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

375TH COMBAT SUPPORT GROUP SCOTT AIR FORCE BASE, ILLINOIS Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R7-23, AFL-CIO, SEIU Charging Party	Case No. 75-CA-10008

Matthew L. Jarvinen, Esq.
For the General Counsel

Captain David F. Brash
For the Respondent

Mr. Carl L. Denton
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to charges filed on October 1, 1990 and first amended on October 7, 1991 by the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU (hereinafter called the Union) a Complaint and Notice of Hearing was issued on October 9, 1991 by the Regional Director for the Denver Colorado Region, Federal Labor Relations Authority. The complaint alleges that the 375th Combat Support Group, Scott Air Force Base, Illinois (herein

called Scott or the Respondent) violated section 7116(a)(1), (5) and (6) of the Statute by implementing changes in the smoking policy on August 15, 1990, and by implementing Personnel Concept III and changes in the drug testing and asbestos removal policies on August 9, 1990 without negotiating with the Union over the substance and/or the impact and implementation of these policies and by implementing such changes while the Union's requests for Federal Service Impasses Panel (herein called FSIP or the Panel) assistance were pending. The complaint further alleges that the Respondent violated Section 7116(a)(1) and (5) of the Statute since July 18, 1990 by refusing to bargain over the Respondent's child care Policy and over the procedures applicable to lateral reassignments and vacancy announcements.

A hearing was held before the undersigned in St. Louis, Missouri. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Both parties submitted post-hearing briefs which have been fully considered.

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

Findings of Fact

The Union is the certified exclusive representative of four separate bargaining units of employees at Respondent's Scott facility, including a unit of Appropriated Fund employees and a unit of Non-Appropriated Fund employees. At all times material, Carl Denton has served as the Union President, John Cissell has served as the Union's Executive Vice President, and Myron Nelson has served as the Union's First Vice President. Robert Nelson (herein called Nelson) is employed by Scott as the Labor Relations Officer. Gerald Norton is Chief of Labor and Employee Management Relations and serves as Nelson's supervisor.

A. THE SMOKING POLICY AGREEMENT

1. On March 16, 1989, the parties executed an agreement with respect to Air Force Regulation 30-27. AFR 30-27, entitled "Smoking in Air Force Facilities," generally provides, at paragraph 3, that smoking will not be permitted in certain enumerated indoor Air Force facilities. Paragraph 3f. bans smoking in "conference rooms," and

paragraph 3g. indicates that smoking will not be permitted in work or "break areas," except under limited circumstances.

2. The March 16, 1989 agreement between the parties provides for application of the smoking ban contained in paragraph 3 of AFR 30-27, but specifically exempts the ban on smoking in break areas (paragraph 3g.) and those areas for which the parties had negotiated agreements. The March 16 agreement also provides that "Where changes to established practices are proposed, the employer will negotiate . . . prior to implementing."

B. THE GROUND RULES DISPUTE

1. Jim Otzellberger, Nelson's predecessor as Labor Relations Officer at Scott, apparently was a chain smoker and most negotiations were held in Otzellberger's office where smoking was allowed. When Nelson took over the position, he inherited Otzellberger's office, and negotiations continued to be held in that office with smoking still allowed. Sometime about, May or June 1989, Norton's office was converted to a breakroom; and in July 1989, Nelson acquired new computer equipment in his office. Nelson asked the Union if they would mind not smoking in his office because of the new computer, but the Union insisted that smoking continue to be permitted during negotiations. Nelson then asked if the Union would agree to meet in the adjoining room (i.e., in Norton's former office) and make his (Nelson's) office a nonsmoking area. Denton indicated that, as long as smoking was allowed, he did not care whether they met in Nelson's office or in the adjoining room. Norton testified that he granted an exception to the Air Force Regulation banning smoking in "conference rooms" (see description of AFR 30-27, infra) in order to "facilitate negotiations." Thus, in September 1989, the parties began to use the room adjoining Nelson's office for negotiations with the understanding that smoking would be permitted there.

2. The Union described the room adjoining Nelson's office as a breakroom while Respondent referred to it as a "conference room." While Denton acknowledged the room was used for meetings, there is no dispute that it was used as a breakroom. The room contains a table with chairs, filing cabinets and a microwave oven, and was used for storage as well as for breaks. Nelson admitted the room contains a refrigerator, an ashtray and a coffee pot and that the room was used by employees to eat lunch and even play cards.

3. The parties continued to smoke during negotiations in that room for approximately the next 8 months. Nelson suggested that negotiations were held at whatever location was convenient depending on the issue involved, but Cissell testified that he attended between 20 and 30 bargaining sessions from the time negotiations were moved from Nelson's office to the adjoining room until July 18, and that 90% of those meetings were held in the room adjoining Nelson's office with smoking permitted. Denton also stated that most of the meetings from the beginning of May through July 18, 1990 were held in the room adjoining Nelson's office. According to Nelson, however, when he met in his office with Denton on April 24, 1990,[1/] the adjoining room was occupied. Nelson asked if Denton minded meeting in Nelson's office, and Denton responded that they usually met in the adjoining room because of the smoking issue. Nelson claims that he then told Denton, "well, there's no smoking in there, and, you know, do you mind meeting in my office," and that they proceeded to meet in Nelson's office that day. While Nelson asserted that his casual statement that "there's no smoking in there" constituted management's notice to the Union that smoking would no longer be permitted during negotiations in the room adjoining his office, he also admitted that smoking was permitted during negotiations in that room 2 days later on April 26, and again during a May 9 meeting.[2/] Thus, both Cissell and Myron Nelson smoked on April 26 during negotiations over a shift change in Ray Mackey's Refrigeration Shop, and there was never any question raised about their smoking. Smoking was also permitted on May 9, when representatives from the Department of Labor and Charles Riley from the Federal Mediation and Conciliation Service (FMCS) met with the parties in that room.

4. Nelson testified that he permitted smoking on April 26 because he was unsure whether Denton had told Myron Nelson and Cissell that smoking was no longer allowed in the

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1/ All dates are 1990 unless otherwise indicated.

2/ Nelson sought to explain the absence of written notification by noting that there had been no written notice when his office was made nonsmoking or when the parties moved their negotiations into the room adjoining his office. However, Nelson conceded that in those instances, there was no question that the Union's negotiators would be able to smoke when negotiations were moved to the adjoining room.

adjoining room. Nelson also testified that he did not again inform Denton that smoking was barred in the adjoining room until June 14, more than 6 weeks later. Nelson failed to explain why he waited until June 14 to inform Denton or why, if smoking was banned as of April 24, smoking was allowed in the room on April 26 and again on May 9. Moreover, while Nelson testified that the reasons he told Denton smoking would no longer be permitted in the room adjoining his office was to provide Denton with notification and to solicit the Union's concerns, both Nelson and Norton conceded that (1) management consistently provided the Union with written notice of any proposed changes to smoking policy at Scott (2) Denton invariably requested to bargain over any smoking policy changes and (3) no such written notice was given in this instance.

5. Denton denied being notified prior to July 18 that there would be any problem with smoking during negotiations in the room adjoining Nelson's office. Had Denton been so notified, he says he probably would have sought bargaining immediately, since all of the Union's negotiators except Denton are smokers. Even after the June 14 date of Nelson's second alleged verbal notification, Nelson cleared the room to allow negotiations to occur in a room where smoking was permitted. Thus, on June 15, Denton and Cissell went to the Civilian Personnel Office for negotiations with Nelson, but the adjoining room was occupied. Cissell asked Nelson to clear the room. When Nelson suggested they use his office. Denton insisted on moving to the adjoining room, and Cissell told Nelson that he knew Cissell's stand on meeting in a nonsmoking room. Denton and Cissell then caucused briefly, and Cissell agreed to postpone the meeting due to Denton's extreme back pain. Later, when they returned to Nelson's office, Nelson had cleared the adjoining room. Although Denton was apologetic about making Nelson clear the room, no meeting was held that day due to Denton's back pain.

6. On July 18, the parties had two bargaining sessions scheduled. One meeting was scheduled for 9 a.m. concerning asbestos abatement procedures, the closing of a Heating Plant in Building 896 and the draft of an Air Force Manual, and the other meeting was scheduled for 1 p.m. to address vacancy announcements, lateral reassignments and Personnel Concept III (PC III).

7. Cissell arrived for the 9 a.m. meeting before Denton and noticed that there were people already using the breakroom adjoining Nelson's office. Cissell asked Nelson to have the people leave so they could meet, but Nelson said they would meet in his office. Cissell disagreed, reminding Nelson

that he would meet only in a room where smoking was permitted. When Nelson refused to clear the breakroom, Cissell said they would have to wait for Denton to arrive. When Denton arrived, he first spoke with Cissell in the hall. Upon entering Nelson's office, Denton objected to other people using the adjoining room and asked what was going on. Nelson said they would use his room for negotiations. Denton said he could not agree to use Nelson's office since they had arranged to use the room next to Nelson's office for bargaining purposes. Denton told Nelson the room should have been cleared for the 9 a.m. meeting, but Nelson refused to move them out of the adjoining room. Nelson asserted that the room had been nonsmoking for 6 months and said Denton could do what he wanted. Denton denied that the room had been nonsmoking for 6 months and reminded Nelson that they had agreed to use the room adjoining Nelson's office specifically to accommodate the Union's negotiators who smoke. Denton insisted on meeting in the adjoining room. When Nelson would not relent, Denton conferred briefly with Cissell before returning to inform Nelson that as far as the Union was concerned, Respondent was not prepared to meet. Denton said he would see Nelson later, and Cissell left. Nelson's testimony concerning the 9 a.m. meeting was that when Denton asked the adjoining room to be cleared, Nelson said he would not do so and suggested that they meet in his office or the Union Office. According to Nelson, Denton responded that neither place was appropriate for negotiations and then left. Nelson did say that the reason the Union would not meet in his office was because smoking was not permitted.

8. When Denton and Cissell returned for the 1 p.m. meeting in the breakroom adjoining Nelson's office, Cissell took an ashtray from on top of the refrigerator and lit a cigarette. After a few minutes of small talk, Nelson told Cissell he had made his point and would appreciate Cissell putting his cigarette out. Denton asked what Nelson was talking about -- the reason they used the room was because it was a smoking room. Nelson said it had been a nonsmoking room for 6 months. Denton said that was ridiculous, but Nelson insisted that Cissell put his cigarette out. Cissell also said that was crazy since he had smoked in that room in the past 6 months and had seen Norton smoke there in the previous 2 months. Cissell then showed Nelson the ashtray and questioned how Nelson could say the room was nonsmoking when the ashtray already contained a cigarette that was not his brand. Although Nelson testified that the room had been nonsmoking since April 24, he admitted the ashtray may have already been in the room when Cissell lit his cigarette. Nelson claimed Respondent had told the Union the whole

building was nonsmoking, but when Denton and Cissell questioned Nelson when and to whom such notice was given, Nelson did not respond other than to say the Union was told the room would be nonsmoking. Denton and Cissell denied being so notified, and left soon after.3/

C. EVENTS FOLLOWING JULY 18

1. By letter dated July 19, Denton submitted the Union's request to bargain over ground rules, proposing that Respondent provide a room away from the Civilian Personnel Office equipped with ashtrays to permit smoking. Denton asked for a prompt response due to "the urgency of getting this matter resolved so that we can continue negotiations on on-going matters as soon as possible."

2. On July 20, Denton also wrote to Daniel Marlett, Respondent's Civilian Personnel Officer. Denton noted Respondent's "most recent unilateral change in conditions involving where the parties meet," and requested Respondent to submit counterproposals regarding those issues then pending negotiations between the parties, including drug testing, child care, asbestos removal, PC III, lateral reassignments, vacancy announcements, base smoking and meeting place arrangements. Denton stated his hope that the parties could soon arrange for a neutral site to conduct negotiations.

3. Norton responded to Denton's July 19 ground rules proposals by letter dated July 20. Norton proposed use of the Denton's Union office for negotiations and further proposed that smoking would not be permitted during negotiations, that a key be given to Respondent and that the room be made available to Respondent 30 minutes before negotiations. Norton concluded his letter as follows:

> If our counters are not acceptable, we suggest that we continue to negotiate in the Labor Relations Office, Bldg 52. This has been our normal meeting place for years (i.e., the status quo). If the office is not acceptable, we will make the adjacent

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3/ Nelson's version of the 1 p.m. meeting was somewhat different. He stated that when Cissell lit his cigarette, Nelson said it was a nonsmoking room and asked Cissell to put his cigarette out, stating that Cissell had made his point; and the session was concluded.

conference room available. If the conference room is to be used, AFR 30-27 will be enforced.

4. Denton testified that he was insulted by Norton's proposals and viewed them to be "a slap in the Union's face." Denton opposed use of the Union's office for negotiations for several reasons, and Respondent no doubt was aware of Denton's opposition. The Union office was small, Nelson usually scanned Union correspondence when in Denton's office, there was no suitable caucus space, and the Union was concerned about the confidentiality of employees seeking its assistance. In addition, Denton felt that Norton's description (paragraph 3) of the Labor Relations Office as the status quo was misleading since negotiations had been conducted in the breakroom next to Nelson's office since September 1989 pursuant to their agreement. Denton further described Norton's letter as "self-serving" in its reference to the room adjoining Nelson's office as a "conference room" and in its admonition that AFR 30-27 (banning smoking in "conference rooms") would be enforced if the room were used for negotiations.

5. Denton wrote to Marlett on July 24, objecting to Norton's description of the status quo and his reference to the room as a "conference room." Denton's letter stated that the Union viewed the matter to be at impasse and announced the Union's intent to seek FSIP assistance. Also on July 24, Norton responded to Denton's July 20 letter requesting counterproposals by stating that Respondent did not view the topics to be at impasse, but that Respondent was willing "to negotiate anytime, however, your refusal to negotiate leaves us no alternative but to implement the issues immediately." On July 25, Denton filed the Union's request for FSIP assistance over the parties' ground rules dispute. According to Denton, it was Norton's "ridiculous" ground rules proposals of July 20 (and management's obvious unwillingness to restore the previous practice) which prompted the Union to seek Panel assistance.

6. By letter dated July 27, Norton responded to Denton's July 24 letter concerning the ground rules issue, stating that management did not view the negotiations to be at impasse. In response to Norton's offer to meet that afternoon to address ground rules, Denton told Nelson he would arrange a meeting for the following Monday.

7. Denton sent Myron Nelson to meet with Nelson in the latter's office on July 30 in an effort to resolve "this

most serious situation."4/ At the outset, Nelson indicated that any negotiations at Scott would be nonsmoking. Myron Nelson disagreed since there were negotiated agreements permitting smoking in certain areas on base. The Nelson's then considered about 5 or 6 alternative sites for conducting negotiations, but were unable to reach agreement. Despite Denton's July 20 proposals for a bargaining site away from the Personnel Office, Nelson claimed that he first learned of the Union's interest in a more neutral site at the July 30 meeting. Near the end of the meeting, Nelson stated that Myron Nelson knew Denton had been told there would be no smoking in Building 52, but Myron Nelson denied the statement since he had smoked there at other meetings and had never been told not to smoke.

8. After the Nelsons' July 30 meeting failed to resolve the ground rules matter, Norton advised the Union by letter dated July 31 that the Union's "refusal to meet and negotiate" on the topics listed above in Denton's July 20 letter left Respondent "no alternative but to implement our final proposals on 9 Aug 90." Faced with Respondent's stated intent to implement, Denton submitted an August 3 request for Panel assistance regarding the issues then pending between the parties (including those topics listed in his July 20 letter). Denton explained his request for Panel assistance by noting that despite his July 20 request, the Union never received any counterproposals from Respondent. Denton also sought to protect the status quo and procedurally to protect the Union's bargaining rights.

9. Norton admitted that despite Respondent's knowledge that the Union had requested Panel assistance, Scott implemented the several policy changes on August 9, as scheduled. Norton acknowledged that the policies implemented on August 9 were those referenced in various Union correspondence (in all likelihood including those topics listed in the Union's July 20 letter). As stated in a letter from Marlett's August 17 letter to FSIP, "management implemented all changes on 9 August 1990" concerning the issues contained in Denton's submission to the Panel. Norton attempted to distinguish between the date given for implementation and the date of actual implementation, he admitted, however that the information in the August 17 letter was accurate.

4/ Denton considered Myron Nelson's agreement to refrain from smoking and to meet on Respondent's "turf" to be a conciliatory gesture on the Union's part.

D. RESPONDENT'S GRIEVANCE

1. On July 29, the Respondent filed a grievance alleging that the Union violated the parties' negotiated agreement by refusing to negotiate in good faith on July 18. The grievance alleged that Denton's refusal to negotiate was "just another stalling tactic" in the Union's effort to prevent management from implementing policy changes. The grievance also claimed that Denton had been told "several months ago" that smoking would not be permitted in the room adjacent to Nelson's office, but that the Union did not request negotiations. As a remedy, the grievance sought to have the Union to drop all "charges and/or allegations surrounding these incidents."

2. The Union's response to the grievance denied any contract violation, denied engaging in "stalling tactics," and denied that Nelson ever told the Union that the room would be nonsmoking. To the contrary, the Union asserted that the reason the Union agreed to use the room was to allow the Union's negotiators to smoke. The Union denied engaging in stalling tactics and denied that Nelson notified the Union that the room would be nonsmoking.

3. At the arbitration hearing held on March 6, 1991 before Arbitrator Richard Ross, the Union argued that the grievance was moot and non-arbitrable and declined to present any evidence concerning the merits. As Denton put it, the Union chose to put "all its marbles . . . in the basket with the FLRA.5/

4. Ross's March 14, 1991 award sustained Respondent's grievance, citing the Union's acknowledged failure to bargain from July 18 to October 23, 1990. However, since the Union had returned to the bargaining table on October 23, no remedy was required. Ross's decision further states that:

> The undersigned has no power or authority to order the Union to drop all charges and/or allegations relating to the unfair labor [practice] charges filed by the Union prior to the filing of the grievance herein.

5/ While Norton testified that Respondent pursued the grievance to arbitration to force the Union back to the bargaining table, on cross-examination he stated that the Union had already returned to the bargaining table by the time of the arbitration hearing.

The Union filed exceptions to Ross' award on April 16, 1991, but on June 12, 1991, the Authority denied the Union's exceptions.

E. BASE SMOKING

1. On June 5, Marna Kettwich (then serving in Norton's position) provided the Union a proposal to ban smoking in Scott facilities except where negotiated agreements permitted smoking. By letter dated June 22, Denton requested bargaining and submitted proposals. On June 29, the parties met concerning the proposed change in smoking policy. Although the parties reviewed the Union's proposals, Nelson acknowledged that the session was cut short when he told the Union there would be a letter coming down on smoking from the Wing Commander, Colonel Robert J. Boots. There were no other meetings concerning the base smoking policy prior to July 18. However, Respondent waited until August 2, after the breakdown in negotiations, to provide the Union with a copy of Col. Boots' letter of July 30 which essentially banned smoking inside Scott buildings effective August 15 (unless there was a negotiated agreement to the contrary). Also by letter dated August 2, Norton notified the Union that the Scott policy on smoking would be implemented in a group of 5 buildings on August 15. Although Denton promptly submitted the Union's request to bargain and requested maintenance of the status quo by letter of August 3, Respondent proceeded to implement the changes in smoking policy on August 15 even in the face of the Union's request for Panel assistance.

2. Daniel Hamilton, a union steward employed in the Transportation Squadron's Vehicle Maintenance Shop (LGTM) at Scott, has worked in Building 548 since the LGTM moved there in 1985. The smoking policy in Building 548 was established as a result of negotiations requested by the Union on December 2, 1985. The negotiations included written proposals, at least two meetings and culminated in either May or June 1986 with a verbal agreement that the break room, restrooms and private offices would be designated smoking areas, subject only to approval by the base Fire Marshall.6/ That policy remained in effect until August 15,

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6/ Hamilton testified that the agreement was not reduced to writing since he had never experienced any problems with LGTM management living up to its verbal agreements and since designated smoking area signs would be posted with the Fire Marshall's signature.

when Major Robert Ross, Commander of Transportation Squadron, citing Col. Boots' July 30 letter, banned smoking in all work areas in Building 548 and relegated smoking to outside areas.

3. Myron Nelson, who has worked in Building 5 as a Telephone Switchman Mechanic since 1970, negotiated an agreement with the Chief Custodian of the building, Paul Sullivan, sometime either in 1987 or 1988, to permit smoking in the hallways, restrooms, the workbench area, the breakroom and several of the inner offices. Smoking areas were designated by signs, but the agreement was not reduced to writing since Nelson had worked with Sullivan for 18 years and found him to be a man of his word. That smoking policy remained in effect until Master Sergeant Ferguson told Nelson on August 15 or 16 that a new policy would ban smoking when Nelson came to work the next morning. When Nelson approached Sullivan the next morning about the new smoking policy, Sullivan indicated that his hands were tied since he was following directives.

F. DRUG TESTING

1. By cover letter dated February 13, Norton forwarded the Union a package of materials concerning Respondent's plan to implement a civilian drug testing plan. By letter dated February 23, the Union requested to bargain and submitted an initial set of 9 bargaining proposals, including a proposal that samples be divided into three parts with one part sent to the lab, one part preserved for a second test, if necessary, and one part given to the employee. A briefing was conducted by management on March 13, but no negotiations were conducted at that time at Nelson's request.

2. Thereafter, another meeting was scheduled for June 19, at which time the Union submitted 11 additional bargaining proposals. The parties' bargained over the Union's initial set of 9 proposals, but Respondent asked to take the second set of proposals under advisement. Nelson told the Union he could not agree to proposals a. or b. and wanted to impasse the proposals. With respect to proposal c., Nelson indicated it was a proposal to which Respondent could probably agree. Respondent did not agree to proposal d. There was considerable discussion of proposal e., including the exchange of several counterproposals. Respondent's concern was that the entire process would be on government time and sought to reach a compromise on who would bear the cost of the testing. Nelson indicated proposal f. was something the parties could probably work out, but Nelson

would not agree to proposals g., h. or i., stating that Respondent was ready to go to impasse over them. Nelson declared the Union's proposals to be at impasse even though Respondent had offered not any counterproposals. Although additional meetings were scheduled concerning drug testing, none took place for various reasons. Eventually, after the parties' July 18 ground rules dispute and Respondent's failure to provide counterproposals pursuant to Denton's July 20 request, the Union requested FSIP assistance concerning drug testing on August 2. Respondent proceeded to implement its drug testing plan on August 9 (at least according to its correspondence with the FSIP) even though it had not completed negotiations and the Union had sought Panel assistance. However, the first unit employee was not tested for about another 3 months.

G. CHILD CARE

1. By letter dated May 18, Norton notified the Union of Respondent's intent to implement a pilot program for child care operations. On May 31, the Union requested to bargain and submitted initial proposals. The parties met on or about June 14 at which time Respondent briefed the Union. Respondent advised the Union that the child care program would be upgraded with training and higher pay rates for child care workers. The Union agreed that Respondent could proceed with implementation, provided the parties engaged in post-implementation bargaining. While the parties briefly reviewed the Union's bargaining proposals, the parties delayed consideration of the proposals. By letter of July 2, the Union requested another meeting for July 11 to negotiate over the Union's child care proposals, but that meeting was postponed. Another date was set for July 20, but that meeting never took place due to the July 18 dispute over meeting place arrangements.7/ The Union requested Respondent's counterproposals on July 20, but none were received. There have been no further child care negotiations.

7/ While Denton requested postponement of the July 11 meeting, Nelson conceded it was not unusual for meetings to be postponed and that it was the Union's initiative which led to scheduling of the July 20 meeting.

H. VACANCY ANNOUNCEMENTS, LATERAL REASSIGNMENTS AND PC III

1. In April 1989, the Union requested to reopen negotiations over vacancy announcement procedures following an 18-month test program. When they met, both parties had problems with the test program, but agreed to table the matter to see whether Personnel Concept III (PC III) would become operational. PC III is an automated personnel system designed to eliminate red tape concerning personnel actions, such as filling of vacancies, by providing managers access to computerized personnel records. PC III had significant implications for the Union's dealings with the Personnel Office since it had the potential to revamp the entire personnel system. The Union requested to bargain over PC III on May 10, when it saw an article in the "Command Post" indicating that PC III would be on line soon. In its May 10 request, the Union also sought to continue negotiations over vacancy announcement procedures and lateral reassignments. The Union's concern was with management filling of vacancies through lateral reassignment. The Union had not heard from Respondent concerning either vacancy announcement procedures or lateral reassignment for some time, and it sought to negotiate over the 3 issues at the same time since they were related to PC III.

2. The parties met on June 29, but Respondent advised the Union that PC III was not yet operational. The parties considered using an alternative computer system for advertising and filling vacancies, but ended up tabling the issues pending further investigation into the availability of the other system. The parties scheduled another meeting on the 3 issues for 1 p.m. on July 18, but that meeting never took place. While Denton admitted the parties were not far apart, Respondent had not met with the Union on any of the 3 issues since June 29. Nelson acknowledged that PC III was being used by military personnel, and despite informing the FSIP that it was implemented on August 9, Nelson believed that it was not yet operational for civilians since only training had been conducted for civilians. Nelson himself received training in the use of PC III in either 1989 or 1990.

I. ASBESTOS REMOVAL PROCEDURES

1. By letter dated April 10, Norton notified the Union of the Respondent's intent to implement an asbestos removal program that would require certain unit employees to be trained and to participate in removal of asbestos encountered in the work place. Previous asbestos removal had been

performed by volunteers. The Union requested bargaining and submitted 12 initial proposals on April 23. At the parties' initial meeting on May 11, Respondent explained that it could no longer afford to hire an asbestos removal team to supplement the use of volunteers. The parties then reviewed the Union's proposals, with particular attention paid to the Union's proposal for unit employees to receive physical examinations. No agreement could be reached on any of the Union's proposals. Respondent raised concerns over the exercise of management rights with respect to some of the proposals, but did not submit any counterproposals.

2. Another meeting was held on June 19 during which the parties considered the possibility (1) of having employees x-rayed and have an x-rayed specialist known as a "B-reader" review those X-rays, (2) of using volunteers to perform the asbestos removal and (3) of reassigning those employees who wished not to work around asbestos. Respondent agreed to let Cissell attend the training that it proposed to provide unit employees. Although Nelson believed negotiations were progressing and speculated that the parties would be able to reach agreement, no agreements were reached at the June 19 meeting. The next meeting was scheduled for July 18, but never occurred due to Nelson's refusal to make the breakroom available for negotiations. Although the Union requested Respondent's counterproposals on asbestos, Respondent failed to submit any. No more meetings were held concerning asbestos, and Respondent implemented its final offer on August 9 without completing negotiations. Although Cissell did not believe the parties were at impasse, Respondent implemented while the Union's request for Panel assistance was pending.

Conclusions

A. Is there an issue of collateral estoppel in the case?

The General Counsel's position is that Arbitrator Ross' finding that the Union refused to bargain in good faith is not binding on the Administrative Law Judge in this unfair labor practice proceeding under the doctrine of collateral estoppel, also known as issue preclusion. The Authority held in U.S. Department of the Air Force, Scott Air Force Base, Illinois, 35 FLRA 978 (1990) that the certain elements must be present before the doctrine applies:

> (1) the same issue must be involved in both cases; (2) the issue must have been actually litigated in the first case; (3) the resolution of the issue must have been necessary to the decision in the first case;

> (4) the prior decision on the issue to be precluded must be final; and (5) the party precluded have been fully represented at the prior hearing on the precluded issue.

Respondent makes a much more lengthy argument on the issue preclusion or collateral estoppel issue. Respondent maintains the Arbitrator's finding that the Union failed to negotiate in good faith should be treated as conclusive in this case. Respondent sees a jurisdictional issue in the case. Lowry Air Force Base, 29 FLRA 566, 569-570 (1987). Respondent urges two alternative theories. First, that application of the section 7116(d) preclusion rule[8/] shows that the finding should be conclusive. Secondly, as a matter of policy, and in furtherance of an underlying goal of the preclusion rule, the Arbitrator's finding should be held conclusive. That is, the Respondent asserts that the Union is bound by the finding of the Arbitrator on this singular issue because, insofar as the Union now asserts that it negotiated in good faith, the Arbitrator has already found to the contrary.

Respondent's position is troublesome in this particular case when trying to apply it to the particular issue herein. Clearly, the sole issue before Arbitrator Ross concerned a contract issue. As seen in Respondent's original grievance and in the award itself, the issue in the Arbitration Proceeding was whether the Union violated the parties' negotiated agreement by failing to bargain in good faith since July 18. Contrariwise, the issue before the undersigned is whether Respondent violated the Statute in August 1990 when it implemented several policy changes and refused to continue negotiations over 3 other issues. This issue was not fully litigated during the arbitration. The

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8/ Section 7116(d) reads, in pertinent part, as follows:

> Issues which can be properly raised under an appeals procedure may not be raised as unfair labor practices. . . . an employee has an option of using the negotiated grievance procedure or an appeals procedures, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

Union's position at arbitration was that it would present no evidence on the contractual bargaining issue but, defend the grievance on the basis of arbitrability and to fully litigate the statutory bargaining issue before the FLRA. Furthermore, the Arbitrator specifically refused to rule on any unfair labor practice issues because in his opinion he lacked authority to direct the Union to drop its pending unfair labor practice charges. Applying the established elements set out by the Authority in Scott Air Force Base, supra, it is concluded that neither collateral estoppel nor issue preclusion apply in this matter. Thus, it is found that the issue here was not the same as in the arbitration proceeding; the issue here was not litigated; nor was the unfair labor practice issue now before me issue fully presented at the arbitration proceeding.

Respondent also argues that the Union was in the position of "aggrieved party", both at the time of the grievance and at the time of the filing of the unfair labor practice charge for purposes of section 7116(d). The evidence is clear that the Union did not choose the grievance procedure and sought not to participate until told that an ex parte proceeding would be held if it did not participate. Such reluctant participation can hardly be seen as an aggrieved party exercising its option about which forum to proceed under. Moreover, a careful reading of section 7116(d) reveals that aggrieved party, means only that an "employee" may exercise such options. Therefore, it is found that the Union should not be bound by Respondent's choice of what procedure to follow. In covering all bases Respondent insists Griffiss Air Force Base, 12 FLRA 198, 208 (1983), teaches that status of a party as the formal filing party does not control the issue. While, the undersigned would not argue with Griffiss, supra, the instant record leaves little doubt that the aggrieved party of the arbitration proceeding was Respondent who filed a grievance and selected arbitration as the correct route to take the matter and not the Union. Accordingly, it is found that Respondent's contention that the section 7116(d) preclusion rule or collateral estoppel apply in this matter is rejected. It is found, therefore that the unfair labor aspect of this case is properly before the Authority.

B. Did Respondent unilaterally change the conditions under which the parties conducted negotiations when, on July 18, Robert Nelson refused to make the breakroom adjoining his office available for negotiations at 9:00 a.m. and refused to permit smoking in that breakroom during negotiations at 1:00 p.m.

Respondent urges that the obligation to negotiate in good faith, once triggered, involves several affirmative responsibilities. The parties must respond to one another's proposals and arguably must do so in face to face meetings. Environmental Protection Agency, 16 FLRA 602, 614 (1984). At these meetings, the parties must attend with a sincere resolve to reach agreement. Such resolve is evidence of the required give and take of negotiations, however, no agreement need necessarily be reached in order to have good faith bargaining. Department of Health and Human Service, Social Security Administration, Baltimore, Maryland, 16 FLRA 217, 230 (1984). Dilatory tactics, however, or an unjustified refusal to bargain are not to be condoned under Respondent's view. Respondent maintains that decisions in this area become quite fact specific, guided only by a totality of the circumstances test. Neither failure to reach agreement nor hard bargaining tactics are conclusive. But, these matters must be examined on a case by case basis with decisions made on all the facts.

The General Counsel simply contends that the Respondent unilaterally changed the parties' ground rules, i.e., the conditions under which the parties conducted negotiations, when on July 18, Nelson refused to make the breakdown adjoining his office available for the 9 a.m. meeting and refused to allow Union negotiators to smoke during the 1 p.m. meeting in the breakroom. This change is asserted as the reason on the breakdown in negotiations rather than bad faith bargaining by the Union.

There is no dispute that the parties agreed to move negotiations from Nelson's office to the adjoining room in September 1989 and that the express purpose of this change in location was to allow Union negotiators to continue smoking. The reason for the move was Nelson's concern that smoking would affect his new computer equipment, and the Union agreed to use the adjoining breakroom only on condition that smoking would be allowed. While this ground rules arrangement under which smoking was allowed during negotiations in that breakroom was not reduced to writing, it clearly remained the status quo until July 18.

Nelson's claim that he provided verbal notice of the smoking ban on April 24 makes little sense in the light of his admission that smoking was permitted in that room only 2 days later on April 26 and on May 9 without objection or comment. Likewise, Nelson's assertion that he notified Denton of the smoking ban again on June 14 seems unlikely.

If smoking was banned on April 24 it would scarcely be expected that Nelson would allow smoking on April 26 and May 9 and not raise the matter again until June 14 some 5 weeks after the original notice. Furthermore, Nelson's claim of verbal notice on June 14 is undermined by the fact that he cleared the adjoining breakroom for negotiations on June 15, the next day, based on the Union's request and for the specific reason that Cissell would not meet in a nonsmoking room.

Much more believable is the Union's response, that it was never told of the ground rules change (i.e., that smoking would be banned in the room adjoining Nelson's office). Of note here is, Respondent's admission that the Union invariably requested to bargain over smoking policy changes. Furthermore, almost all of the Union's negotiators are smokers, making it doubtful that Denton would allow such a change to occur without requesting to bargain. If, as Respondent asserts, Denton failed to object when notified of a ban on smoking during negotiations, he more than likely would have had some unhappy campers on his negotiating team. Finally, Denton's denial that he was ever notified of the ground rules change prior to July 18 gains some support from the fact that ashtrays were still in the room on July 18. Cissell and Denton's uncontradicted testimony establishes that when Cissell lit his cigarette at the 1 p.m. meeting, he obtained an ashtray from that room, an ashtray with a cigarette butt in it. This finding suggests that smoking had not been banned in that room for almost 3 months as Respondent would have one believe.

Respondent admits that it consistently provided the Union with written notice of changes in smoking policy at Scott, but that it failed to do so in this case. Nelson's testimony that he verbally notified Denton of the ban on smoking in the breakroom adjoining his office on April 24 (and again on June 14) certainly is not consistent with the admitted practice of providing written notice and creates doubt. Nelson's attempt to explain that he didn't provide written notification to the Union when negotiations were moved to the breakroom or when smoking was banned in his office misses the point. In neither of those situations did Respondent propose to prevent the Union's negotiators from smoking. In view of the past written notification in the smoking policy area and the ambiguousness concerning whether smoking would be allowed during negotiations, it is difficult to support an assertion that adequate or sufficient notice was given the Union that smoking would not be permitted during negotiations. U.S. Department of Labor

44 FLRA No. 81 (1992); Internal Revenue Service (District Region), 10 FLRA 326 (1982); Department of the Army, Harry Diamond Laboratories, Adelphi, Maryland, 9 FLRA 575 (1982). Therefore, it is found that there was no notice given to the Union prior to July 18 that smoking would not be permitted in the area used by the negotiators, thereby changing a condition under which the parties negotiated.

Accordingly, it is found that the Respondent unilaterally changed the parties' ground rules on July 18 by refusing to permit smoking during negotiations without notifying the Union or bargaining with it prior to the ground rules change.

C. The Respondent violated section 7116(a)(1), (5) and (6) when, on August 15, it changed the smoking policy and when on August 9, it changed the drug testing and asbestos removal policies, all without bargaining with the Union over the substance and/or the impact and implementation of such changes and while the Union's request for assistance was pending before the Federal Service Impasses Panel.

The General Counsel's position is that Respondent violated section 7116(a)(1), (5) and (6) of the Statute by implementing several changes specifically set out below prior to the completion of negotiations and while the issues were pending before the FSIP.

1. Ground Rules and the Pending Bargaining Issues

The ground rules dispute is the heart of this case. Consequently, any analysis must take into account the Authority's holding that ground rules are part and parcel of the negotiating process. The Authority has said that "negotiating a ground rules agreement . . . is an inherent aspect of an agency's obligation to bargain in good faith[.]" Veterans Administration, Washington, DC and Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, 22 FLRA 612, 633 (1986) (VA Fargo) (emphasis in original). The logical corollary to the holding in VA Fargo is that an agency may not unilaterally establish or change existing ground rules arrangements. The General Counsel asserts that here the Respondent changed existing ground rules and that the Union's seeking to negotiate and clarify the ground rules before resuming substantive negotiations was proper. Further, the General Counsel insists that following the July 18 change in ground rules, Union action to preserve its bargaining rights

concerning both the ground rules dispute and the substantive issues then pending negotiation was appropriate.

Respondent maintains that under Authority holdings there are two critical points regarding negotiations of ground rules. First, the obligation to bargain over ground rules springs from the overall section 7103(a)(12) obligation to "bargain in a good faith effort to reach agreement with respect to . . . conditions of employment" and is not severable. U.S. Department of the Air Force, Headquarters, Air Force Logistics Space Command, Wright-Patterson Air Force Base, 36 FLRA 524, 533 (1990). Second, "a party may not insist on bargaining over ground rules which do not enable the parties to fulfill their mutual obligation." Hill Air Force Base, 39 FLRA 1381 (1991). Respondent feels that both these points must be measured by the totality of the circumstances of the case. Such circumstances, it asserts will make clear that the breakdown over ground rules was contrived for delay and to fabricate a reason for impasse and Panel assistance. Its stance is that it is not always appropriate to request ground rules negotiations in response to substantive proposals. Environmental Protection Agency, supra. While this position is a fundamental one, it occurs that the party claiming that ground rules submitted as an effort to stall bargaining has the burden of proving its case. Finally, Respondent asserts that because the good faith bargaining obligation extends to both substantive proposals as well as ground rule proposals, both must be entertained simultaneously, if possible. This conclusion it says can be drawn from Wright-Patterson Air Force Base, that, ". . . ground rules proposals must, at a minimum, be designed to further, not impede, the bargaining for which the ground rules are proposed." Wright-Patterson Air Force Base, supra. In short, Respondent argues that the law requires a determination, under the totality of the circumstances, whether ground rule proposals are submitted as a means to further or to frustrate substantive bargaining. Thus, Respondent takes the position that before the propriety of the Union's request to negotiate ground rules is evaluated, the Union's position on the matter must be clarified. It believes, the Union position that all issues pending negotiation as of July 18, regardless of the progress of those negotiations, were automatically at impasse until the ground rules negotiations to resolve the July 18 problems were completed, merely hostaged further negotiations. In its view, the ground rules controversy was used as carte blanche justification for an across the board refusal to bargain on several other issues. Moreover, it asserts that to allow such gamesmanship certainly frustrates the purposes of the Statute.

Respondent argues that a totality of the circumstances shows that the Union's tactics in introducing ground rules into the negotiations here constitutes bad faith bargaining. Respondent says that three areas need examination in order to determine whether there was bad faith bargaining. According to Respondent, given the developments in three specific areas - the status of pending negotiations, the circumstances of the ground rules controversy, and the availability of alternative means to deal with the controversy - it is clear that the totality of the circumstances evidences bad faith, rather than justified, refusal to bargain by the Union. Examination of those areas, according to Respondent reveals that the Union frustrated productive collective bargaining, overreacted to legitimate enforcement of the Air Force smoking regulation during negotiations, and used extreme and unjustified means, given the reasonable alternatives available, to deal with the controversy. The issues declared at impasse by the Union due to the July 18 breakdown included the following: AFR 40-110, AFR 40-303, civilian drug testing, child care program, shift changes, asbestos removal, Personnel Concept III, lateral hiring, vacancy announcements, and the Scott smoking policy. It is noted that, each of the issues was at a different stage of negotiation on July 18. It is also noted that while there appeared to be progress in each area, each issue had its own peculiar problems. Thus, Respondent argues that as to all the issues, and particularly drug testing, robust collective bargaining had produced much progress. Notwithstanding what Respondent saw as progress, the process "was frustrated in midstream by the Union refusal to bargain". In its opinion, the Union should have, and could have, continued negotiations over ground rules while at the same time continuing negotiations on the other pending issues at alternative meeting sites.

The record disclosed that after the July 18 change in ground rules the Union immediately requested bargaining and submitted what seem to be realistic bargaining proposals together with a plea for expedited treatment due to the urgency of the situation. Respondent's July 20 response was described by the Union as a "slap in the Union's face." In that response, Respondent proposed using Denton's Union office, a location already known by the parties to be unacceptable. Respondent also proposed that it be given free reign in the use of the Union office by not only having a key, but having it available to Respondent 30 minutes before each meeting. Additionally, it proposed that there would be no smoking, the very issue on which the negotiations were already deadlocked. Lastly, it suggests

retaining the status quo, but creates its own status quo by suggesting that the parties use the Labor Relations Office (i.e., Nelson's office, where smoking had not been permitted since September 1989) as the status quo.9/ In the alternative, it suggested using the adjacent "conference room," but noted that AFR 30-27, banning smoking in conference rooms, would be strictly enforced. The significance of this description of the room adjacent to Nelson's office as a "conference room" is not lost, because the room suggested had served as a "breakroom" where smoking was permitted in under the parties' March 16, 1989 agreement concerning AFR 30-27. Thus, Respondent through it's description created a new issue over which the parties might well come to another standstill.

Respondent's suggestion that the Union deliberately manufactured a ground rules impasse as a stalling tactic to delay its implementation of policy changes then pending negotiations is unpersuasive for several reasons. First, on July 19, Denton asked for a prompt response to the bargaining proposals concerning ground rules due to "the urgency of getting this matter resolved as soon as possible." Such language, from either party, the day after negotiations breakdown would seem to be a peace offering rather than an attempt to create a dispute over ground rules to serve as a stalling tactic. Moreover, it appears that it was the Union not Respondent who sought to initiate, continue and/or reopen negotiations over the vacancy announcement, lateral reassignment and child care issues. It is impossible to conceive any advantage the Union might gain by deliberately creating a ground rules impasse around the issues involved. The party who might gain the most leverage by a ground rules dispute would certainly appear to be Respondent, who could possibly avoid potentially protracted and complex negotiations over management-initiated drug testing and smoking policy changes.

The General Counsel argues that Respondent's July 20 ground rules proposals are similar to those submitted by the agency in Wright-Patterson Air Force Base, supra, there, in response to the Union's request to initiate mid-term bargaining over "last change agreements,"

9/ As previously noted the status quo prior to July 18 was to negotiate in the breakroom adjoining Nelson's office with smoking permitted.

management submitted ground rules proposals intended to apply to all union-initiated mid-term bargaining. Management's proposals included a proposal that it not be obligated to bargain over union-initiated bargaining proposals, that the union incorporate a zipper clause in the next collective bargaining agreement, that the union be limited to a single mid-term bargaining initiative each year until the zipper clause was negotiated into the new agreement, and that the union waive its statutory right to seek FMCS or FSIP assistance. Under the circumstances, the Authority held that management's proposals were not "designed to enable the parties to fulfill their mutual obligation to bargain in good faith." As made clear by the Authority in the case, "ground rules proposals must, at a minimum, be designed to further, not impede, the bargaining for which the ground rules are proposed." While the July 20 ground rules proposals may not be as onerous as those advanced by management in Wright-Patterson Air Force Base, supra, a close look at them reveals that they were not proposals "designed to enable the parties to fulfill their mutual obligation to bargain in good faith." Proposing free reign over the Union's office and barring smoking during negotiations (the issue which caused the breakdown in negotiations) and a distortion of the status quo, in my view, were not proposals intended to move negotiations forward, but rather, appear to have been aimed at impeding them and thereby preventing any movement on the substantive issues then pending.

After viewing Respondent's ground rules proposals, the Union thought the ground rules issues concerning location and smoking were at impasse and, therefore, on July 25 petitioned the FSIP for assistance. Respondent chose not to wait on the outcome of the Union's request for Panel assistance, but decided during the hiatus in negotiations to announce its intent to implement certain changes which were then pending negotiations. Respondent readily concedes that several changes were implemented and that implementation took place after the Union had contacted the FSIP. The General Counsel suggests that Respondent then attempted to orchestrate the situation and in the event of litigation, blame the Union for refusing to meet for negotiations. Again the General Counsel argues that Respondent unilaterally sought to dictate the terms under which the parties would meet and the Union merely sought to bargain over ground rules before resuming face to face negotiations. According to the General Counsel, the Union belief that the ground rules matter was at impasse when it filed with the Panel was valid. As further evidence of its good faith, the Union did

not rely solely on the Panel to resolve the matter, but, sent Myron Nelson to meet with Respondent on July 30 in a last ditch effort to resolve the ground rules issue. Furthermore, by agreeing to meet on Respondent's own "turf" without smoking, the Union made significant concessions. Even if the ground rules issue was not at impasse as of July 25, when the Union petitioned the Panel for assistance, it cannot reasonably be disputed that the parties were at impasse following the Nelsons' July 30 meeting.

Even while the ground rules issue was pending, the Union sought to continue bargaining over the substantive issues then outstanding by requesting management's counter-proposals. Thus, despite the apparently intractable ground rules dispute, the Union sought to continue negotiating by mail. When Respondent failed to submit counterproposals and threatened instead to implement its final proposals, the Union did what it could to preserve its bargaining rights and the status quo by again filing for Panel assistance on August 2. It appears that the Union's action in seeking Panel assistance was warranted in view of the underlying impasse over ground rules, Respondent's refusal to submit counterproposals on the pending issues and, finally the threat to implement its final proposals on August 9. Unfortunately for Respondent, the totality of the evidence does not support its view that the Union was engaged in either stonewalling, footdragging or any dilatory tactics which would constitute bad faith bargaining. In sum, the evidence showed a legitimate ground rules dispute over which the parties might reasonably be found to be at impasse. Therefore, the Union's seeking Panel assistance appears to have been a legitimate move to preserve its rights. Accordingly, after considering the totality of the circumstances surrounding the parties dispute, it is found that the Union's actions herein did not constitute bad faith bargaining. Therefore, it is found that Respondent unilaterally changed the conditions under which negotiations between the parties were conducted without notice or bargaining.

2. The Bargaining Violation

The General Counsel contends that the Respondent's action in implementing a new smoking policy, its drug testing plan, asbestos removal procedures and PC III without first completing negotiations with the Union violated section 7116(a)(1) and (5) of the Statute.

The Respondent takes the position that implementation was appropriate due to Union waiver because it flatly

refused to bargain. Respondent thus contends that it was left with no choice but to implement after it had given the Union a full opportunity to bargain.

It is settled that, absent a clear and unmistakable waiver of bargaining rights, an agency must provide the exclusive representative an opportunity to bargain, as appropriate, over the substance and/or the impact and implementation of a change in unit employees' conditions of employment prior to implementing the change. See, e.g., Ogden Air Logistics Center, Hill Air Force Base, Utah, 41 FLRA 690 (1991).

It has already been determined that smoking policies applicable to unit employees are substantively negotiable. See, e.g., Department of Health and Human Services, Public Health Service, Health Resources and Services Administration, Oklahoma City, Oklahoma, 31 FLRA 498 (1988). There is no dispute that Respondent implemented a new base-wide smoking policy on August 15 without first completing negotiations. Clearly, the Union had an interest in negotiating over the base smoking policy, in general and a greater interest concerning the policy contained in Col. Boots' July 30 letter. Thus, it is found that the August 15 implementation of the base smoking policy was prior to Respondent's fulfilling its bargaining obligation.

Respondent's implementation of the new smoking policy also appears to constitute a repudiation of the smoking policy agreements already in existence in Buildings 5 and 548. The record testimony by Hamilton and Myron Nelson reveals that the parties negotiated verbal agreements permitting smoking in certain designated areas inside Buildings 5 and 548, and that Respondent terminated smoking inside those buildings as of August 15. In Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211, 1218-19 (1991), the Authority indicated that it would consider "the nature and scope of the failure or refusal to honor an agreement . . . in the circumstances of each case" to determine whether an agency's breach of a negotiated agreement amounts to a repudiation of the agreement in violation of section 7116(a)(1) and (5). The mid-August implementation of a smoking ban in Buildings 5 and 548 cancelled the already existing verbal agreements permitting smoking in designated areas inside those buildings. Accordingly, it is found that the cancellation of already existing agreements without bargaining constituted a repudiation of those agreements and therefore, constitutes an independent violation of section 7116(a)(1) and (5) of the Statute.

While the Authority has held that management's right to determine internal security practices under section 7106(a)(1) encompasses the right to establish drug testing plans, agencies are nonetheless obligated to bargain over procedures and appropriate arrangements for adversely affected employees under section 7106(b)(2) and (3) of the Statute. In National Federation of Federal Employees, Local 15 & Department of the Army, U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois, 30 FLRA 1046 (1988) (proposals 8 and 9), the Authority found union proposals providing for employees to retain a portion of a test sample and to obtain an independent test, negotiable procedures under section 7106(b)(2). Here the Union offered a similar proposal seeking retention of a portion of the sample by the employee for purposes of a second test. That proposal constitutes a negotiable procedure under section 7106(b)(2). Accordingly, it is found that Respondent's implementation of its drug testing plan on August 9, (although unit employees were not tested until later) without completing negotiations over the Union's negotiable impact and implementation proposals to constitute a violation of section 7116(a)(1) and (5) of the Statute.

Like the General Counsel, my research failed to disclose any decisions addressing the negotiability of asbestos removal procedures. It is certain, however, that agency management must bargain over the impact and implementation of significant additions to unit employee's job duties. See, e.g., Department of Health and Human Services, Social Security Administration, Field Assessment Office, Atlanta, Georgia, 11 FLRA 419 (1983) (implementing requirement that employees conduct training programs at field offices requires impact and implementation bargaining). In my opinion, implementation of a requirement that unit employees perform asbestos removal constitutes a significant change in conditions of employment (i.e., has a more than de minimis foreseeable impact on unit employees). Any additional duties which would expose employees to the potentially dangerous effects of asbestos would, in my opinion, be negotiable.

The General Counsel contends that the Union's proposals that management provide proper training for those employees assigned to perform asbestos removal (proposal c), comply with safety regulations (proposal d), and provide initial and periodic physical examinations (proposals e and f) constitute negotiable procedures and appropriate arrangements under section 7106(b)(2) and (3). The Authority has

long held that proposals for training which do not interfere with management's right to determine the timing or choice of training programs constitute appropriate arrangements under section 7106(b)(3). See, American Federation Government Employees, Local 3231 & Social Security Administration, 22 FLRA 868 (1986) (proposal 3) (training for employees assigned to new job duties).

Similarly, it is found that the Union's proposal that the Respondent comply with external Occupational Safety and Health Administration (OSHA) and Environmental Protection Agency (EPA) regulatory guidelines concerning the safety of employees are negotiable. Section 7106(a)(2)(B), sets out the management right to assign work, specifically states that its exercise must be "in accordance with applicable laws." In National Treasury Employees Union & U.S. Department of the Treasury, Internal Revenue Service, 42 FLRA 377 (1991), the Authority was faced with a union proposal that the exercise of management's right under section 7106(a)(2)(B) to contract out be limited by applicable laws. The Authority held that the term "applicable laws" in section 7106(a)(2) of the Statute included OMB Circular A-76 since it involved a rule, regulation or other agency pronouncement having the force and effect of law. The OSHA and EPA guidelines in this case, concerning the removal of asbestos have the force and effect of law, therefore, the Union's proposal that management comply with such guidelines constitutes an appropriate arrangement for employees adversely affected by the exercise of management's right to assign asbestos removal duties to unit employees.

The Union's proposal for physical examinations herein is found to constitute an appropriate arrangement under section 7106(b)(3). In National Federation of Federal Employees, Local 1827 & Defense Mapping Agency, Aerospace Center, 26 FLRA 785 (1987) (proposal 1), the Authority addressed the negotiability of a union proposal that management provide employees with eye examinations. It was found that the proposal concerned conditions of employment, but, concluded that the proposal was nonnegotiable since there was no showing that the "examinations referred to in the proposal are related to occupational illnesses or injuries. . . ." In my opinion such a showing was made herein since the Union's proposal specifically ties the examinations to the employees' fitness to perform the asbestos removal duties and also to any physical problems associated with such work. Consequently, it is found that the Union's proposals concerning physical examinations is negotiable as appropriate arrangements.

Inasmuch as number of the Union's proposals concerning asbestos removal procedures are negotiable as appropriate arrangements, Respondent's implementation of such procedures without first completing negotiations should be considered a violation of section 7116(a)(1) and (5) of the Statute.

The record leaves enough doubt regarding whether PC III is operational at Scott to find that the General Counsel did not establish by a preponderance of the evidence that Respondent violated the Statute by its implementation. Although Nelson testified that he and other management officials received training in the use of PC III as early as 1989 or 1990, there is no evidence to establish that PC III is a condition of employment or that it has any impact on bargaining unit employees. The Respondent asserts, and the evidence bears out, that there has been no implementation of this program as to civilian employees at Scott. The General Counsel has not carried his burden of proving such implementation. Even the General Counsel appeared uncertain as to what the violation would be in this case. Its bare assertion that a provision of training to managers (in a personnel system with such an obvious effect on the dealings between the Union and the Personnel Office) be considered an initial step toward implementation of PC III, is therefore, rejected. Absent a showing that bargaining unit working conditions are involved, it is found that there is no violation of the Statute concerning PC III implementation while the Union had an outstanding bargaining request or while the Union had a request for services of the Panel.

3. The section 7116(a)(6) violation considered separately.

The General Counsel also maintains that the Respondent's failure to maintain the status quo concerning Base smoking, drug testing, asbestos removal procedures and PC III while the Union's August 2 request for Panel assistance was pending constitutes an independent violation of section 7116(a)(1) and (6) of the Statute.

In Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA 466 (1985) (BATF), a violation of section 7116(a)(1), (5) and (6) was found where the agency failed to maintain the status quo concerning negotiable matters at impasse before the FSIP. In so finding, the Authority held as follows:

> by requiring the parties to maintain the status quo to the maximum extent possible after an impasse in

> negotiations has been reached and the services of the Panel have been invoked in a timely manner, the purposes and policies of the Statute will be effectuated by permitting the parties an opportunity to utilize the impasse resolution procedures of the Statute, thereby fostering stability in Federal labor-management relations. 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 such action is consistent with the necessary functioning of the Agency.

The facts in BATF indicate that the union invoked the Panel's services concerning 4 bargaining issues, and the agency implemented changes with respect to those 4 issues. The Panel ordered the parties to adopt the union's proposal on one issue, but declined to assert jurisdiction over the remaining issues pending resolution of underlying bargaining issues. The Authority subsequently ruled that the agency had no duty to bargain over 2 of those issues and found no violation with respect to the agency's implementation of those 2 matters. However, the Authority held that the agency violated section 7116(a)(1), (5) and (6) by failing to maintain the status quo regarding the other 2 issues (including the remaining issue over which the Panel had declined jurisdiction), finding that both matters were negotiable.

In U.S. Customs Service, 16 FLRA 198, at 210 (1984), it was found that in certain limited circumstances, agency management is free to implement its "last best offer" following impasse. However, changes in working conditions may be unilaterally implemented following impasse only if the agency:

> provides the other party with sufficient notice of its intent to implement the changes (which cannot exceed the scope of the proposals advance by that party during prior negotiations) so that the other party is afforded a reasonable opportunity under the circumstances to invoke the processes of the [FSIP].

The short answer to any such argument by the Respondent in this case is that the Union did "invoke the processes of the FSIP." Accordingly, the requirement in BATF to maintain the

status quo to the maximum extent possible remains applicable, and Respondent's implementation of the 4 policy changes raised the possibility that it violated section 7116(a)(1), (5) and (6).

Here, Respondent implemented changes in the base smoking and drug testing policies and asbestos removal procedures while the Union's August 2 request for Panel assistance was pending. The Respondent does not maintain that implementation was required "consistent with the necessary functioning of the agency." Since the Union properly invoked the Panel's services the inquiry must be limited to whether the Union's proposals before the Panel are negotiable proposals. As noted above, the smoking policy is substantively negotiable, and the Union had submitted at least one negotiable impact and implementation proposal concerning drug testing and several negotiable proposals concerning asbestos removal procedures. Since the Union's proposals concerning these issues are negotiable, the Respondent was obligated to maintain the status quo while the matter was pending before the Panel, and was required to do so regardless of the Panel's ultimate assertion of jurisdiction over the bargaining impasses. Under existing case law it is found that Respondent's failure to maintain the status quo and its implementation of policy changes on August 9 and August 15 violates section 7116(a)(1), (5) and (6) of the Statute.

D. Whether Respondent violated section 7116(a)(1) and (5) since July 18, by failing and refusing to bargain with the Union concerning child care, vacancy announcement and lateral reassignment procedures.

The General Counsel contends that the Respondent violated section 7116(a)(1) and (5) of the Statute by failing and refusing to bargain with the Union over child care and over vacancy announcement and lateral reassignment procedures at all times since July 18.

Respondent maintains there are three circumstances under which management can unilaterally implement changes in conditions of employment. First, such action can be taken after the completion of good faith bargaining resulting in agreement. Secondly, management can do so when there has been a legitimate impasse after good faith bargaining and neither party has applied to the Federal Services Impasse Panel and or FMCS for assistance in a timely manner. Dep't of Justice, Immigration and Naturalization Service, El Paso District Office, 25 FLRA 32, 37 (1987). Third, management can unilaterally implement when the Union has waived its

right to bargain. Such waiver can be found in already agreed upon contract language or in the bargaining history of the parties. Of course, a flat refusal to bargain when offered the opportunity could itself constitute a waiver. Regardless of the source, however, the waiver must be clear and unmistakable. Internal Revenue Service, 39 FLRA 1568, 1574 (1991).

Respondent claims that its implementation of the above issues was proper for two reasons. First, the Union clearly and unmistakably waived any further bargaining rights by its flat refusal to bargain. Secondly, the Union's misuse of impasse procedures was in reality a subterfuge for delay and stonewalling amounting to bad faith bargaining. As evidence of waiver it submits that the Union President begrudgingly admitted that the Union flatly refused to meet on these issues and would not budge from that position until the peripheral ground rules problem was resolved. It also alleged there is no allegation in the complaint that the Respondent implemented changes in any of these 3 areas it allegedly failed and refused to continue bargaining over. With respect to the latter argument, review of the complaint shows that violations concerning these areas were alleged.

While the Union agreed to Respondent's implementation of the child care program, such implementation was expressly conditioned on Respondent's agreement to engage in post-implementation bargaining. Despite the agreement, however, Respondent failed to meet and negotiate with the Union over child care issues after July 18. In addition, the Respondent failed to meet and negotiate with the Union since July 18 over vacancy announcement and lateral reassignment procedures, both of which were initiated by the Union. The Respondent apparently recognized its obligation to bargain since the parties had negotiated over each of these 3 issues prior to the breakdown in negotiations on July 18. It is this refusal to bargain which the General Counsel alleges to constitute a bargaining violation. When the Respondent refused to submit the agreed upon counterproposals and threatened to implement their final offers regarding such policies despite the parties' impasse concerning ground rules, the Union sought to preserve the status quo and its bargaining rights by again seeking Panel assistance. In such circumstances, the Union's action can hardly be called contrived or intended to delay or stonewall the bargaining process. Nor does the record reveal any flat refusal by the Union to bargain which would constitute the clear and unmistakable waiver required. In these circumstances, it is

found that Respondent's failure and refusal to meet and negotiate with the Union at all times since July 18 concerning vacancy announcement and lateral reassignment procedures and child care is violative of section 7116(a)(1) and (5).

REMEDY

Having found that Respondent violated section 7116(a)(1), (5) and (6) of the Statute it is recommended that in addition to the normal cease and desist order and notice posting, that the Authority order certain other action by the Respondent. In addition to the normal remedy it is recommended that Respondent also be ordered, upon the Union's request, to restore the status quo ante regarding at least 3 issues pending before the Panel. No violation was found regarding the PC III, therefore no remedy is necessary. Thus, a requirement that Respondent reinstate the smoking policy in effect at Scott prior to August 15; reinstate the asbestos removal procedures in place prior to August 9; and rescind Respondent's drug testing policy appears to be the only way to give meaning to the requirement in BATF that parties maintain the status quo to the maximum extent possible pending action by the Panel.10/

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 375th Combat Support Group, Scott Air Force Base, Illinois shall:

1. Cease and desist from:

(a) Failing and refusing to bargain with the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, the exclusive representative of certain of its employees, over the smoking and drug testing policies, asbestos removal procedures child care, vacancy announcement and lateral reassignment procedures.

(b) Failing to cooperate in impasse procedures by failing to maintain the status quo regarding smoking and drug testing policies and asbestos removal procedures while the request of the National Association of Government

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10/ The General Counsel's uncontested motion to correct transcript is granted.

Employees, Local R7-23, AFL-CIO, SEIU, the exclusive representative of certain of its employees, for assistance was pending before the Federal Services Impasses Panel.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of 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) Upon request, negotiate in good faith with the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, regarding the substance and impact and implementation smoking, drug testing and asbestos removal policies while the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, had a request for assistance pending before the Federal Service Impasses Panel.

(b) Upon request, negotiate in good faith with the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, concerning child care, vacancy announcement and lateral reassignment procedures.

(c) Reinstate the smoking policy in effect at Scott Air Force Base prior to August 15, 1990; the asbestos removal procedures in place prior to August 9, 1990; and, rescind the drug testing policy.

(d) Post at its facilities 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 Commander 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.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Denver Regional Office, Federal Labor Relations Authority in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

It is further ordered that the portion of the complaint alleging a violation of section 7116(a)(1)(5) and (6) of the Statute based on implementation of the Personnel Concept III, is hereby, dismissed.

Issued, Washington, DC, June 25, 1992

ELI NASH, JR.
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 fail and refuse to bargain with the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, the exclusive representative of certain of our employees, over the smoking and drug testing policies, asbestos removal procedures child care, vacancy announcement and lateral reassignment procedures.

WE WILL NOT fail to cooperate in impasse procedures by failing to maintain the status quo regarding smoking and drug testing policies, asbestos removal procedures while the request of the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, the exclusive representative of certain of our employees, for assistance was pending before the Federal Services Impasses Panel.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request, negotiate in good faith with the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, regarding the substance and impact and implementation of smoking, drug testing and asbestos removal policies while the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, had a request for assistance pending before the Federal Service Impasses Panel.

WE WILL upon request, negotiate in good faith with the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU, concerning child care, vacancy announcement and lateral reassignment procedures.

WE WILL reinstate the smoking policy in effect at Scott Air Force Base prior to August 15, 1990; the asbestos removal

procedures in place prior to August 9, 1990; and, rescind the drug testing policy.

_____
(Activity)

Dated: _____ 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, Denver Regional Office, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is: (303) 844-5224.