63 FLRA No. 120

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL AVIATION DEPOT
JACKSONVILLE, FLORIDA
(Respondent/Agency)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
LOCAL 22
(Charging Party/Union)

AT-CA-04-0318

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DECISION AND ORDER

May 29, 2009

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Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck, Member

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally implementing a new instruction that changed how Selection Advisory Boards (SABs) are used to fill vacancies without negotiating with the Union to the extent required by the Statute. The Judge found that the Respondent violated the Statute, as alleged, and ordered the Respondent to rescind the implemented instruction, reinstate the prior instruction, and bargain with the Union to the extent required by the Statute concerning any proposed changes in SAB procedures.

For the reasons that follow, we deny the Respondent's exceptions.

II. Background and Judge's Decision

SABs are three or five-person panels that the Respondent uses to fill vacancies. SABs rate applicants based on criteria established by the selecting official and submit lists of recommended applicants to the selecting official who retains the right to select any applicant, even one not recommended by the SAB. *See* Judge's Decision at 2-3.

Prior to 2003, Article 16 of the parties' collective bargaining agreement (CBA) provided that SAB procedures were set forth in Agency Instruction 12000.1. That instruction "provided detailed requirements as to when SABs were required, how they were to be constituted, and the procedures they would follow." *Id*. at 3. In particular, that instruction permitted the Union to nominate employees to SABs and required SABs to be used to fill permanent vacancies at the GS-07 level and above. *Id*. at 3, 13.

During negotiations for a new CBA (2003 CBA), the Union and the Respondent agreed on SAB language concerning the application of Agency Instruction 12000.1. The Agency head rejected the SAB provision on the ground that it was contrary to management's right to fill positions, make selections for appointments, and assign work under § 7106(a) of the Statute. *Id.* at 4-5; Tr. at 179. The parties decided to approve the 2003 CBA without the SAB language and agreed to discuss the possibility of addressing the issue in a separate agreement. However, the Respondent ultimately determined that addressing the SAB procedures in a separate memorandum of understanding (MOU) would be just as inappropriate as doing so in the CBA. *Id.* at 4-5. Shortly thereafter, the Respondent informed the Union that it intended to change the SAB procedures. In response, the Union submitted a written proposal containing SAB procedures similar to the prior SAB instruction. *See* GC Ex. 3, "IFPTE Local 22's Proposal." Specifically, the proposal required, among other things, that the Respondent appoint the Union's nominees to SABs, and that SABs be used to fill vacancies at the GS-07 level and above.

The parties met on three occasions concerning the proposed revisions to the SAB procedures, but did not reach agreement. Several months after the third meeting, the Respondent submitted to the Union its "final version" of the new SAB instruction, which was scheduled to be implemented five days later. Judge's Decision at 7. That final version of the SAB instruction provided that the Union would have the opportunity to submit to the Respondent a list of bargaining unit employees willing to participate on the SABs on a quarterly basis, from which the Respondent would have the option (but would not be required) to select SAB participants. *Id.* at 14; s*ee also* GC Ex. 4, "Notice of Proposed Change to Selection Advisory Boards Procedures." The final instruction also mandated that SABs be used to fill vacancies starting at the GS-13 level. *Id.* at 15; *see also* GC Ex. 4, "Notice of Proposed Change to Selection Advisory Boards Procedures."

The Union informed the Respondent that negotiations had not even begun and that it did not agree with this version of the proposal and "wouldn't sign it." Judge's Decision at 7. The Respondent responded that the proposal was its "final offer" and suggested that the Union pursue recourse through mediation or the Federal Service Impasses Panel (Panel) if it did not agree with the proposal. *Id.* Instead, the Union filed a ULP charge, and the GC issued a complaint alleging that the Respondent had violated § 7116(a)(1) and (5) of the Statute by implementing the instruction without negotiating to the extent required by the Statute. *See* GC Ex. 1(b).

Initially, the Judge rejected the Respondent's argument that the complaint is barred by § 7116(d) of the Statute because the unfair labor practice charge challenges the exact same SAB provision that the Union had contested in an earlier ULP charge and a grievance that it had previously lost at arbitration.[1] In this regard, the Judge found that the action before him was based on the 2003 CBA and addressed the Respondent's discussions with the Union between October 2003 and March 2004 regarding the new SAB provision, whereas previous cases dealt with the preceding CBA and the Respondent's actions regarding the convening of the SABs in August and October 2002. Judge's Decision at 11.

The Judge also rejected, as relevant here, the Respondent's argument that it had no duty to bargain because the SAB procedures were "covered by" Article 16 of the 2003 CBA. In this respect, the Judge determined that the SAB language sought by the Union in the 2003 CBA, which was similar to that encompassed in the previous CBA, was rejected by the Agency head and excluded from the final 2003 CBA. *Id.* at 8, 11. As such, the Judge concluded that "it is inappropriate to argue now that [the 2003 CBA] 'covers' the issue of SABs, either expressly or impliedly, or that the issue of SABs is 'inseparably bound up with' the language in Article 16 of the new CBA." *Id.* at 11 (citing *United States Dep't of Health & Human Servs., SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*HHS, SSA, Balt.*)). Specifically, the Judge found that the provisions set forth in Article 16 were not "inseparable" from the Respondent's system for convening SABs and that no agreement outside of the 2003 CBA was negotiated to cover the SABs. *Id.* at 8, 11-12. As such, the Judge found that the Union did not "waive its right to negotiate" over the SAB procedures because the procedures had already been addressed in negotiations over the 2003 CBA. *Id.* Rather, the Judge found that "the Union never abandoned its effort to negotiate specific rules for the conduct of SABs," but, instead, agreed to defer the issue to be addressed in a separate instruction. *Id.* at 12.

With respect to the Respondent's argument that it had no duty to bargain because the Union's proposal regarding the use of SABs was nonnegotiable, the Judge concluded that the proposal requiring the use of SABs in the hiring process for specific positions, i.e., for those positions at the GS-07 level and above, "do not interfere with a management right and are fully negotiable." *Id.* at 19 (citing *NFFE, Local 2099*, 35 FLRA 362 (1990) (*Local 2099*)). In terms of any negotiation that took place with regard to the proposal addressing the positions for which SABs would be used, the Judge found that, "[w]hile the [Respondent] told the Union at the bargaining sessions that the current practice was too time-consuming, there is no evidence in the record that the parties actually discussed whether each of their concerns could be accommodated by compromising on the range of the positions requiring SABs." *Id.* The Judge concluded that the Respondent "simply declared the issue nonnegotiable," and ultimately implemented its original proposal on the Union, "which the Union president estimated eliminated 90 percent of his unit's employees from SABs." *Id.* at 19-20 (citing Tr. at 31-32).

In addition, the Judge found that the Union had submitted other proposals that were not properly addressed by the Respondent, and determined that "[t]he Agency . . . seem[ed] to have concluded that management's rejection of a Union proposal was tantamount to the issue being resolved." *Id.* at 15-16. In this respect, with regard to the Union's proposal requiring the Union's participation on SABs, the Judge stated that the Authority has found that these types of proposals "may . . . 'under certain circumstances,' be negotiable as an appropriate arrangement under [§] 7106(b)(3)." *Id.* at 18 (quoting *AFGE, Local 1815*, 53 FLRA 606, 615 (1997) (*Local 1815*)). With respect to the Union's proposal that the Agency remove the cover sheets from promotion applications, the Judge found that the Agency simply responded that it could not remove the cover sheets because "this was handled by a different office and the cover sheet merged with the first page of the application itself." *Id.* at 6 (citing Tr. at 115,

1. 5 U.S.C. § 7116(d) states, in pertinent part:

> Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under § 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, 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.

161-62). Ultimately, the Judge found that the Respondent's "continued, and improper, assertion of non-negotiability to a large portion of the Union's proposals, interfered significantly with the bargaining process and precluded a proper discussion of the issues facing the parties." *Id.* at 20. Thus, the Judge determined that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing to bargain in good faith with the Union. Specifically, the Judge found that the Respondent improperly restricted and prematurely terminated bargaining and implemented the new SAB instruction before the parties had reached impasse.

After considering the guidelines that the Authority considers when an agency has failed to bargain over the impact and implementation of a management decision, the Judge ordered a *status quo ante* remedy. In this regard, the Judge analyzed the five factors set forth in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*), finding that: (1) the Respondent provided adequate notice to the Union of its proposed change; (2) the Union requested bargaining; (3) the Respondent's bargaining misconduct was willful; (4) the benefit of using SABs to fill vacancies outweighs the burden on the Respondent to hold a high number of SABs; and (5) the resumption of the old SAB procedures, at least for the duration of good faith bargaining, would not significantly disrupt the Respondent's operations. The Judge concluded that the *FCI* factors weighed in favor of imposing a *status quo ante* remedy and ordered the Respondent to utilize the pre-2004 SAB instruction until it has completed good faith bargaining on a revised instruction.

III. Positions of the Parties

A. Respondent's Exceptions

The Respondent argues that it has no statutory duty to bargain with the Union because the SAB procedures are "covered by" the 2003 CBA. Exceptions at 2. Specifically, the Respondent claims that "SABs are clearly 'inseparably bound up with' Article 16, 'Filling Manpower Requirements'" because the previous CBA addressed SABs in Article 16, and the 2003 CBA, while not addressing SABs, addresses issues with regard to 'Filling Manpower Requirements.' *Id.* According to the Respondent, "[t]his case is clearly dealing with 'filling manpower requirements' through merit staffing, since the employees impacted by [SAB] procedures are current bargaining unit employees applying for vacant positions through the merit staffing program." *Id.* at 3. The Respondent further claims that, since the parties discussed the SAB procedures when negotiating Article 16 of the 2003 CBA, "[t]he Union clearly should have contemplated that the negotiated provisions would foreclose further bargaining on the procedures used in filling manpower requirements, including merit staffing." *Id* at 7. In addition, the Respondent alleges that the parties "did not agree that the issue would be bargained at a later date" and as such, it "had no obligation to continue bargaining over procedures and appropriate arrangements related to hiring." *Id.*

In addition, the Respondent contends that the Judge erred in determining that it failed to bargain in good faith to the extent required by the Statute. In this respect, the Respondent argues that it fulfilled its bargaining obligations under the Statute because the Union, after being informed by the Respondent that its proposal was nonnegotiable, did not request an allegation of non-negotiability, submit a negotiable proposal, or suggest any compromise language varying from the prior SAB procedure. According to the Respondent, the Union's position that it should have "an absolute right to appoint people to SABs, regardless of the circumstances" violates management's right to select under § 7106 of the Statute. *Id.* at 14. The Respondent claims that the Union never submitted a negotiable proposal during the impact and implementation bargaining and the Judge improperly made a negotiability determination without considering the actual language of the Union's proposal. *Id.* at 14, 17-18. The Respondent also argues that "the ALJ erred when he essentially decided that the union proposal was negotiable in its entirety without severing that portion of the union proposal that was negotiable as an appropriate arrangement[,]" which it claims is inconsistent with *Local 1815* "and its progeny." *Id.* at 16.

In addition, the Respondent alleges that it fulfilled its bargaining obligation specifically with regard to the Union's proposal requiring that SABs be used for filling vacancies starting at the GS-07 level, even though its chief negotiator contended throughout the SAB discussions that this proposal was nonnegotiable. *Id.* at 15. In support, the Respondent cites *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 16 FLRA 217 (1984) (*SSA, Balt.*), stating that, the employer in that case had bargained in good faith when it "met with the union five times, rejected the union's proposals, explained the reasons for the rejection, and ultimately implemented its relocation plan upon impasse." *Id.* at 15. As such, the Respondent maintains that its implementation of the SAB instruction was lawful.

Finally, the Respondent contends that the Judge erroneously ordered a *status quo ante* remedy. The Respondent argues that the Judge erred in determining that the Respondent was "guilty of willful bargaining misconduct" because the Judge "never considered the

negotiability of an actual proposal from the Union." *Id.* at 17. In this regard, the Respondent claims that the Union never actually presented a negotiable proposal over which to bargain. *Id.* at 17-18. In addition, the Respondent contends that a *status quo ante* remedy would disrupt the efficiency and effectiveness of the Respondent's operations because the Respondent "would be forced to return to a procedure that was specifically found to interfere with management's rights[.]" *Id.* at 18.

B. GC's Opposition

The GC argues that the Judge correctly determined that the SAB procedures are not "covered by" the 2003 CBA for two reasons: (1) SABs are not addressed in the 2003 CBA nor in any other "side agreement"; and (2) "the parties could not have reasonably contemplated that their discussions[,] [which did not result in any type of agreement,] would foreclose further bargaining[.]" Opposition at 10-11. To the contrary, the GC contends that "the parties had a verbal agreement to get back together regarding the SAB procedure when it came up for renegotiation[.]" *Id.* at 11. As such, the GC claims that the Respondent "has waived any right to raise the 'covered by' defense." *Id.*

The GC also argues that the Union did not waive its right to bargain over the SAB procedures, as "a waiver of any bargaining rights must be clear and unmistakable." *Id.* (citing *IRS*, 29 FLRA 162, 166 (1987)). In this regard, the GC claims that the record reflects that "the Union never abandoned its effort to negotiate the specific rules applicable to the conduct of the SABs[,]" but rather, that the parties had agreed to return to the bargaining table to incorporate the SAB language into an MOU. *Id.* at 11-12. According to the GC, once the parties realized that the Agency head would have to approve the MOU like it did the 2003 CBA, they decided to wait and negotiate over the SABs when the revised SAB instruction was presented to the Union. *Id.* Consequently, the GC argues that the Union did not waive its bargaining rights with respect to the SABs.

In addition, the GC contends that the Respondent failed to bargain over the proposed changes to the SAB procedures to the extent required by the Statute. *Id.* at 13-14. The GC claims that the Judge correctly found that requiring union participation on rating panels may be negotiable as an appropriate arrangement in order to prevent unfair or inaccurate ratings. *Id.* at 15. In this regard, the GC asserts that the Judge properly found that the Respondent made no attempt to craft a proposal pertaining to Union participation on the SABs that would address the concerns of employees adversely affected by management's right to select. *Id.* The GC also argues that the Judge correctly found that there is no evidence to support the Respondent's claim that using SABs to hire at the GS-07 level and above is too time consuming. *Id.* As such, the GC contends that the Judge properly found that, in declaring the matter to be nonnegotiable, the Respondent "significantly interfered with the bargaining process[.]" *Id.* at 16.

Lastly, the GC claims that the Judge properly ordered a *status quo ante* remedy. In this regard, the GC argues that the Respondent's bargaining misconduct was willful because it: (1) did not give the Union meaningful feedback during negotiations;
(2) claimed that there was an agreement regarding the new SAB instruction even though the parties had not agreed on specific language; and (3) ceased bargaining once the Union would not approve the new SAB instruction which contained revisions that it had not seen before. *Id.* at 16. The GC also contends that the Respondent does not provide sufficient evidence to support its argument that a *status quo ante* remedy would disrupt the efficiency and effectiveness of the Respondent's operations.

IV. Analysis and Conclusions

A. The Judge did not err in rejecting the Respondent's argument that the SAB issue is "covered by" the 2003 CBA.

The Authority has held that, absent a reopener clause, parties are not permitted to demand mid-term bargaining over matters that are covered by an agreement. *See, e.g., United States Dep't of Labor, Wash., D.C.*, 60 FLRA 68, 72 (2004) (citing *HHS, SSA, Balt.*, 47 FLRA at 1013). A subject matter for negotiation is covered by a collective bargaining agreement if the matter is expressly contained in the agreement. *HHS, SSA, Balt.*, 47 FLRA at 1018. If the agreement does not expressly contain the matter, then the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *Id.* Consideration of the parties' bargaining history is an "integral component" of this determination. *United States Customs Serv., Customs Mgt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). Moreover, the Authority has held that, where a judge's interpretation of the meaning of the parties' agreement is challenged, it will determine whether the judge's interpretation is supported by the record and by the standards and principles applied by arbitrators and the federal courts. *IRS, Wash., D.C.*, 47 FLRA 1091, 1110-11 (1993).

The Respondent argues that it has no statutory duty to bargain with the Union because the SAB procedures are "covered by" the 2003 CBA. Exceptions at 2.

However, the 2003 CBA does not expressly or impliedly address the SABs. Prior to 2003, Article 16 of the parties' CBA specified that SAB procedures were governed by Agency Instruction 12000.1, which "provided detailed requirements as to when SABs were required, how they were to be constituted, and the procedures they would follow." Judge's Decision at 3. The 2003 CBA makes no mention of the SABs. During the 2003 CBA negotiations, the parties agreed to SAB language concerning the application of Agency Instruction 12000.1, but that provision was rejected by the Agency head on the ground that it was contrary to management's right to fill positions and to make selections for appointments. The 2003 CBA was subsequently approved without the SAB language. Even though the parties discussed addressing the SAB issue in a separate agreement, the Respondent argued that including the SAB language in a separate agreement would also be inappropriate. *Id.* at 4-5. Based on these facts, the Judge properly found that the 2003 CBA was not intended to cover the SAB procedures.

The Respondent further claims that, since the parties discussed the SAB procedures when negotiating Article 16 of the 2003 CBA, further bargaining regarding such procedures is foreclosed because the subject is "inseparably bound up with, and plainly an aspect of, a subject matter contained in an agreement[.]" *Id.* at 3 (citing *HHS, SSA, Balt.*, 47 FLRA at 1018). Since the Agency head rejected the language that directly addressed the SAB procedures in the 2003 CBA, and the parties were unable to agree upon a separate agreement that included SAB language, we conclude that Article 16, "Filling Manpower Requirements," was not intended to cover the SAB procedures. Accordingly, we find that the SAB procedures are not "inseparably bound up with" Article 16 and that the SAB issues are not "covered by" the 2003 CBA. As such, we deny the Respondent's exception.

B. The Judge did not err in finding that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing to bargain over the implementation of the new SAB instruction.

Prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999) (*FCI, Bastrop*). When, as here, an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency has an obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, if the resulting change has more than a *de minimis* effect on conditions of employment. *See Dep't of Health & Human Servs., Soc. Sec. Admin.*, 24 FLRA 403, 405-06 (1986).

If an agency has an obligation to bargain, then it can satisfy that obligation by reaching agreement with the union, or by bargaining in good faith to impasse over negotiable proposals submitted by the union. *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003) (*PBGC*) (Member Pope dissenting, in part, as to another matter) (citation omitted). This obligation to bargain is predicated on the union's submission of negotiable proposals. *Id.* An agency may refuse to bargain where it contends that the proposals submitted by the union are nonnegotiable. *See id.* (citing *United States Dep't of HUD*, 58 FLRA 33 (2002)). However, the agency acts at its peril if it then implements the proposed change in conditions of employment. *See, e.g., PBGC*, 59 FLRA at 50; *United States Dep't of HHS, SSA, Balt., Md.*, 39 FLRA 258, 262-63 (1991). If all pending union proposals are found to be nonnegotiable, then the agency will not be found to have violated the Statute by implementing the change without bargaining over it. *PBGC*, 59 FLRA at 50. If any pending union proposals are found to be negotiable, then the agency will be found to have violated the Statute by implementing the change without satisfying its obligation to bargain over the negotiable proposals and either reaching agreement or declaring impasse. *Id.* (citing *FCI, Bastrop*, 55 FLRA at 852).

In sum, to determine whether the agency committed a ULP by failing to bargain prior to making a change in conditions of employment, the first inquiry is whether the agency had an obligation to bargain at all under the circumstances. *Id.* at 50-51. If it did, then the next inquiry -- whether the agency satisfied its bargaining obligation -- may focus on the negotiability of the union's proposals and the agency's response to those proposals. *Id.* at 51; *see also United States Dep't of HHS, SSA, Balt., Md.*, 36 FLRA 655, 669 (1990) (where respondent's defense to a ULP complaint rests on its contention that a particular proposal is nonnegotiable, resolution of the negotiability dispute is necessary to determine whether a ULP has been committed).

As to the first inquiry -- whether the Respondent had an obligation to bargain -- the Judge did not determine whether the Respondent had an obligation to bargain with the Union because the proposed change had more than a *de minimis* effect on conditions of employment. *See PBGC*, 59 FLRA at 50. Absent any

claim by the Respondent that the proposed change did not have more than a *de minimis* effect, we assume for purposes of this decision that there was an obligation to bargain on this basis.

As to the second inquiry -- whether the Respondent satisfied its bargaining obligation -- the Judge properly found that it did not, holding that the Union's proposal concerning the use of SABs at the GS-07 level and above was negotiable, and as such, the Respondent should have bargained with the Union to the extent required by the Statute. Judge's Decision at 19.

The Authority has found that proposals similar to the Union's proposal requiring that SABs be used to fill vacancies starting at the GS-07 level are negotiable. Simply requiring the use of rating and ranking panels in certain circumstances does not affect the exercise of management's rights and is within the duty to bargain. *NTEU*, 53 FLRA 539, 567 (1997) (citing *NTEU*, 46 FLRA 696, 778-79 (1992) (portion of proposal requiring that an evaluation board be used to fill vacancies in certain circumstances found to be a negotiable procedure under § 7106(b)(2))); *see also Local 2099*, 35 FLRA 362 (provision requiring that a panel be appointed to consider qualified candidates did not violate management's right to assign work because the provision did not require the assignment of specific duties to particular individuals). As proposals requiring the use of rating panels are negotiable, the Respondent's wholesale rejection of the Union's proposal was improper.

As Authority precedent holds that proposals requiring the use of rating panels in certain circumstances are negotiable, and as the Respondent failed to negotiate with the Union to the extent required by the Statute, its summary rejection of the Union's proposal and unilateral implementation of its desired instruction was improper. As noted above, if any pending union proposals are found to be negotiable, an agency will be found to have violated the Statute by implementing a change without satisfying its obligation to bargain over the negotiable proposals and either reaching agreement or declaring impasse. *PBGC*, 59 FLRA at 50 (citation omitted). Based on the facts found by the Judge and Authority precedent, we find that the Respondent violated § 7116(a)(1) and (5) of the Statute because the Respondent failed to bargain in good faith with the Union to the extent required by the Statute. We therefore deny the Respondent's exception.[2]

C. The Judge did not err in ordering a *status quo ante* remedy.

Where an agency has failed to bargain over the impact and implementation of a management decision, the Authority evaluates the appropriateness of a *status quo ante* remedy using the factors set forth in *FCI*, 8 FLRA at 606. The *FCI* factors are: (1) whether and when notice was given to the union by the agency concerning the change; (2) whether and when the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligation; (4) the nature and extent of the adverse impact on unit employees; and (5) whether and to what degree a *status quo ante* remedy would disrupt the efficiency and effectiveness of the agency's operations. *United States Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 13 (2000) (citing *FCI*, 8 FLRA at 606).

The appropriateness of a *status quo ante* remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy. *United States Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852 (2002) (Member Pope dissenting as to remedy).

The Respondent contends that the Judge erred in ordering a *status quo ante* remedy. Specifically, the Respondent argues that the Judge erred in determining that the Respondent was "guilty of willful bargaining misconduct" because the Judge "never considered the negotiability of an actual proposal from the Union" since the Union never actually presented a negotiable proposal over which to bargain. Exceptions at 17-18.

As stated above, the Judge determined that the Union's proposal addressing the grade levels for which SABs would be utilized was negotiable. Judge's Decision at 19. In addition, the Judge found that the parties met on three occasions to negotiate the proposed revisions to the SAB procedures, after which, and without reaching any type of agreement with the Union, the Respondent informed the Union that it would implement its "final version" of the new SAB instruction. *Id.* at 7. The Judge determined that the Respondent's conduct "failed to reflect a sincere desire to reach a mutual agreement[.]" *Id.* at 21-22. As the proposal was negotiable, and as the facts as found by the Judge demonstrate that the Respondent failed to bargain in good faith and to the extent required by the Statute with the Union over the proposal, the Respondent

2. In view of our finding of an unfair labor practice with regard to the Respondent's failure to bargain over whether SABs could be used to fill vacancies starting at the GS-07 level, it is unnecessary to consider the Respondent's remaining arguments in resolving the exception, including its argument regarding the negotiability of union participation on SABs.

willfully failed to discharge its bargaining obligation.

The Respondent also contends that a *status quo ante* remedy would disrupt the efficiency and effectiveness of the Respondent's operations because the Respondent "would be forced to return to a procedure that was specifically found to interfere with management's rights[.]" Exceptions at 18. In this regard, the parties had, for years, been operating under an agreement that provided for the precise SAB procedures that the Respondent is now claiming would "disrupt . . . the efficiency and effectiveness" of the Respondent's operations. *See FCI*, 8 FLRA at 606. In addition, the Respondent does not present any evidence to substantiate such a claim. As such, we deny the Respondent's exception.

V. Order

Pursuant to § 2423.41 of the Authority's Regulations and § 7118 of the Statute, the United States Department of the Navy, Naval Aviation Depot, Jacksonville, Florida, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in conditions of employment without bargaining over those changes to the extent required by the Statute with the International Federation of Professional and Technical Engineers, Local 22 (Union), the exclusive representative of certain of its employees.

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

2. Take the following affirmative action:

(a) Rescind the Selection Advisory Board procedures, NADEPJAXINST 12000.1, that were promulgated on June 3, 2004, and replace them with the version of those procedures that was in effect immediately before that date.

(b) Notify and, upon request, bargain with the Union to the extent required by the Statute concerning any proposed changes in Selection Advisory Board procedures.

(c) Post at its Jacksonville, Florida facility, a copy 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 Commanding Officer of the Agency, 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director of the Atlanta Regional Office, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of the Navy, Naval Aviation Depot, Jacksonville, Florida, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

We hereby notify bargaining unit employees that:

WE WILL NOT unilaterally implement changes in conditions of employment without bargaining over those changes to the extent required by the Statute with the International Federation of Professional and Technical Engineers, Local 22 (the Union), the exclusive representative of certain of our employees.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Statute.

WE WILL rescind the Selection Advisory Board procedures, NADEPJAXINST 12000.1, that were promulgated on June 3, 2004, and replace them with the version of those procedures that was in effect immediately before that date.

WE WILL notify and, upon request, bargain with the Union to the extent required by the Statute concerning any proposed changes in Selection Advisory Board procedures.

_____
(Agency)

Dated:_____By:_____
(Signature) (Commanding Officer)

This Notice must remain posted for 60 consecutive days from the date of the posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, whose address is: Federal Labor Relations Authority, Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270, and whose telephone number is: (404) 331-5300.

Office of Administrative Law Judges

DEPARTMENT OF THE NAVY
NAVAL AVIATION DEPOT
JACKSONVILLE, FLORIDA
Respondent

and

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS,
LOCAL 22
Charging Party

Case No. AT-CA-04-0318

Peter Hines
For the General Counsel

Joseph T. Quina
For the Respondent

Earl Gregory Baseman
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

Based on an unfair labor practice charge filed by the International Federation of Professional and Technical Engineers, Local 22 (the Union or Charging Party), the Regional Director of the Authority's Atlanta Region issued a Complaint and Notice of Hearing on June 30, 2004, alleging that the Department of the Navy, Naval Aviation Depot, Jacksonville, Florida (the Agency or Respondent) violated section 7116(a)(1) and (5) of the Statute by implementing changes to its promotion procedures without negotiating to the extent required by the Statute. The Respondent filed a timely answer, denying that it committed an unfair labor practice and asserting several affirmative defenses.

A hearing in this matter was held in Jacksonville, Florida, at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General

Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered. I conclude, in agreement with the General Counsel, that the Respondent violated § 7116(a)(1) and (5) of the Statute.

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

FINDINGS OF FACT

The Union is the exclusive collective bargaining representative of a bargaining unit of nonprofessional employees at the Agency. It represents a little over 800 employees there, working in GS-1 through GS-13 jobs, while four other unions represent another 4000 employees at the same facility. Tr. 17, 41-43. The Union has been a party to a series of collective bargaining agreements (CBAs) with the Agency. One such CBA was signed by the parties in October 1997 (Resp. Ex. 1) and remained in effect until a successor agreement was approved by the Department of Defense in October 2003 (Resp. Ex. 2).

The instant case involves the procedures used by the Agency to make promotion selections. In the 1997 CBA, Article 16 addressed this issue in general, requiring for instance that vacancies normally be filled competitively and that employees not selected for promotion be informed how to improve their chances. Resp. Ex. 1 at 16-17. Section 5 of that article provided:

> Selection Advisory Boards (SAB) for filling Unit vacancies will be conducted in accordance with NADEPJAXINST 12000.1 (latest version). When it is determined that an SAB will be convened, the Employer will contact the Union to provide either one Unit Employee member for a three-member SAB or two Unit Employee members for a five-member SAB.

The full text of NADEPJAXINST 12000.1 (Instruction 12000.1), an internal Agency regulation or instruction, was not offered into evidence, but it is apparent from the record that it provided detailed requirements as to when SABs were required, how they were to be constituted, and the procedures they would follow. SABs were required for filling permanent vacancies at the GS-7 level and above. Tr. 64-65. The board would rate the applicants based on criteria established by the selecting official, and it would submit a recommended applicant and an alternate to the selecting official; however, the selecting official retained the right to select any applicant, even one not recommended by the board. Tr. 19-20; G.C. Ex. 3 at 3-4. This process had been used at the Agency since at least 1988.

Between August 2002 and April 2003, the Union and the Agency engaged in a grievance dispute concerning the application of Instruction 12000.1, pursuant to the 1997 CBA. In August 2002, the Agency asked the Union to nominate two members of a five-member SAB. But when the Union submitted two employees' names, the Agency rejected them as unqualified for that particular promotion board. Resp. Ex. 4. The Union argued that the CBA and Instruction 12000.1 required management to accept the employees nominated by the Union; the Agency disagreed, and ultimately an arbitrator ruled in favor of the Agency. *Id*. In a decision dated April 25, 2003, the arbitrator ruled that under Instruction 12000.1 and under section 7106(a) of the Statute, the chairman of an SAB retains the power to appoint its members, and that if the Union could dictate the members of the SAB it would be a direct interference with a statutory management right. *Id*. During the time that this grievance was pending arbitration, the Union also filed two unfair labor practice charges, alleging that the Agency had violated the Statute by refusing to accept the Union's nominees for two separate SABs. Resp. Ex. 8, 9. Both of these charges were ultimately withdrawn by the Union.

Starting in April of 2000, the Union and the Agency began negotiating a new CBA, and these negotiations culminated in the second half of 2002. The Union sought to have portions of Instruction 12000.1 incorporated into the contract itself, and ultimately the Agency agreed to detailed language concerning SABs in Article 16, Section 8 of the new CBA. Tr. 73. A CBA was signed by Union and Agency negotiators on January 9, 2003. Tr. 82-83. When the agreement was submitted for agency head review, however, management officials at the Department of Defense (DOD) notified Agency officials in Jacksonville that several provisions of the CBA, including Article 16, Section 8, did not conform to law, rule or regulation, and as a result the CBA was disapproved on February 7, 2003. Tr. 74-75; Resp. Ex. 3. On April 11, 2003, the Department of Defense sent a detailed letter to the Agency's Commander, specifying why each provision was found unacceptable. It stated that union participation on SABs "is non-negotiable as it is contrary to 7106a(2)(c) of the Statute" and cited the Authority's decision in *American Federation of Government Employees, Local 1815 and U.S. Department of the Army, U.S. Army Aviation Center and Fort Rucker, Fort Rucker, Alabama*, 53 FLRA 606 (1997) (*Fort Rucker*).[1/]

1/ DOD's refusal to accept the SAB language in the contract did not, apparently, take the negotiators by surprise. Agency

Thus in early 2003, the Agency and the Union were back at the bargaining table, seeking to resolve the eighteen enumerated provisions of their agreement that had been disapproved, one of which was the provision concerning selection advisory boards. While the Union was still interested in securing some contractual basis for the use of SABs, it also wanted to see a CBA executed, and it ultimately recognized that it would not be able to finalize a CBA that contained references to SABs. Tr. 190-91. The parties then discussed the possibility of a memorandum of understanding (MOU) on the subject, but the Agency felt that this would be similarly unacceptable. *Compare* Tr. 90-94 *and* 191-94; Resp. Ex. 11. As a result, nothing specific was negotiated on this issue. According to the Union negotiators, Agency representatives advised them that the SAB instruction would be revised in the near future, and the parties agreed to deal with the procedures concerning SABs in the context of a revised instruction. Tr. 50-51, 194-99; *cf.* Tr. 93-94. The parties reached agreement on a new CBA on October 1, and DOD approved it on October 7, 2003.

Ten days later, on October 17, the Agency submitted to the five unions on base the draft of a revision to the procedures for selection advisory boards. The Agency called the union representatives together on that date and briefed them on the new procedures and advised them to follow the contractual procedures if they wished to negotiate. Tr. 21, 100; G.C. Ex. 2. Each of the unions did separately request to negotiate, and the Charging Party submitted its written proposals to the Agency on October 28. G.C. Ex. 3. The Charging Party essentially proposed the same procedures as had been in the old instruction; the Union further offered explanatory language that emphasized the selecting official's sole discretion in making a final decision on promotions and the limited advisory role of the SAB in the process. *Id*. at 6-7. The Union asserted that the language regarding the role of the Union and bargaining unit employees on SABs was a negotiable procedure and arrangement under section 7106(b) of the Statute. *Id.* at 7.

The Union and the Agency met on three occasions to discuss the proposed revisions to the SAB procedures, on November 25 and December 15, 2003, and January 7, 2004. Greg Baseman, the Union President, was the Union's spokesman throughout the meetings, and Linda Anderson served as the Agency's chief negotiator. At the November 25 meeting, Baseman talked initially about ground rules for the negotiations, and then he explained the Union's proposals that had been submitted earlier. Management explained the purposes behind their own proposals, and the Union addressed some specific concerns about the language in the Agency's proposal. Tr. 24-26, 159-61. After the meeting, an Agency representative sent a copy of her notes of the meeting to the Union and Agency negotiators. Resp. Ex. 5. The December 15 meeting proved to be little more than a formality, as some of the Union participants were not able to come to the meeting; as a result, the meeting was adjourned almost immediately, although Baseman testified that one of his Union colleagues did present his own concerns about the SAB process and the need for Union participation. Tr. 27, 113, 161; Resp. Ex. 6.[2/]

At the final negotiation session, held on January 7, the Union reiterated why it wanted to continue the old SAB procedures, and it also presented some additional, or counter-proposals. Tr. 28-29, 113-14, 161-62. Three of these new issues were cited in the Agency's notes of the meeting (Resp. Ex. 7): the Union wanted the selecting official to provide an explanation in writing if he selected an applicant other than one of the SAB's recommended employees; the Union wanted the cover sheets of promotion applications to be removed, to protect the anonymity of the applicants; and it wanted an SAB to be required whenever a minority or woman applied for a position. According to Union President Baseman, the Agency did not offer any response to these proposals on January 7, but simply said they would take the Union's concerns into consideration. Tr. 29, 58. According to the Agency participants, however, Ms. Anderson addressed each of the three specific issues cited in Resp. Ex. 7. She told the Union that the new procedures already require a justification of any deviation by the selecting official from the board's recommendations, and that the Agency couldn't remove cover sheets from applications because this was handled by a different office and the cover sheet merged with the first page of the application itself. Tr. 115, 161-62. With regard to the third new Union proposal, the Union decided to withdraw it later in the day on January 7, as it decided this was best handled within the EEO process rather than the SAB procedures. Tr. 116, 162-64; Resp. Ex. 10. One of the Union representatives also requested information from the Agency on January 7 concerning the number of SABs held from 2000 to 2002, and the Agency provided this information to him. Tr. 116; Resp. Ex. 7.

negotiators had been verbally informed earlier in 2002 that DOD believed that any Union participation in the SAB process was non-negotiable, and the Agency negotiators passed this information on to the Union. This did not, however, stop the Union from pursuing such language in the CBA, nor did it stop the Agency from agreeing to it. Tr. 76-79, 190-92.

2/ While Baseman attributed this discussion to the December 15 meeting, it appears that he may have confused the December 15 meeting with the January 7 meeting. *Compare* Tr. 27 *and* the participant lists in Resp. Ex. 6 and 7.

At none of the three negotiation sessions did the Agency's negotiator agree to any specific Union proposal, nor did the parties sign off or initial any proposal from either side. Instead, the Agency sought to consolidate all the proposals and responses from the five unions and to respond to the unions' concerns in the best way the Agency was able. Tr. 120-21, 126-27, 170-71. In the Agency's notes of the January 7 meeting, which were sent to the Union the following day, the Agency stated: "Management stated they would review all the unions [sic] proposals, and get back with each union once they have revised their original proposal." Resp. Ex. 7.

The next contact between the parties concerning SAB procedures was on March 30, 2004, when the five unions were called to a meeting conducted by Anderson, who gave them what she called the final version of the instruction that would be implemented on April 5. Tr. 29, 117, 166. Anderson told them that management had considered all of their proposals and had incorporated "a lot" of their concerns into the final language. Baseman told Anderson at the March 30 meeting that negotiations with his union had not even started, that he didn't agree to the proposal, and he wouldn't sign it. Tr. 30-31, 167. Anderson, in turn, told the Union that this was the Agency's final offer, and if the Union didn't agree, it could pursue mediation or impasse resolution under the CBA. Tr. 118, 167. The Union did not pursue either mediation or impasse resolution, but instead it filed the instant unfair labor practice charge on April 1. The Agency did proceed to implement the new instruction, but the effective date was delayed until June 3, 2004, to enable the Agency to train some of the selecting officials on the new procedures. Tr. 119, 168.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

The General Counsel's primary argument in this case is that the Respondent declared impasse and terminated negotiations prematurely, and thereby it did not negotiate to the extent required by the Statute. Citing *Letterkenny Army Depot*, 34 FLRA 606 (1990), the GC asserts that procedures governing the promotion process are negotiable, and from this premise it argues that the Respondent's revision of its instruction governing the use of Selection Advisory Boards was a negotiable change in conditions of employment that had more than a *de minimis* effect on bargaining unit employees. The GC then argues that none of the recognized bases for implementing negotiable changes were present: *i.e.*, the parties had not reached agreement; there had been no impasse after good faith bargaining, followed by a failure to timely invoke impasse resolution procedures; and the Union had not waived its right to bargain. *See, e.g., U.S. Department of the Air Force, 832D Combat Support Group, Luke Air Force Base, Arizona*, 36 FLRA 289, 298 (1990) (*Luke AFB*).

The Respondent asserts several legal grounds for dismissing the complaint and for finding that it had no obligation to bargain at all with the Union over the SAB instruction. Noting the arbitration decision issued in April 2003 (Resp. Ex. 4), the Agency insists that the Union's unfair labor practice charge in the instant case challenges exactly the same provision that the Union challenged in the grievance that it lost in arbitration. Therefore, the Agency argues that the complaint is barred by section 7116(d) of the Statute. In a similar vein, the Respondent argues that the Union makes the same claim in this case that it made in filing and withdrawing unfair labor practice charges in August 2002 (Resp. Ex. 8) and January 2003 (Resp. Ex. 9). In both of those charges, the Union protested the Agency's refusal to accept the Union's nominees to two SABs, acts which the Union labeled as changes in the past practice of the parties. According to the Respondent, the Union's current protest of the Agency's change in SAB procedures is just a reiteration of the same claim it has been making for three years, and thus it is time-barred under section 7118(a)(4).

Next, the Respondent argues that it had no duty to bargain over the new SAB procedures because the subject is "covered by" Article 16 of the new collective bargaining agreement. While Article 16, Section 5 of the 1997 contract expressly incorporated the requirements of the Agency's SAB instruction, and similar language was sought by the Union in the new contract, the language was rejected by the agency head and the final contract language included nothing about SABs. *Compare* Resp. Ex. 1 at 17 *and* Resp. Ex. 2 at 59-65. Similarly, no memorandum of understanding on SABs was negotiated to cover this topic. In the context of this bargaining history, the Agency says the Union bargained away its right to negotiate on this issue, and the Agency was free to revise its SAB instruction unilaterally. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004, 1017-18 (1993) (*SSA*).

Finally, assuming that it had a duty to bargain over the SAB instruction, the Respondent argues that it fulfilled its obligation and properly implemented the change. It notified the five unions on the base of the language of its proposed instruction, it met on three occasions with the Charging Party, and it modified some of its proposals to meet the unions' concerns. When the

Agency notified the unions on March 30 that it was implementing a final version of the instruction, it either had reached an agreement with the Charging Party or it had reached impasse. The Union did not seek mediation or the assistance of the Federal Service Impasses Panel subsequent to March 30. Thus, in either case, the Agency was free to implement its March 30 proposal. *Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky*, 17 FLRA 896 (1985).

Regarding the Agency's defenses, the General Counsel argues first that the instant unfair labor practice charge, filed on April 1, 2004, was timely. The charge alleged, as does the complaint, that the Agency did not fully negotiate over changes in the SAB procedures. The Agency had just announced two days earlier that it was going to implement those new procedures, so the charge could not have pertained to the events that were the subject of the Union's 2002 and 2003 ULP charges. The earlier charges were based on disputed language in the prior CBA and the prior SAB instruction, and specifically over the ability of the Agency to reject Union-nominated SAB members; that was an entirely different issue than the Agency's implementation of new procedures in 2004. For the same reason, the GC asserts that section 7116(d) of the Statute does not apply to the instant case. The grievances which resulted in a 2003 arbitration decision concerned the relative power of the Union and the selecting official to name members to an SAB; while the parties continued to dispute this question in their 2003-2004 negotiations on the SAB instruction, the current ULP charge addresses the Agency's unilateral implementation of the new instruction, not the precise wording of the instruction itself.

The General Counsel refers to the Agency's "covered by" defense as a claim that the Union waived its right to negotiate the SAB instruction during bargaining on the CBA, and the GC rejects the argument. Reviewing the testimony concerning the CBA negotiations from 2002 through 2003, the GC asserts that the parties simply deferred the issue of SAB procedures, first from the CBA itself to a memorandum of agreement, and when that proved infeasible, until the Agency revised its SAB instruction. It was anticipated by the parties that there would be negotiations once the Agency submitted a proposed revision to the instruction, and in fact the Agency did precisely that ten days after the CBA was approved. Thus the GC argues that the Union did not waive its right to bargain on this issue, and the issue was not covered by the CBA.

Analysis

1. Preliminary Issues

I will dispose of the Respondent's procedural arguments quickly, because I do not believe they have even a shred of merit, and proceed to the substantive issues of this case, which are more difficult.

The defenses offered under sections 7116(d) and 7118(a)(4) of the Statute are really two versions of the same argument. In both arguments, the Agency is claiming that the Union sought to relitigate old, rejected issues. In the 7118(a)(4) defense, the Agency points to two ULP charges the Union had filed, in August 2002 and in January 2003; since the issue in the current case is the same as the allegations in those old charges, the Agency reasons, the allegations are more than six months old and time-barred. In the 7116(d) defense, the Agency asserts that the current ULP charge seeks to relitigate the same issue that was raised and rejected in arbitration.

The problem with these arguments is that the premise is false. The ULP charges filed in 2002 and 2003 were essentially identical to the allegations the Union made in its 2003 arbitration, but the issue in those cases was quite different from the issue posed by the case before me. In 2002 and 2003, the Union objected to the Agency's rejection of its nominees for two different promotion boards. The selecting official felt those employees were unqualified, under the language of the old SAB instruction, but the Union asserted that the Agency was required to accept the Union's nominees. That is not at all what is in dispute now.

First of all, the instant case arises under a new collective bargaining agreement, with different language than the one that was in effect when the earlier grievances and ULP charges were filed. The 2002 and 2003 grievances were based on the old CBA language, and the arbitrator's decision was based on that contract and the language of the old SAB instruction. In the case at bar, the Union is not arguing that it still has the power to name members of SABs; it is arguing that the Agency did not negotiate with it fully in revising the SAB instruction. It is true that in both situations, the Union is alleging that the Agency changed a condition of employment – the procedures for conducting SABs – but the nature of the alleged change is quite different in each case, and the events are separated in time by a year or more. The instant case deals with the Agency's actions, while negotiating and failing to negotiate, between October 2003 and March 2004; the other cases dealt with the Agency's actions in convening SABs in August and October 2002. The current ULP charge is therefore properly before me. *See OLAM Southwest Air*

Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California, 51 FLRA 797, 801-02 (1996).

The Respondent's "covered by" argument is also rejected. The 2003 CBA says nothing whatever about selection advisory boards. While the 1997 contract at least referenced the Agency's instruction dealing with SABs, and the Union wanted to incorporate similar or stronger language in the 2003 contract, such language was rejected by the Commanding Officer, and subsequently the parties agreed to a CBA that contained no reference at all to SABs. Thus it is inappropriate to argue now that this very contract "covers" the issue of SABs, either expressly or impliedly, or that the issue of SABs is "inseparably bound up with" the language in Article 16 of the new CBA. *SSA*, 47 FLRA at 1018. Even in the old CBA, the substantive procedures for conducting SABs were addressed in an Agency instruction, separate and apart from the CBA; the contract simply stated that the instruction was binding on the parties, and required the Agency to contact the Union in naming members. Resp. Ex. 1 at 17. Article 16 of the new CBA provides for filling vacancies on merit, references the Agency's computerized database for posting vacancies, and sets guidelines for temporary details and job reassignments. Resp. Ex. 2 at 59-65. There is nothing about the Agency's system for selection advisory boards that is "inseparable" from these latter provisions. There is no reason to infer that by omitting the reference to Instruction 12000.1, the parties intended to give the Union and employees no role or say in the SAB process. This is especially true in this case, since at the time the new CBA was executed, on October 1, 2003, the old language of Instruction 12000.1 was still in effect, giving the Union authority to nominate employee members of SABs.

As the General Counsel noted, the Respondent actually seems to arguing that the Union's conduct during the 2003 CBA negotiations constituted a waiver of its right to bargain further on the subject of SABs, but this argument also fails. As a factual matter, it is clear to me from the testimony of both management and Union witnesses that the Union never abandoned its effort to negotiate specific rules for the conduct of SABs, but that it deferred those efforts from the CBA to the Agency instruction. Indeed, the Agency's conduct during the 2003 negotiations suggested to the Union that it would be more amenable to the Union's proposals in the latter context. Management negotiators in 2002 had agreed, in Article 16, Section 8 of the proposed new CBA, to specific language that provided more detail than the 1997 contract regarding the Union's role in SABs. Tr. 73-74, 84-86. After DOD instructed the Commanding Officer at the Agency to disapprove that language, the parties went back to the bargaining table and initially sought to incorporate similar language into an MOU, but since MOUs must also be approved by the agency head, it would have been rejected for the same reason. It was a management official who then suggested to the Union that the procedures could be negotiated when the Agency revised its SAB instruction. Tr. 190-94. The events immediately subsequent to the signing of the new CBA bore out the Agency negotiator's words: less than two weeks later, the Agency submitted its proposed revision of Instruction 12000.1, providing the parties the framework for negotiating new language. Thus I find that the Union did not waive its right to negotiate on the subject of SABs, but simply deferred those negotiations until the Agency sought to revise the instruction on the subject.

2. The October 2003 - March 2004 Negotiations

The basic facts surrounding these events are not in dispute. It is clear that the Agency did notify the Union in advance of the language of its proposed change to the SAB instruction; that the Union requested bargaining and offered a counter-proposal to the Agency; that the Agency terminated the bargaining process on March 30 when it announced its intent to implement final language; and that the Union did not seek the assistance of the FSIP subsequent to that March 30 announcement. The parties disagree on how to characterize the Agency's conduct during the negotiations and whether the Agency was entitled to declare impasse on March 30 and to subsequently impose its final offer.

Section 7103(a)(12) of the Statute defines "collective bargaining" as

> the performance of the mutual obligation . . . to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment . . . but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

This principle of collective bargaining is further described in section 7114(b)(1), which cites the duty "to approach the negotiations with a sincere resolve to reach a collective bargaining agreement." These same principles and obligations also apply to changes in conditions of employment during the term of a collective bargaining agreement. *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9 (1981). Moreover, in determining whether a party has fulfilled its bargaining responsibilities, the Authority considers the totality of the circumstances of the case. *U.S. Department of the Air Force, Headquarters, Air Force*

Logistics Command, Wright-Patterson Air Force Base, Ohio, 36 FLRA 524, 531 (1990).

The system of SABs that had been utilized at the Agency for many years prior to 2004 made such boards mandatory for all vacancies at the GS-7 level and above, and it allowed the Union a direct role in nominating employee (or "peer") members of the boards. Even after the previously-discussed arbitration ruling went against the Union in April 2003, the Union still had a right to nominate board members, although the selecting official had discretion to reject those nominees and ask the Union for additional names. Under the draft instruction proposed by the Agency in October 2003, SABs would be required only for GS-13 positions and above (which eliminated nearly all bargaining unit positions represented by the Union), and the unions would have no role whatever in nominating or selecting peer members. G.C. Ex. 2. While the new SAB instruction made many changes to the old system, these two changes stand out, and the Union clearly pressed the Agency to retain these provisions in October 2003 and beyond. Tr. 63-65, 104, 109-11, 160, 191. The Union also raised many other specific concerns about the draft proposed by the Agency, such as the definition of peer members, the use of board members from other military installations, encouraging interviews of applicants, and protecting applicants' anonymity. Resp. Ex. 5-7.

The parties held three bargaining sessions, but since some of the Union negotiators were unable to attend the December 15 session, bargaining occurred at only two of them. It appears that throughout the process, the Agency insisted that two of the most far-reaching changes in the new instruction (the grade levels at which SABs will be required and the Union's ability to nominate board members) were non-negotiable, on the same grounds as the agency head had previously disapproved the CBA. Tr. 171, 179, 183-86. At each of the substantive sessions, the Union negotiators identified a variety of issues regarding the proposals, the Agency negotiators offered feedback to the Union about those issues, and the Agency advised the Union that it would take those matters into consideration and get back to them. Tr. 58, 108. At no point during the sessions did the Agency suggest compromise language to proposals made by the Union, and at no point did the parties initial or otherwise reach agreement on any specific proposals. Tr. 26, 27, 33, 141-44. The first time that the Agency offered any modified language in its proposals was on March 30, when Ms. Anderson declared the negotiations over and asked each of the assembled unions to sign a document which she said would be implemented the following week. In this final version of the SAB instruction, the Agency included a provision that allowed each union to submit a list every three months of employees who were willing to sit on SABs, although the Agency was free to select anyone it wanted for the "peer" positions. Resp. Ex. 4 at 3. It also added the word "disability" to the list of subjects that selecting officials could not discuss when talking to a supervisor about an applicant (an issue the Union had raised on November 25). *Compare* Resp. Ex. 4 at 6 *and* Resp. Ex. 5. As in its original proposal, the Agency's final proposal required SABs only for GS-13 positions and higher.

Despite claims to the contrary by the management witnesses at the hearing, it is evident from the record that the parties never reached an actual agreement on the terms or language of the revised SAB instruction. Both Anderson and Hamilton, the Agency negotiators who testified about the bargaining sessions, initially asserted that when they left the January 7 session, they believed that they had reached agreement on all issues that were discussed; but when they were pressed for details on this point, they conceded that they never obtained any express statement of agreement from the Union on any of the issues, and that indeed the Union negotiators still insisted on language that the Agency would not accept. Tr. 116, 124-27, 165, 167, 178-81. With respect to the issue of "peer" members of SABs, the Union continued to demand more of a role than the Agency had offered on or before January 7, and even as of March 30; similarly, the Union continued to demand that SABs be required for more positions than just GS-13 and above. Tr. 124-27, 178-81.[3/]

While the Agency witnesses suggested that by January 7 the Union was only pursuing three minor issues (see the three numbered items in Resp. Ex. 7), I reject that assertion, for the reasons stated above. Moreover, the record suggests that even with regard to these three items, the Union had not agreed to at least one of them. With regard to Item 2 (removing cover sheets to protect applicants' anonymity), the Agency witnesses testified that Anderson told the Union that this was something they had no control over, that the cover sheets came to the Agency this way from the service center. Tr. 115, 161-62. Thus, while the Agency may have believed that its response sufficed to end the discussion, it is clear that the Union did not consent to the existing language. This was similarly true concerning a wide range of other issues. The Agency in

3/ At the January 7 bargaining session, Mr. Parker, one of the Union negotiators, requested data from the Agency as to the number of SABs the Agency had held from July 1, 2000 to July 21, 2002. Resp. Ex. 7. This indicates that even at that last meeting, the Union was still pursuing its demand to require SABs for positions below the GS-13 level. It goes to the Agency's objection to the cost and time expended by SABs and suggests that the Union was looking for room in which to compromise.

general, and Anderson in particular, seem to have concluded that management's rejection of a Union proposal was tantamount to the issue being resolved. This is not, however, the meaning of "agreement" under the Statute. Rather, the Authority has explained that an agreement "is one in which authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining." *U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 317 (1997). Looking at the entire history of the parties' negotiations up to and including March 30, 2004, it is abundantly clear that the Union continued to disagree with many of the Agency's proposals, and that there was never a meeting of the minds on the terms of the SAB instruction. Therefore, the Agency's implementation of the instruction cannot be justified on the basis of the parties having reached agreement.

As Ms. Anderson told the Union on March 30, however, perfect and mutual agreement is not necessary for management to implement the terms of its final proposal, if an impasse has been reached pursuant to good-faith bargaining, and if the Union has failed to file a timely impasse resolution request. *Luke AFB, supra*, 36 FLRA at 298 (1990); *Department of Justice, United States Immigration and Naturalization Service, El Paso District Office*, 25 FLRA 32, 37 (1987). Despite her description of the negotiations as at impasse, however, I find that an impasse had not been reached at that time, and that the Agency's imposition of its last proposal was both premature and unlawful.

I have already noted that collective bargaining requires a good-faith effort to reach agreement, and I do not believe that was the attitude demonstrated by the Agency in its dealings with the Union. Rather, the Agency sought to impose those terms it felt appropriate, after listening to the "concerns" of the Union. The meetings of November 25, December 15 and January 7 do not reflect any attempt on management's part to actually work out mutually agreeable language in an atmosphere of compromise. Indeed, no compromise language was ever offered by the Agency at any of its meetings with the Union. At the end of the January 7 meeting, the Agency told the Union it would review the proposals of all the unions "and get back with each union once they [i.e. management] have revised their original proposal." Resp. Ex. 7. This suggested that the Agency was preparing a compromise proposal and that there would be subsequent discussions about the proposal, in an attempt to find mutually acceptable terms. Instead, the Agency was simply preparing to decide on its own what terms were best for all parties and to impose them, leaving the unions the Hobson's choice of accepting those terms or invoking impasse resolution procedures before the parties had even begun trying to compromise.

It is true that the Agency's final instruction did offer at least some modifications of its original proposal. Section III, paragraph 1.e. of the final instruction allows the Union on a quarterly basis to submit names of employees willing and able to sit on SABs, and Section V, paragraph 1.c. added the word "disability" to a list of prohibited areas of inquiry. The latter change appears to have been made at the express request of the Union (see Resp. Ex. 5), but the former change does not appear to have been proposed by the Union at any point in the negotiations.[4/] I would attach considerably more significance to the Agency's "concession" on the nomination of peer members if it had bothered to discuss this proposal with the Union at a negotiation session, rather than waiting nearly three months from the final session and then telling the Union to take it or leave it. As I noted before, the Agency's January 8 memo to the Union (Resp. Ex. 7) suggested that just such discussions were imminent, and a failure to reach a compromise after such a meeting might have demonstrated an impasse, on this issue at least. But in fact the Agency was not making "proposals," in the sense that sections 7103(a)(12) and 7114(b) contemplate; it was making unilateral decisions on the terms of its SAB instruction. The Union was given the opportunity to explain its "concerns" on various aspects of the instruction, and the Agency periodically indicated that it might or might not be able to accommodate those concerns, but the decisionmaking on those final terms was entirely unilateral. This is not collective bargaining as the Statute envisions.

Superimposed on the entire process between October 2003 and March 2004 was the Agency's repeated insistence that a large part of the SAB instruction was non-negotiable. This clearly was a continuation of the discord that ensued from the parties' earlier negotiation of Article 16, Section 8 of the new CBA relating to SABs, a provision that was rejected by the agency head and on which the parties then labored fruitlessly to resolve between February and October 2003. As the parties sought to negotiate language of a new SAB instruction, the Agency negotiators asserted a management right to select members of the SAB as a basis for refusing to negotiate any proposal limiting the selecting official in any way. Moreover, the Agency's assertion of non-negotiability covered the Union's proposal to require SABs for more than just GS-13

4/ The record is silent as to whether this language was suggested by a different union or devised by the Agency.

positions and above. Tr. 125-26, 170-71, 172, 174-76, 178-81. In effect, then, the two most far-reaching changes in the SAB instruction, and the two most controversial issues in the negotiations over the new instruction, were declared off-limits by the Agency from the outset.

It is evident from the DOD memo to the Agency in April 2003 (Resp. Ex. 3 at 3-4) that the Agency's position on non-negotiability was based on the Authority's *Fort Rucker* decision. But this decision, which found a proposal requiring a union observer on rating panels to be non-negotiable, must be read in context with other decisions of the Authority that explain how such proposals may be negotiable. *National Treasury Employees Union and U.S. Department of Commerce, Patent and Trademark Office*, 53 FLRA 539 (1997); *National Federation of Federal Employees, Local 2099 and Department of the Navy, Naval Plant Representative Office, St. Louis, Missouri*, 35 FLRA 362 (1990) (*Naval Plant Representative Office*); *see also Federal Aviation Administration, Washington, D.C.*, 55 FLRA 1233 (2000) (*FAA*). Thus, while the Authority explained in *Fort Rucker* that limitations on the selection of panel members "affect" and "impair" a management right under section 7106(a), the provision may still, "under certain circumstances," be negotiable as an appropriate arrangement under 7106(b)(3). 53 FLRA at 615. In *Customs*, the Authority went further by holding that proposals simply requiring the use of panels, as opposed to a single individual, do not even "interfere" with management's statutory rights to select, to assign work, or to determine its organization. 35 FLRA at 365-70. *See also National Treasury Employees Union and U.S. Department of the Treasury, Customs Service, Washington, D.C.*, 46 FLRA 696, 777-80 (1992), where a proposal specifying the circumstances in which a selection board must be used was found to be a negotiable procedure under section 7106(b)(2). And in *FAA*, the agency terminated a contractual practice allowing a union to participate on selection panels, because it interfered with management's statutory right to select, the Authority upheld an arbitrator's decision that the contractual provision was a lawful arrangement under 7106(b)(3). 55 FLRA at 1236-37.

By relying solely on *Fort Rucker* and by looking only at the language therein that was favorable to management, without considering also the unfavorable language, the Agency here (perhaps at the misguided command of DOD) significantly restricted the scope of negotiations that could occur on its revised SAB instruction. With regard to the possibility of the Union having a role on SABs, the Agency considered only how this impaired management and did not consider whether a narrowly tailored proposal could be negotiated which reasonably address the concerns of employees adversely affected by management's unfettered exercise of its right to select. While the Agency did ultimately agree to allow the Union to offer names of employees who might then be selected to SABs, I have already explained that this was imposed unilaterally by management, not through any actual bargaining and discussion with the Union. And with regard to the types of positions for which SABs would be required, the Agency seems to have missed the point entirely of *Naval Plant Representative Office* that such proposals do not interfere with a management right and are fully negotiable. As late as January 7, 2004, the Union was still seeking information to understand just how much time and effort was expended in conducting SABs for all positions at GS-7 and above. While the Agency told the Union at the bargaining sessions that the current practice was too time-consuming, there is no evidence in the record that the parties actually discussed whether each of their concerns could be accommodated by compromising on the range of positions requiring SABs. The Agency simply declared the issue non-negotiable, and it ultimately imposed its original proposal on the Union, a proposal which the Union president estimated eliminated 90 percent of his unit's employees from SABs. Tr. 31-32. It is clear that the Agency's continued, and improper, assertion of non-negotiability to a large portion of the Union's proposals, interfered significantly with the bargaining process and precluded a proper discussion of the issues facing the parties.

Thus, on March 30, 2004, the Agency was wrong to declare negotiations over and to implement its final proposals unilaterally. An impasse had not occurred, because the Agency had improperly restricted the issues that could be discussed, and it never truly sought to engage in compromise with the Union on the issues it did discuss. The Agency treated the Union as a second-class entity, someone it would listen to and take suggestions from, but not someone it would seriously engage in true negotiations. The Agency listened to the Union for three short meetings and then decided on its own which of the Union's concerns merited a modification of management's original proposal. One party's unilateral declaration of impasse does not mean that an impasse has actually been reached. *See Veterans Administration, Washington, D.C.* and *Veterans Adminis-tration Medical Center, Leavenworth, Kansas*, 32 FLRA 855, 873-74 (1988). When the course of bargaining demonstrates that further negotiations would be fruitless, then an impasse has been reached. In my opinion, that point had not been reached in this case.

First, for the reasons I have already stated, I feel that there was no impasse here, because the Agency had not engaged in true good-faith bargaining. If the Agency had truly sought to obtain agreements on

specific terms of the proposed instruction with the Union, and had discussed the acceptability of various compromise proposals, then it might be said that further bargaining was doomed; but this hypothesis was never put to the test. Second, I put particular emphasis on the lack of any true discussion of compromise positions concerning what positions would be subject to SABs. The Agency's first, and final, proposals on this issue exempted it from using SABs except for positions GS-13 and over; from the Union's perspective, this excluded almost the entire bargaining unit. The Agency's rejection of the Union's proposal was based partly on the asserted non-negotiability of the issue and partly on the time and expense of conducting SABs for hundreds of vacancies. While the Agency's assertion of non-negotiability was at best a distortion of the law and at worst flatly wrong, the Agency's objection based on the time and expense of SABs, and the Union's January 7 request for information on the number of SABs conducted in the past, cried out for further discussion and lent itself easily to a compromise. Although the Statute does not require either party to accept a proposal or make any particular concession, the Agency's error here was in shutting off any further discussion of compromise when a compromise appeared to be easily within reach. I find that the Respondent simply lost patience with the process, due in part to a mistaken belief that much of the issues were non-negotiable and in further part to a belief that it was required only to listen to the Union before implementing what it deemed best.

For all the reasons stated above, I conclude that the Agency terminated the bargaining process prematurely on March 30, 2004, and implemented its new SAB instruction before an impasse had been reached. Therefore, the Respondent violated section 7116(a)(1) and (5) and committed an unfair labor practice.

REMEDY

Where, as here, an agency has failed to negotiate fully over the exercise of a management right, the guidelines of *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*) are applicable to whether a status quo ante remedy is appropriate.

The first factor cited in *FCI* is whether, and when, the Agency notified the Union of the proposed change; to the Agency's credit, it did provide adequate notice of its proposed change, both the initial proposal submitted in October 2003 and the final version announced on March 30 but not implemented until June 3. The second factor, whether and when the Union requested bargaining, weighs in the Union's favor. As to the third factor, I consider the Agency's bargaining misconduct to be willful. While it appears that the Agency negotiators sincerely believed that some of the Union's proposals were non-negotiable, this was, as I have already discussed, based on a seriously incomplete reading of the case law, a misreading that it expanded beyond the issue of Union membership on SABs to the question of what positions required SABs. Moreover, since the Agency's basic approach to the negotiations failed to reflect a sincere desire to reach a mutual agreement, this can only be described as willful.

The final two factors described in *FCI* involve weighing the adverse impact of a status quo ante remedy on the Agency's operations against the adverse impact of the unilateral change on employees. The Agency argues now, as it did at the bargaining table, that returning to the pre-2004 SAB procedures would be unduly time-consuming, but there is little or no evidence to support this argument. One witness, Ms. Hamilton, testified that the Agency was "having basically 365 Selection Advisory Boards a year." Tr. 109. This comment struck me as a rather off-hand attempt to flippantly quantify an issue that could have been conclusively established by the Agency with documentation in its possession. *See* Resp. Ex. 7. This number, even if it were accurate, refers to the entire Agency and not the unit represented by the Union. Nonetheless, I do recognize that in a unit of 830 employees, utilizing SABs for all vacancies in GS-7 positions and higher, instead of just for GS-13 and higher, will require the Agency to conduct a significant number of SABs. On the other hand, the Agency's premature termination of bargaining and imposition of an unwanted change in promotion procedures on the bargaining unit communicated to employees that they were essentially powerless to resist the Agency when it wanted to make a change. The Agency belittles the Union's counter-proposal as merely seeking to continue the old instruction, but this was a set of procedures that the Agency had agreed to in negotiations and had lived with for many years. As recently as January 2003, the Agency had executed a CBA continuing those procedures. Thus I find it less than persuasive that the resumption of the old SAB procedures, at least for the duration of good-faith bargaining, would significantly disrupt the Agency's operations. Filling vacancies through the use of rating panels, rather than by a single individual, has wide recognition in the Federal sector, as reflected in FLRA case law, and the Authority has found such a requirement to be related to the merit system principle of ensuring fair consideration to applicants for promotion. *Naval Plant Representative Office*, 35 FLRA at 366. Since June of 2004, bargaining unit employees have not had the assurance of seeing a large number of their promotion applications reviewed by a panel, and this is an adverse effect that carries weight. In balance, I find that the FCI factors weigh in favor of

imposing a status quo ante remedy and requiring the Agency to utilize the pre-2004 SAB instruction, at least until it has completed good-faith bargaining on a revised instruction.

I therefore recommend that the Authority issue the following remedial order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of the Navy, Naval Aviation Depot, Jacksonville, Florida (the Agency), shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in conditions of employment without bargaining over those changes to the extent required by the Statute with the International Federation of Professional and Technical Engineers, Local 22 (the Union), the exclusive representative of certain of its employees.

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

2. Take the following affirmative action:

(a) Rescind the Selection Advisory Board procedures, NADEPJAXINST 12000.1, that were promulgated on June 3, 2004, and replace them with the version of those procedures that was in effect immediately before that date.

(b) Notify, and upon request bargain with, the Union to the extent required by the Statute concerning any proposed changes in Selection Advisory Board procedures.

(c) Post at its Jacksonville, Florida facility, a copy 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 Commanding Officer of the Agency, 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 ensure that such Notices are not altered, defaced or covered by any other material.

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Atlanta Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 25, 2006.

_____
RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Navy, Naval Aviation Depot, Jacksonville, Florida, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes in conditions of employment without bargaining over those changes to the extent required by the Statute with the International Federation of Professional and Technical Engineers, Local 22 (the Union), the exclusive representative of certain of our employees.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL rescind the Selection Advisory Board procedures, NADEPJAXINST 12000.1, that were promulgated on June 3, 2004, and replace them with the version of those procedures that was in effect immediately before that date.

WE WILL notify, and upon request bargain with, the Union to the extent required by the Statute concerning any proposed changes in Selection Advisory Board procedures.

_____
(Agency)

Dated:_____ By:_____
(Signature)(Commanding Officer)

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 its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, whose address is: Federal Labor Relations Authority, Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270, and whose telephone number is:
404-331-5300.