry Air Force Base", or, more specifically, "3415 Air Base Group, Lowry Air Force Base, Colorado" is "the only proper Respondent in this case" (Res. Brief, pp. 16, 17), is without merit. The Complaint, consistent with the charge, names as Respondent "Lowry Air Force Base"; the exclusive recognition of Local 1974 runs to "Lowry Air Force Base and Tenant Organizations" (G.C. Exh. 2); and, undeniably, Lowry Air Force Base is a constitutent part of the Department of the Air Force. Accordingly, the Complaint properly described Respondent. I neither reach, nor express any opinion concerning, the question as to whether any order could, pursuant to such description, issue as to any entity above Lowry Air Force Base, including the Air Training Command or Headquarters Air Force. See, Department of Health and Human Services, Social Security Administration, Region VI, and Department of Health and Human Services, Social Security Administration, Galveston, Texas District, 10 FLRA No. 9 (1982); Department of Health and Human Services, Social Security Administration, 10 FLRA No. 20 (1982); Veterans Administration, 1 FLRA No. 101, 1 FLRA 888 (1979).

Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA No. 120, 3 FLRA 783, 787 (1980). Or, as the Authority has stated otherwise, ". . . to the extent that an agency has discretion with respect to a matter affecting the conditions of employment of its employees, that matter is within the duty to bargain of an agency." National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA No. 118, 3 FLRA 747, 759-76 (1980); and as Judge Arrigo held in: Defense Contract Administration Services Region, Boston, Massachusetts; Commander, Fort Devens, Fort Devens, Massachusetts; Defense Logistics Agency, Washington, D.C.; Department of Defense, Washington, D.C. and National Association of Government Employees, Local R1-210 (Case Nos. 1-CA-212, 1-CA-298, 1-CA-299, and 1-CA-300 (December 22, 1980); Boston District Recruiting Command, Boston, Massachusetts; 94th U.S. Army Reserve Command, Hanscom Air Force Base, Massachusetts; Commander, Fort Devens, Fort Devens, Massachusetts; Department of the Army, Washington, D.C.; Department of Defense, Washington, D.C. and American Federation of Government Employees, AFL-CIO, Local 1900, Case Nos. 1-CA-206, 1-CA-207, 1-CA-208, 1-CA-209, 1-CA-303, and 1-CA-304 (December 22, 1980); and Department of the Army and American Federation of Government Employees, AFL-CIO, Case No. 3-CA-766 (December 22, 1980); and as I held in Harry Diamond Laboratories and Department of the Army and Department of Defense and American Federation of Government Employees, AFL-CIO, Local 2 and Office of Personnel Management, Intervenor, Case Nos. 3-CA-719, 3-CA-889, and 3-CA-970 (May 18, 1981) and in Office of the Assistant Secretary of Defense For Public Affairs and Washington Headquarters Services and American Federation of Government Employees, AFL-CIO, Local 2 and Office of Personnel Management, Intervenor, Case Nos. 3-CA-718, 3-CA-1024 (May 18, 1981), an activity has ". . . a duty to bargain with the Union as to matters not precluded by express provisions of Government-wide regulations or the regulations issued by DOD and DA."

As previously stated, only two of the Union's proposals are in issue, namely Section 2, A through K and Section 4.b.2., and I have fully set forth the corresponding provisions of AFR 40-452 and the Union's Proposals. Clearly, the Union's Proposals at issue do not constitute mere "procedures." To the contrary, as more fully set forth below, the Union's Proposals sought to change the Performance Appraisal System as set forth in AFR 40-452 by substituting the Union's own version of a Performance Appraisal System. I conclude that the Union's Proposals in issue, i.e., Section 2, A through K and Section 4.b.2., as a whole, were incompatible with AFR 40-452 and that Respondent was without discretion to bargain concerning the changes in question sought by the Union[4/] which were precluded by the express terms of agency-wide regulations.

4/ As the record shows, by no means were all Union Proposals declared non-negotiable (See, G.C. Exh. 7, Attachment); proposals not precluded by AFR 40-452 were negotiated; language was agreed to by the (continued)

The Union's proposed definition of "job element", Section 2 A, would require that each job element be ". . . any major component of an employee's job that has been included in the official position description . . ."; whereas, AFR 40-452, Par. 1-7 c, provides that a job performance element is," a significant requirement of the job, derived by analysis of the job" and may be "an important duty or responsibility of the position, or it may be a specific project or task consistent with or directly drawn from the duties and responsibilities in the position description" (Emphasis supplied). As Respondent states in its Brief, ". . . the Union proposal has an inflexible requirement that the job element be 'included' within the official position description" (Respondent's Brief p. 18); but, by contrast, the Regulation provides that, a job performance element ". . . may be a duty or responsibility without regard to the position description" (Respondent's Brief p. 18), i.e., it "may be an important duty or responsibility of the position" (AFR 40-452, Par. 1-7 c); or it "may be a specific project or task consistent with . . . the position description" (AFR 40-452, Par. 1-7 c), but "not directly drawn from it" (Respondent's Brief, p. 18); or it may be "directly drawn from the duties and responsibilities in the position description" (AFR 40-452, Par. 1-7 c). The Authority has held that,

> "The right to assign work to employees or positions under Section 7106(a), subject to the provisions of section 7106(b), is composed of two discretionary elements: (1) the particular duties and work to be assigned, and (2) the particular employees to whom or position to which it will be assigned [Footnotes omitted]. Furthermore, management discretion . . . includes the right to assign general continuing duties, to make specific periodic work assignments to employees, to determine when such assignments will occur and to determine when the work which has been assigned will be performed.
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> ". . . the establishing of 'critical elements' and 'performance standards' as provided for in law and defined by regulation are among the ways in which management supervises and determines the quality,

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(continued)

parties (See, G.C. Exh. 7, Attachment); and the "Job Performance Appraisal System for Employees covered by AFGE 1974 and AFGE 2040" as implemented (Res. Exh. 4, Attachment), demonstrates a Job Appraisal System structured for bargaining unit employees, reflects language agreed upon by the parties, and, while adhering to AFR 40-452, fleshes out AFR 40-452 and includes language, proposed by the Union, either not found in AFR 40-452 or restructured for bargaining unit employees.

> quantity, and timeliness of work required by employees. . . . "National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA No. 119, 3 FLRA 768, 775-776 (1980), aff'd sub nom., National Treasury Employees Union v. Federal Labor Relations Authority, No. 80 - 1895, - F.2d - (October 12, 1982) (In its decision, the Court noted, inter alia, that, ". . . the Authority concluded that . . . identification of critical job elements are within the scope of the power reserved exclusively to management by Section 7106(a) to 'direct employees' and 'assign work.' . . . In sum, the Authority concluded that, by virtue of the provisions of Section 7106(a), management retained the non-negotiable right to determine what work will be done, and by whom and when.")

Consistent with § 6(a), AFR 40-452 Par. 1-7 c, exercised the non-negotiable right to assign particular duties and work to particular employees, i.e. ". . . management discretion . . . includes the right . . . to make specific periodic work assignments to employees" as well as the right to assign "general continuing duties" (3 FLRA at 775) as well as the right to establish, or to identify, critical job elements (3 FLRA at 776). As the Union's proposal, Section 2 A, would not permit establishment, or identification, of a job performance element not included in the official position description, it is incompatible or irreconcilable with AFR 40-452, Par. 1-7 c which provides that, "A job performance element may be an important duty or responsibility of the position, or it may be a specific project or task consistent with . . . the position description" or it may be "directly drawn from the duties and responsibilities in the position description." Respondent has called attention to the Authority's decision, in American Federation of Government Employees, AFL-CIO, Local 2849, 7 FLRA No. 88, 7 FLRA 571 (1982), which involved a union proposal, in part, as pertinent, that "Standards and elements so identified will be consistent with the duties and responsibilities contained in properly classified position descriptions" as to which the Authority held, in part, as follows:

> ". . . A position description reflects the duties and responsibilities assigned to a position; in other words, it merely describes work which it is expected would be assigned to an employee but it is not, in itself, an assignment of work. Moreover, when performance standards are established, a position description may be revised, if necessary . . .
>
> "Thus, this proposal, by requiring consistency between position description, on the one hand, and critical elements identified and performance standards established for a position, on the other hand, would

> not limit the Agency's choice of critical elements or performance standards. Rather, the Agency could always achieve consistency as required by the proposal merely by amending the position description. Accordingly, under the proposal, the right of the Agency to assign work and to direct employees through establishing such elements and standards remains unaffected, subject to the procedural requirement that the position description involved accurately reflect the work assigned." (7 FLRA at 573-574).

Local 2849, supra, is distinguishable, and, therefore, not controlling here, for various reasons. First, the Union's proposal concerning "job element" does not seek merely consistency with a position description, but, rather, that it must have "been included in the official position description." Second, AFR 40-452, Par. 1-7 c, consistent with Local 2849, itself, provides that the job performance and element be "consistent with or directly drawn from the duties and responsibilities in the position description." Third, the Union's proposal here would limit Respondent's right to establish as a job performance element the assignment of a specific project or task to a particular employee, unless the particular project or task were included in the employee's official position description, not, merely, that the project or task be "consistent with" the position description, and would limit Respondent's right to assign work and to direct employees through establishing job performance elements and standards for a particular employee.

Section 2 A of the Union's Proposal permeates and controls all of the succeeding subsections of Section 2 which incorporate the defined term "job element", including, for example: Section 2 B, Section 2 C, Section 2 D, Section 2 H, and Section 2 I.

Section 2 B of the Union's Proposal defines "critical element" as "a job element which is of such importance that if it is not performed adequately, acceptable performance of the job as a whole is not possible." The identical proposal was involved in Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council 214, AFL-CIO, Case No. 5-CA-20018 (October 20, 1982) (OALJ-83-06) and, with regard thereto, Judge Arrigo held, ". . . the definition of 'critical element' as proposed by the Union . . . is at substantial variance and therefore incompatible or irreconcilable with the definition contained in the regulation. Accordingly, I conclude that AFR 40-452 is a bar to negotiations on this proposal. . . ." I fully agree. In addition, as noted above, the comments concerning "job element", which is specifically incorporated in the Union's definition or "critical element" also apply. Moreover, Mr. Brock, Respondent's Chief Negotiator, testified that Mr. Case, the Union's Chief Negotiator,

". . . explained that critical elements should be those elements that involved grade controlling duties." (Tr. 179).

And Ms. Cheryl L. Lepard, a member of Respondent's negotiating team, testified, in part, as follows:

"A. In his [Mr. Case's] explanation of critical element, he was telling us that the critical element should be those portions of the job which are grade controlling as far as position classification is concerned." (Tr 226).

Mr. Case's testimony, at best, was equivocal. He testified, in part, as follows:

"Q. Are you saying that you don't remember ever talking about grade controlling items with Management in regard to critical elements?

"A. I talked with Management for a long time about grade-controlling functions within our activity, as far as the negotiations go. Any major component of a position description could be grade controlling. But what's that got to do with the definition?

"Q. That's what I'm asking you.

. . .

"WITNESS: I'm sure that our rationale came from what AFGE general counsel told us, and that was to speak in terms of the major components of an employee's position description." (Tr. 73-74).

I conclude that Mr. Case did explain that under the Union's Proposal, critical elements should be grade controlling. The Authority has held that a proposal which would require that the critical elements of a position be based only on grade controlling factors of a position is inconsistent with § 6(a) of the Statute. American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA No. 34, 7 FLRA 217, 221-222 (1981); American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA No. 14 (1981). Accordingly, the proposal, as explained by Mr. Case, was for this reason also outside the duty to bargain.

Section 2 C of the Union's Proposal which defines "non-critical

element" as "a job element that is not critical, but is important enough to require measurements based on objective criteria", not only specifically incorporates "job element", as to which the comments above concerning this term also apply, but is further at substantial variance with AFR 40-452, Par. 1-7 e and, therefore, incompatible or irreconcilable therewith.

Section 2 D of the Union's Proposal, which defines "performance standard", is identical to the proposed definition of performance standard in Wright-Patterson, supra, which Judge Arrigo found,

> ". . . taken as a whole, at substantial variance and therefore incompatible or irreconcilable with the definition contained in the regulation. Accordingly, I conclude that AFR 40-452 is a bar to negotiations. . . ."

In addition, although the last sentence of the Union's Proposal was that, "All performance standards must be fair, equitable, objective, valid, reliable and job related" (Union Proposal Section 2 D) and the Authority has held ". . . that a proposal that performance standards be 'fair and equitable' simply established a general, nonquantitative requirement by which the application of performance standards may subsequently be evaluated in a grievance . . ." is negotiable, American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA No. 120, 3 FLRA 783, 790 (1980); American Federation of Government Employees, AFL-CIO, Local 3804, supra, 7 FLRA at 224; nevertheless, Respondent's last offer, as implemented, provided, in part,

> "Section 1. General. The Air Force Job Performance Appraisal System (JPAS) as applied to bargaining unit employees will be fair, objective, equitable and job related. . . ." (Res. Exh. 4, Attachment, Section 1).

Consequently, while I fully agree with Judge Arrigo that the proposed definition of "performance standard" should be considered as a whole, the record does not establish a refusal to bargain even as to the "fair and equitable" portion of the Union's Proposal.

Union Proposals Sections 2 E through 2 H and Section 4.b.2. constitute the Union's four level rating plan, by which the Union sought to totally replace the five level rating scale of AFR 40-452, Pars. 1-7 n through r, and for this reason alone are incompatible or irreconcilable with the rating scale contained in the regulation. Moreover, without examining in detail each definition in Union Proposal Section 2 E through 2 H, it is further apparent that each of the Union's definition is incompatible or irreconcilable with the provisions of the regulation. For example, the parties agreed that the range of rating for each individual element should be: exceeded the standard; met the standard;

and did not meet the standard (See G.C. Exh. 7, Attachment, Union Proposal 4.b.1., which is not in issue; and compare Res. Exh. 4, Attachment, Section 4.b.1.). Nevertheless, the Union's proposed "Outstanding" rating (Section 2 E) provides, in part, "The employee has significantly exceeded the established performance standard," but provides no objective measure as to when an employee has "significantly exceeded" any standard, and appears to contemplate a single performance standard as well as performance on all requirements of the position; whereas, the regulation provides an objective standard, namely, "exceeds the performance requirements of all job performance elements." Thus, an employee rated for each element as "exceeded the standard," under AFR 40-452, Par. 1-7 n, would be rated "Superior" while under the Union Proposal would be rated "Outstanding" only if the employee had "significantly exceeded" the established standard. The Union's Proposal contains no rating comparable to AFR 40-452, Par. 1-7 o for "Excellent." The Union Proposal for "Satisfactory" first provides that, "The employee has met the established standard"; but then provides that "The employee requires an average degree of supervision and normal problems are satisfactory solved. Assignments are complete and prepared as compared to the average employee" (Section 2 F); whereas, AFR Par. 1-7 p, for "Fully Successful" provided simply that the ". . . employee meets the performance requirements of all the job performance elements. . . ." The Union Proposal for "Marginal" provides, "The employee has barely met the established standards while overall performance meets the requirements of the position"; but then provides, "There are noted deficiences with room for improvement and more direct supervision may have been required" (Section 2 G); whereas, AFR Par. 1-7 q, for "Minimally Acceptable" provides that the employee, ". . . meets the performance requirements of all critical job performance elements . . . but does not meet the performance requirements of one or more non-critical job performance elements." Union Proposal for "Unacceptable" provides, "The Employee has failed to meet the established standards, one or more critical elements and has failed to complete assignments in an acceptable manner" (Section 2 H); whereas AFR 40-452, Par. 1-7 r, for "Unacceptable" provides, simply that the employee, ". . . does not meet the requirements of one or more critical job performance elements. . . ."

Union Proposal, Section 2 I, "Work Plan," because it would limit critical or non-critical elements to major components "of an employee's official position description" is incompatible or irreconcilable with AFR 40-452, Par. 1-7 s for reasons set forth above.

Union Proposal, Section 2 J, "Performance Appraisal" is not incompatible with AFR 40-452, Par. 1-7 j and Union Proposal, Section 2 K, "Training" is not incompatible with AFR 40-452, Par. 5-4; however, the Union refused to negotiate these provisions separately (Tr. 189) and, as the Union's proposals, considered as a whole, were incompatible or irreconcilable with the regulation and I conclude that AFR 40-452 was a bar to negotiations.

The second issue is whether, if the Union's Proposals were incompatible or irreconcilable with AFR 40-452, as I have found, a compelling need determination may be made in an unfair labor practice proceeding. Although the Authority has not yet addressed the question, fully in agreement with the decisions of Judge Arrigo, in Boston District Recruiting Command, et al., supra, and Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council 214, AFL-CIO, Case No. 5-CA-20018 (October 20, 1982) (OALJ-83-06); Judge Dowd, in Defense Logistics Agency, et al, Case No. 1-CA-213 (July 7, 1981) (OALJ-81-131); Judge Chaitovitz, in U.S. Air Force, Washington, D.C. and U.S. Air Force, Electronic Systems Division, Hanscom Air Force Base (Bedford, Massachusetts) and National Association of Government Employees, Local R1-8, Case No. 1-CA-853 (October 22, 1982) (OALJ-83-10), and with my decision, in Harry Diamond Laboratories, et al, supra, Case Nos. 3-CA-719, 3-CA-889, and 3-CA-970 (May 18, 1981) (OALJ-81-104), I conclude that compelling need may not be adjudicated in an unfair labor practice proceeding before an Administrative Law Judge.

Because the Union did not first pursue the procedures provided for presenting the compelling need issue to the Authority and because the Union's Proposals, considered as a whole, were incompatible or irreconcilable with AFR 40-452, the record does not establish any refusal to bargain in violation of § 16(a)(5) or (1) of the Statute and, accordingly, it is recommended that the Authority issue the following:

ORDER

The Complaint in Case No. 7-CA-1379 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 23, 1982
Washington, DC

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOUTHWESTERN POWER ADMINISTRATION

Activity

and

Case No. 0-AR-1062

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1002

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator John P. Owen filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed and submitted to arbitration claiming that the performance by a general foreman of switching duties, which is work regularly performed by bargaining-unit employees, violated Article XXIII, Section 23.1 of the parties' collective bargaining agreement. Article XXIII, Section 23.1 pertinently provided that a general foreman shall not normally perform bargaining-unit work except in situations such as checking the work of others, training of employees, and when life or property is in danger and there are no other qualified persons available to do the work. The Arbitrator determined that the performance by the general foreman of the switching duties in dispute was clearly prohibited by the parties' agreement because none of the exceptions provided applied. Consequently, he ruled that the Activity had violated the agreement. In so ruling he rejected the Activity's argument that such a determination was inconsistent with management's right to assign work in accordance with section 7106(a)(2)(B) of the Statute. He concluded in this respect that although the Statute reserves to management the right to assign work, "it does not prevent an Agency from voluntarily