65 FLRA No. 220

UNITED STATES
DEPARTMENT OF THE NAVY
SUPERVISOR OF SHIPBUILDING,
CONVERSION AND REPAIR
NEWPORT NEWS, VIRGINIA
(Respondent)

and

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 2
(Charging Party)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
LOCAL 1
(Charging Party)

WA-CA-08-0207
WA-CA-08-0208

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DECISION AND ORDER

July 29, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This consolidated unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (the Judge) filed by the General Counsel (GC) and the National Association of Independent Labor, Local 2 (NAIL). The Respondent filed an opposition to the exceptions of the GC and NAIL.

The consolidated complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by repudiating an agreement that it reached with the Charging Parties[1] concerning parking at the Respondent's facility. The Judge found that the Respondent did not violate the Statute as alleged, and he recommended dismissing the consolidated complaint.

For the reasons that follow, we deny the GC's and NAIL's exceptions, and we dismiss the consolidated complaint.

II. Background

The Respondent's employees work at a facility that the Respondent operates (Respondent's facility). Judge's Decision at 2-3. The employees of several other components of the Department of the Navy (Agency) also work at the Respondent's facility, and the employees of those other Agency components are referred to as "tenant command" personnel. *See id.* at 3. The Charging Parties – NAIL and the International Federation of Professional and Technical Engineers, Local 1 (IFPTE) – are the exclusive representatives of some of the Respondent's employees. *See id.* The American Federation of Government Employees, Local 53 (AFGE) is the exclusive representative of some of the tenant command personnel who work at the Respondent's facility (AFGE-represented personnel). *See id.*

The Respondent assigns parking privileges to its employees, as well as tenant command personnel, in accordance with procedures in a written instruction. *See id.* The Respondent invited the Charging Parties to negotiate a revision to the instruction, and the Charging Parties proposed revisions that would, among other things, change the parking privileges of AFGE-represented personnel. *Id.* After receiving those proposals, the Respondent contacted the Agency component that employs the AFGE-represented personnel – the Fleet Industrial Supply Center, Norfolk (FISC) – to suggest that FISC inform AFGE of the proposed revisions. *Id.* The Respondent then continued bargaining without further involvement by either FISC or AFGE, and, eventually, the Respondent and the Charging Parties negotiated and signed a revised instruction (Revision J).[2] *Id.* at 3-4. Under Revision J, the

1. Although there are two Charging Parties to this case, only NAIL filed exceptions.

2. Revision J states, in pertinent part:

> Eligible [parking space] applicants will be assigned to specific parking assignment groups. Parking lot and space assignment will occur in assignment group order as follows:
>
> (1) Group I – Special designated parking . . . [.]
> (2) Group II – Handicapped personnel.

Respondent would first designate eligible parking applicants as members of one of five prioritized "assignment groups," and applicants would then receive parking assignments in the order dictated by their assignment group's priority status. *Id.* at 3-4 & n.3. In keeping with the Charging Parties' proposals, Revision J's lowest priority assignment group consisted entirely of tenant command personnel, including AFGE-represented personnel. *Id.*

When the Respondent began reallocating spaces under Revision J, it realized that some FISC employees would lose their parking spaces as the result of an unanticipated parking shortage. *Id.* at 4. The Respondent was unsuccessful in obtaining additional spaces, and it informed FISC of the effect that the shortage would have on FISC employees. *See id.* Thereafter, AFGE sent the Respondent a demand to cease changes to parking at the Respondent's facility in order to afford AFGE an opportunity to bargain with FISC on the matter. *Id.* The Respondent then notified the Charging Parties that it was not implementing Revision J. *See id.* The Charging Parties filed ULP charges, and the GC issued a complaint, alleging that the Respondent unlawfully repudiated Revision J. *Id.*

III. Judge's Decision

Before the Judge, the GC argued that the Respondent repudiated a lawful agreement in violation of § 7116(a)(1) and (5) of the Statute,[3] whereas the Respondent contended that it did not violate the Statute because implementing Revision J would have unlawfully permitted the Charging Parties to negotiate substantive changes to the working conditions of AFGE-represented personnel. *See id.* at 5. The Judge explained that, although it was undisputed that the Respondent refused to implement Revision J, the "Authority . . . will not find an unlawful repudiation where the agreement allegedly repudiated is contrary to law." *Id.* at 6 (citing *U.S. Dep't of Transp., Fed. Aviation Admin., Atlanta, Ga.*, 60 FLRA 985, 986 (2005) (*FAA*)). In this regard, the Judge determined that Revision J is contrary to § 7114(a)(1) of the Statute (§ 7114(a)(1)) because it would allow the Charging Parties "to directly determine, or regulate, the conditions of employment of employees in the AFGE . . . bargaining unit[, which] runs afoul of the principle of exclusive recognition[.]"[4] *Id.* at 7; *see also id.* (citing *NAGE, Local R1-109*, 61 FLRA 593, 597 (2006) (*Local R1-109*)). Therefore, the Judge concluded that the Respondent's refusal to implement the agreement did not constitute unlawful repudiation, and he recommended that the Authority dismiss the consolidated complaint.[5] *Id.* at 8.

IV. Positions of the Parties

A. GC's Exceptions

The GC argues that the Judge erred in finding that Revision J is contrary to law and that, consequently, he erred in finding that the Respondent did not unlawfully repudiate the agreement. GC's Exceptions at 3, 6. The GC contends that both the Authority and the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) have recognized that agreements providing bargaining unit members with preferential access to limited resources are lawful, even where their effects are "inconvenient" or "unseemly[.]" *Id.* at 7 (quoting *U.S. Dep't of the Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA*, 952 F.2d 1434, 1441 & n.8 (D.C. Cir. 1992) (*Cherry Point*)) (internal quotation marks omitted); *see also id.* at 6-8. In particular, the GC asserts that the agreement to afford employees represented by the Charging Parties priority access to a finite benefit – i.e., parking spaces

(3) Group III – [Respondent Employee] and Tenant Command Carpools.
(4) Group IV – [Respondent Employee] individuals.
(5) Group V – Tenant Command individuals.

Judge's Decision at 4 n.3 (quoting GC Ex. 4 at 4).

3. Section 7116(a) of the Statute states, in pertinent part:

> [I]t shall be an unfair labor practice for an agency . . . (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; [and] . . . (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

4. Section 7114(a)(1) of the Statute provides, in pertinent part: "A labor organization . . . accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit."

5. The Judge also found that the Respondent justifiably refused to implement Revision J because honoring it would have unlawfully interfered with the bargaining relationship between FISC and AFGE. *See* Judge's Decision at 7. However, because the consolidated complaint is fully resolvable on the basis of the Judge's § 7114(a)(1) finding alone, *see infra* Parts V.-VI., we find it unnecessary to address the Judge's additional finding concerning unlawful interference, or the exceptions to that finding.

– is lawful and enforceable even though it effectively reduces the number of parking spaces available to other individuals, including AFGE-represented personnel. *Id.* at 6-8 (citing *AFGE, Local 2139*, 61 FLRA 654, 656 (2006) (*Local 2139*); *Soc. Sec. Admin., Office of Hearings & Appeals, Region II, Buffalo Office of Hearings & Appeals, Buffalo, N.Y.*, 58 FLRA 722, 727 (2003) (*SSA*); *AFSCME, Local 2910*, 53 FLRA 1334, 1338 (1998) (*AFSCME*)).

B. NAIL's Exceptions

Like the GC, NAIL argues that the Judge erred in finding that the agreement is contrary to § 7114(a)(1) and in concluding that the Respondent did not unlawfully repudiate Revision J. *See* NAIL's Exceptions at 1. According to NAIL, the Judge's decision – rather than Revision J – is contrary to § 7114(a)(1) because it deprives NAIL of its rights "to represent employees of [the] Respondent[,] . . . to negotiate and reach agreement with [the] Respondent, and to have those agreements implemented." *Id.* at 2. In that regard, NAIL asserts that the Judge's reasoning would make "practically every agreement" between the Charging Parties and the Respondent meaningless because the Respondent could always refuse to implement those agreements based on their effects on employees represented by another union. *Id.* at 3.

C. Respondent's Opposition

The Respondent contends that, contrary to the GC's arguments in its exceptions, *Cherry Point* actually supports the Judge's decision in this case. *See* Opp'n 3-4. According to the Respondent, "[w]hile *Cherry Point* acknowledges that union proposals within the scope of mandatory bargaining . . . may have '*some impact*' on personnel outside the bargaining unit[,]" *Cherry Point* does not sanction agreements by one exclusive representative that "actually regulate[]" the conditions of employment of a bargaining unit with a different exclusive representative. *Id.* at 4-5 (quoting *Cherry Point*, 952 F.2d at 1440) (internal quotation marks omitted).

With regard to NAIL's exceptions, the Respondent contends that, although reaching lawful agreements over facility-wide matters may require coordinated bargaining with other unions as well as the Charging Parties, negotiations regarding "employer-specific matters[,] such as flexible schedules, telework, training, travel, [and] merit staffing procedures" for the Respondent's employees, need not include exclusive representatives other than the Charging Parties. *Id.* at 10 n.4.

V. Analysis and Conclusions

As the Judge stated, although unlawfully repudiating a negotiated agreement is contrary to § 7116(a)(1) and (5) of the Statute, the "Authority will not find an unlawful repudiation where the agreement allegedly repudiated is contrary to law." *FAA*, 60 FLRA at 986 (citing *Gen. Servs. Admin., Wash., D.C.*, 50 FLRA 136, 139 n.7 (1995)) (agency did not unlawfully repudiate agreement if it was contrary to Back Pay Act). Under § 7114(a)(1), once a union is certified as the exclusive representative of an appropriate unit of employees, that union has the exclusive right to bargain with respect to the conditions of employment of employees in that certified unit. *See AFGE, Local 2879, AFL-CIO*, 49 FLRA 1074, 1087-89 (1994) (*Local 2879*). An agency may not negotiate with one exclusive representative to regulate the conditions of employment for a unit represented by another union because such negotiations would run afoul of the principle of exclusive representation. *See AFGE, Local 32 v. FLRA*, 110 F.3d 810, 815 (D.C. Cir. 1997) (*Local 32*) (unions may not negotiate agreements that "*govern*" the working conditions of employees in other bargaining units or that "b[i]nd" an agency with respect to the rights of those employees). *Cf. Local R1-109*, 61 FLRA at 597 (applying *Cherry Point* to find proposals that "directly determine" conditions of employment for employees in another bargaining unit outside duty to bargain); *AFGE, Local 32*, 51 FLRA 491, 507-08 (1995) (applying *Cherry Point* to find proposals "directly implicating" employees in other bargaining units outside duty to bargain); *Local 2879*, 49 FLRA at 1088-89 (applying *Cherry Point* to find proposals that "seek to regulate" conditions of employment of employees in another bargaining unit outside duty to bargain).[6]

6. We note that private-sector precedent under the National Labor Relations Act (NLRA) holds that it is a ULP for parties to apply the terms of a collective bargaining agreement negotiated by one union to employees represented by a different union. *See, e.g., Sperry Sys. Mgmt. Div., Sperry Rand Corp. v. NLRB*, 492 F.2d 63, 67 n.4 (2d Cir. 1974) ("Demands by a union to represent employees outside the certified uni[t] are unfair labor practices[.]"); *id.* at 69 ("[A]n employer commits [an] unfair labor practice . . . when it imposes on employees of one unit the contract and bargaining agent of another unit."); *Local 7-210, Oil, Chemical, & Atomic Workers, Int'l Union, AFL-CIO v. Union Tank Car Co.*, 475 F.2d 194, 197 (7th Cir. 1973) (under NLRA, employer properly

According to the GC and NAIL, Revision J merely "affects" the conditions of employment of AFGE-represented personnel but does not run afoul of the principle of exclusive recognition. *See* GC's Exceptions at 6-8; NAIL's Exceptions at 3. However, the wording of Revision J establishes that it does more than merely affect the conditions of employment of AFGE-represented personnel. In particular, Revision J expressly determines the access of "tenant command" personnel to parking, *see supra* note 2, even though AFGE – the exclusive representative of some of the tenant command personnel – had no part in negotiating the revised instruction. Thus, the above-cited precedent supports a conclusion that Revision J is contrary to § 7114(a)(1).

Moreover, Revision J is unlike the proposals discussed in *Cherry Point*, *Local 2139*, *SSA*, and *AFSCME*, which the GC cites in support of its exceptions. The GC contends that Revision J is comparable to a hypothetical proposal discussed in *Cherry Point*, which would have called for "all parking at [the agency's facility] [to] be reserved for employees" represented by the union making the proposal. *See Local 32*, 110 F.3d at 815 (internal quotation marks omitted) (discussing the hypothetical proposal in *Cherry Point*). As the D.C. Circuit explained in *Local 32*, although the hypothetical proposal in *Cherry Point* would have "severely limited" the parking options available to employees not represented by the proposing union, the proposal would have been lawful because it did not "define[the] parking privileges . . . for members of other bargaining units[.]" *Id.* In a similar manner, the lawful proposal in *Local 2139* was limited to address only the parking privileges of "bargaining unit employees" represented by that union. 61 FLRA at 654. Revision J, on the other hand, is *not limited* to bargaining unit employees represented by the Charging Parties, and it directly *defines* the parking privileges of AFGE bargaining unit members by expressly identifying "tenant command individuals" as a particular parking "assignment group." *See supra* note 2. As a result, Revision J is not comparable to the hypothetical proposal discussed in *Cherry Point* or the proposal found negotiable in *Local 2139*.

As for the other decisions cited by the GC, in *SSA*, a proposed ULP remedy required an agency to restore the status quo ante (SQA) with regard to the parking privileges of one group of employees at its facility. *See* 58 FLRA at 727. The Authority held that "the fact that the [r]espondent had bargaining obligations with more than one labor organization regarding parking privileges d[id] not justify not imposing an SQA order." *Id.* However, the Authority did not authorize the charging party in *SSA* to negotiate an agreement that would directly determine the conditions of employment of other bargaining units, and, thus, *SSA* does not support the GC's exceptions. In *AFSCME*, the Authority applied *Cherry Point* to find that "nothing on the face of th[e] proposal [under consideration] indicates a direct effect on non-unit employees."[7] 53 FLRA at 1338. By contrast, Revision J on its face directly affects employees in a unit other than those represented by the Charging Parties because it expressly identifies them as "tenant command individuals" and then precisely regulates their parking privileges by placing them in a certain parking "assignment group." *See supra* note 2.

With regard to NAIL's argument that the Judge's decision violates NAIL's § 7114(a)(1) rights "to represent employees of [the] Respondent[,] . . . to negotiate and reach agreement with [the] Respondent, and to have those agreements implemented[,]" NAIL's Exceptions at 2, the Judge's decision does not prevent NAIL from reaching lawful agreements with the Respondent regarding the working conditions of employees represented by NAIL. Rather, the decision prevents NAIL from attempting to negotiate or enforce agreements that govern the conditions of employment of a bargaining unit represented by a different exclusive representative. As NAIL does not have § 7114(a)(1) rights to negotiate or enforce agreements on behalf of AFGE-represented personnel, *see Local R1-109*, 61 FLRA at 597, the Judge's decision on that point is not inconsistent with § 7114(a)(1).

NAIL argues further that the Judge's decision will render meaningless its ability to negotiate

refused to apply union's contract to workers certified as members of another unit with a different bargaining representative).

[7] Proposal 1 in *AFSCME* stated, in relevant part:

> *Unit employees represented by the [union]* shall be given access to parking spaces in the same proportion as the number of unit members to the [agency] population as a whole. . . . The [agency] will assign *bargaining unit employee parking spaces* in the following order of priority: . . . 1. permanently handicapped employees; 2. employees who work unusual hours; 3. car pools and van pools; 4. all other vehicles.

53 FLRA at 1334 (emphases added).

agreements on behalf of its members because the Respondent could always refuse to implement them based on the effects they have on other bargaining units. NAIL's Exceptions at 3. However, the Judge did not find that the Respondent could refuse to implement agreements simply because they "affect" other bargaining units. He found that the Respondent could not lawfully implement agreements negotiated with the Charging Parties that "directly determine, or regulate, the conditions of employment of employees" in other bargaining units. Judge's Decision at 7. Thus, NAIL's argument is based on a misinterpretation of the Judge's decision and does not provide a basis for finding the decision deficient.

For the foregoing reasons, we find that Revision J directly determines the parking privileges of AFGE-represented personnel, and, consequently, it is inconsistent with the principle of exclusive recognition. *See Local 32*, 110 F.3d at 815; *Local R1-109*, 61 FLRA at 597. Therefore, we deny the exceptions to the Judge's findings that Revision J is contrary to § 7114(a)(1) and that, as a result, the Respondent did not unlawfully repudiate Revision J by refusing to implement it.

VI. Order

The consolidated complaint is dismissed.

Office of Administrative Law Judges

DEPARTMENT OF THE NAVY
SUPERVISOR OF SHIPBUILDING,
CONVERSION AND REPAIR,
NEWPORT NEWS, VIRGINIA
Respondent

and

NATIONAL ASSOCIATION
OF INDEPENDENT
LABOR, LOCAL 2
Charging Party

and

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL 1
Charging Party

June M. Marshall, Esq.
For the General Counsel

Joseph R. Barco, Labor Relations Specialist
For the Respondent

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority), Part 2423.

A Consolidated Complaint and Notice of Hearing was issued on December 28, 2009, based on two separate unfair labor practice charges filed on February 7, 2008, against the Department of the Navy, Supervisor of Shipbuilding, Conversion, and Repair, Newport News, Virginia (Respondent). Case No. WA-CA-08-0207 was filed by the National Association of Independent Labor, Local 2 (NAIL), and Case No. WA-CA-08-0208 was filed by the International Federation of Professional and Technical Engineers, Local 1 (IFPTE). The Consolidated Complaint alleges that the Respondent repudiated an agreement it entered into with NAIL and IFPTE concerning vehicle parking and violated §7116(a)(1) and (5) of the Statute.

On February 16, 2010, the General Counsel filed a Motion for Summary Judgment in the consolidated complaint asserting that there were no material facts in dispute, and it was entitled to judgment as a matter of law. On February 17, 2010, the Respondent filed a response to the motion for summary judgment in which it agreed that there were no material facts in dispute, but contended that summary judgment should be made in favor of the Respondent.[1]/

Based upon the assertions of the Respondent and General Counsel, there were no genuine issue of material facts in dispute, and an Order Indefinitely Postponing the hearing was issued on February 18, 2010.

MOTIONS FOR SUMMARY JUDGMENT

The Authority has held that motions for summary judgment filed under §2423.27 of its Regulations serve the same purpose and are governed by the same principles, as motions filed in the United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr, Nashville, Tenn.*, 50 FLRA 220, 222 (1995); *Dep't of the Navy, U.S. Naval Ordnance Station, Louisville, Ky.*, 33 FLRA 3, 4-5 (1988) (*NOS, Louisville*), *rev'd on other grounds*, No. 88-1861 (D.C. Cir. Aug. 9, 1990). The motion is to be granted if the "'pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *NOS, Louisville* at 4, quoting Rule 56(c). After reviewing the pleadings, affidavits, and exhibits submitted by the parties, I agree that there is no genuine issue of material facts with respect to the consolidated complaint before me.

Accordingly, it is unnecessary to hold a hearing in this case, and it is appropriate to decide the case on the motions for summary judgment. The summary of the undisputed material facts and my conclusions of law and recommendations are set forth below.

[1] The "response" to the General Counsel's motion submitted by Respondent is for all intents and purposes a cross-motion for summary judgment and it is treated as such.

FINDINGS OF FACT

The Respondent is an agency under §7103(a)(3) of the Statute. (GC Ex. 2, 3) The Respondent's facility is not located on a military installation or other federal property, but rather is situated at the Northrop Grumman Shipyard in Newport News, Virginia. (Resp. App. A) In addition to its own employees, there are other federal personnel located at the Respondent's facility who provide support to the Respondent's mission and are considered "Tenant Command Personnel". (*Id.*) The largest tenant command having employees at Respondent's facility is the Integrated Logistics Support Department, which is organizationally aligned under the Fleet Industrial Supply Center, Norfolk (FISC, Norfolk). (*Id.*)

The Charging Parties in this case, NAIL and IFPTE are labor organizations within the meaning of §7103(a)(4) of the Statute. (GC Ex. 2, 3) NAIL is the exclusive representative of a unit of Respondent's employees appropriate for collective bargaining at the Newport News facility; IFPTE is also the exclusive representative of a unit of Respondent's employees at the same facility. (*Id.*). The American Federation of Government Employees, Local 53 (Local 53), is the exclusive representative of a bargaining unit that includes employees employed by FISC, Norfolk. (Resp. Apps. A, B at 2) Some of the employees in Local 53 bargaining unit are assigned to one of the tenant commands at the Respondent's Newport News facility and are located there.[2/] (Resp. Apps. A, B)

In addition to office space, Northrop Grumman Shipbuilding, Newport News, provides 378 parking spaces for the Respondent and its tenant commands at the Newport News facility. (Resp. App. A) In the summer of 2007, the Respondent began the process of revising its instruction for the distribution and use of parking spaces. (*Id.*) During the course of the negotiations associated with this revision IFPTE and NAIL proposed, among other things, that the former practice of assigning individuals to a parking lot, but leaving the choice of specific parking spaces to a daily first-come, first-served basis, be replaced with one that assigned all parking spaces by numbers, to individuals and carpools. (*Id.*) Another proposal put forward by IFPTE and NAIL was that individuals employed by tenant commands be assigned parking spaces only after individuals in four other categories that included employees of the Respondent, received parking space assignments. (*Id.*) Respondent notified FISC, Norfolk of the IFPTE/NAIL proposals which would change a working condition of FISC employees located at the Newport News facility, and suggested that FISC, Norfolk inform Local 53 of the proposals. (*Id.*) During the ensuing negotiations between Respondent and IFPTE and NAIL, there was no discussion between the Respondent and either FISC, Norfolk or Local 53. (*Id.*)

On or about August 8, 2007, negotiations with IFPTE and NAIL were completed and an agreement was reached and signed. The agreement took the form of SUPSHIPNN Instruction 5560.1J (Revision J), which set forth policies concerning the allocation of vehicle parking at the Respondent's Newport News facility. (GC Ex. 2, 3, 4; Resp. App. A at 2) Revision J included the proposals described above that were made by IFPTE and NAIL.[3/] (GC Ex. 4; Resp. App. A)

In October 2007, the Respondent made an initial allocation of parking spaces using the process set forth in Revision J and discovered there were approximately 25 fewer spaces than what was needed to meet demand. (Resp. App. A) Under the prior first-come, first-served process for allocating parking spaces, daily absences based on such reasons as leave, official travel, and alternative work schedules

[2] The FISC, Norfolk employees located at the Respondent's facility had previously been employees of the Respondent. (Resp. Response at 2; Resp. App. B) As a consequence of a reorganization that was effective in 2005, they were "organizationally reassigned in place" to FISC, Norfolk which was another component within the Department of the Navy. (Resp. App. B) In a decision issued in 2006, the Regional Director of the Authority's Denver Regional Office found that the employees who previously were included in the bargaining unit represented by NAIL had accreted to the bargaining unit represented by AFGE, Local 53. (Resp. App. B)

[3] Revision J provides in relevant part:

> 7. Space Assignment
>
> b. Eligible applicants will be assigned to specific parking assignment groups. Parking lot and space assignment will occur in assignment group order as follows:
>
> (1) Group I – Special designated parking as listed in enclosure (1)
> (2) Group II – Handicapped personnel.
> (3) Group III – SUPSHIPNN and Tenant Command Carpools.
> (4) Group IV – SUPSHIPNN individuals.
> (5) Group V – Tenant Command individuals.

(GC Ex. 4 at 4)

had masked this shortfall. (*Id.*) Under the new approach set forth in Revision J tenant command personnel were relegated to the last group in line to receive assigned parking spaces. Thus, they would absorb the entire shortage and would lose their parking spaces. (*Id.*) After unsuccessfully attempting to obtain additional parking spaces, Respondent notified FISC, Norfolk of the parking shortage and its effect on FISC personnel. (*Id.*)

On January 7, 2008, Respondent received a demand from Local 53 for an opportunity to bargain prior to the implementation of the changes in parking. (Resp. App. A at 3) In February 2008, the Respondent agreed to delay implementation of the Revision J process for several weeks to afford FISC, Norfolk and Local 53 an opportunity to conduct discussions on the matter. (*Id.*) At that point, Respondent informed IFPTE and NAIL that Revision J had not been implemented. On February 7, 2008, IFPTE and NAIL both filed unfair labor practice charges alleging that the Respondent repudiated the agreement reached in August 2007. (GC Ex. 1(a), (b))

By memoranda dated April 7, 2008, Respondent informed IFPTE and NAIL that it would not implement Revision J because of the effect it would have on the working conditions of employees in the AFGE, Local 53 bargaining unit. (GC Ex. 5, 6; Resp. Apps. C, D) The memoranda included "Draft SUPSHIPNNINST.5560.1K" (Draft Revision K), which the Respondent characterized as an effort to solve the parking problem that resulted from Revision J for the review of IFPTE and NAIL. (GC Ex. 5, 6; Resp. Apps. C, D, E)[4/] In the April 7, 2008, memoranda, the Respondent invited IFPTE and NAIL to request consultation/negotiation. (Resp. Apps. C, D; GC Ex. 5, 6) No negotiations occurred. (Resp. App. A)

DISCUSSION AND ANALYSIS

Position of the Parties

A. General Counsel

The General Counsel (GC) contends that the Respondent, IFPTE and NAIL reached an agreement on parking at Respondent's facility and that the Respondent repudiated in violation of §7116(a)(1) and (5) of the Statute. The General Counsel acknowledges that repudiation is not a violation in circumstances where the agreement term at issue is contrary to law. (GC Brief at 3). The GC asserts that in this case there is no showing that any provision of the agreement is contrary to law and the impact of the agreement on employees in a bargaining unit represented by a labor organization other than the two who are parties to the agreement, does not render it illegal. (*Id.*) Rather than failing to implement the agreement reached with IFPTE and NAIL, the GC argues that the Respondent has the obligation to bargain with the representative of the other bargaining unit affected. (*Id.*)

As a remedy, the General Counsel seeks an order requiring the Respondent to cease and desist, implement Revision J, and post a notice to employees.

B. Respondent

The Respondent asserts that its actions in refusing to implement Revision J did not violate the Statute as alleged. (Resp. Response at 3) Respondent contends its actions were driven by its realization that implementation of Revision J would change the conditions of employment of employees in a third unit of recognition whose exclusive representative was not afforded an opportunity to bargain over the change. (*Id.*) Respondent avers that implementation of Revision J without the third union being afforded an opportunity to bargain would have subjected it to an allegation that it violated the Statute. (*Id.* at 4.) Additionally, the Respondent maintains that the remedy sought by the General Counsel would allow IFPTE and NAIL to negotiate a substantive change in a working condition of members of AFGE, Local 53 bargaining unit. (*Id.*)

Discussion and Analysis

A. The Respondent Refused to Implement the Agreement

It is undisputed that the Respondent entered into an agreement with IFPTE and NAIL that established a process for assigning the parking spaces under its control at its Newport News facility. That agreement was embodied in Revision J. It is also undisputed that Respondent refused to implement Revision J.

[4] Resp. App. E includes, in addition to Draft Revision K, pages 1 and 8 from Revision J. As it appears that those pages were inadvertently included in Resp. App. E, I will disregard those two pages.

B. The Respondent's Refusal to Implement the Agreement Did Not Constitute Unlawful Repudiation

A failure or refusal to honor an agreement constitutes a violation of the Statute when the breach of contract amounts to a wholesale repudiation of the collective bargaining agreement. *See, e.g., Dep't of Defense, Warner Robins Air Logistics Ctr, Robins Air Force Base, Ga.*, 40 FLRA 1211, 1217-19 (1991). The Authority, however, will not find an unlawful repudiation where the agreement allegedly repudiated is contrary to law. *E.g., U.S. Dep't of Transportation, Fed. Avia. Admin., Atlanta, Ga.*, 60 FLRA 985, 986 (2005). In this case, the Respondent essentially asserts that it could not lawfully implement Revision J because of the effect it would have on the working conditions of employees included in a bargaining unit represented by an exclusive representative that was not a party to the negotiations.

As discussed above, Revision J represented an agreement the Respondent reached with IFPTE and NAIL. In addition to determining conditions of employment of the employees in the bargaining units represented by those two labor organizations, Revision J directly determined conditions of employment of employees of the tenant organizations located at the Respondent's Newport News facility, some of whom are represented by the AFGE, Local 53. In particular, Revision J prescribed the order in which parking spaces would be assigned to employees located at the Respondent's Newport News facility including those employees represented by Local 53, *supra* note 3 above. Thus, Revision J is not an agreement reached with IFPTE and NAIL that merely has "some impact" on employees in the AFGE bargaining unit, instead, it is an agreement reached with those two unions that actually "regulates" and eliminates a condition of employment previously enjoyed by employees in the AFGE, Local 53 bargaining unit. *See, e.g., Am. Fed'n of Gov't Employees, Local 2879, AFL-CIO*, 49 FLRA 1074, 1086-90 (1994).

Under §7114(a)(1) of the Statute, when a labor organization has been accorded exclusive recognition, it is the exclusive representative of the employees in the unit it represents and is entitled to act for and negotiate collective bargaining agreements covering all employees in the unit. Correlatively, once a union is certified as the exclusive representative of an appropriate unit of employees, an agency must "deal only with" that representative concerning matters affecting the conditions of employment of the employees in that unit. *See, e.g., Am. Fed'n of Gov't Employees, Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1276 (1998) (*HUD*). Allowing a union to directly determine the conditions of employment of employees in a bargaining unit for which another union holds exclusive recognition "would run afoul of the principle of exclusive recognition." *Nat'l Ass'n of Gov't Employees, Local R1-109*, 61 FLRA 593, 597 (2006), quoting *HUD*. If follows that allowing IFPTE and NAIL to directly determine, or regulate, the conditions of employment of employees in the AFGE Local 53 collective bargaining unit runs afoul of the principle of exclusive recognition as set forth in §7114 of the Statute.

Despite the absence of a collective bargaining relationship between the Respondent and the AFGE, Local 53, the Respondent nevertheless, had an obligation to honor AFGE's status as the exclusive representative of the employees of FISC, Norfolk located at its facility. In this regard and as noted earlier, AFGE, Local 53's bargaining relationship was with FISC, Norfolk which was a tenant of the Respondent insofar as those FISC employees located at the Respondent's Newport News facility. The record shows that prior to Revision J, the FISC, Norfolk employees located at the Respondent's Newport News facility were provided parking in the spaces controlled by the Respondent at the facility. Parking arrangements for employees generally concern employees' conditions of employment and a change in parking arrangements generally constitutes a change in conditions of employment. *E.g., Soc. Sec. Admin., Office of Hearings and Appeals, Charleston, S.C.*, 59 FLRA 646, 649 (2004), *aff'd as to other matters*, 397 F.3d 957 (D.C. Cir. 2005). In view of the fact that FISC, Norfolk had the bargaining relationship with AFGE, Local 53that entity had the responsibility for fulfilling the bargaining obligation owed to that union in conjunction with any change in the parking arrangements for the employees in its unit of recognition. *See, e.g., Headquarters, Def. Logistics Agency, Washington, D.C.*, 22 FLRA 875, 879-80 (1986) (*DLA*). Despite the fact that it was the responsibility of FISC, Norfolk rather than the Respondent, to fulfill the bargaining obligation owed to AFGE, Local 53 prior to changing the parking arrangements that applied to the employees in Local 53, Respondent would be in violation of the Statute if it took action that interfered with the bargaining relationship between the parties to that exclusive recognition. *See, e.g., DLA*. Although the theory of the violation would differ based on the relationship

between the two organizational entities, such interference can occur regardless of whether the entities involved are in a superior/subordinate relationship in the same chain of command or are simply different organizational entities in the same agency. *See, e.g., id.; see also Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 46 FLRA 1184, 1186-87 (1993). Respondent was not free to disregard the exclusive recognition that AFGE held for the FISC, Norfolk employees and could not enter into an agreement with IFPTE and NAIL that directly affected conditions of employment for employees in the AFGE, Local 53 bargaining unit without violating the Statute.

I find that the Revision J agreement the Respondent reached with IFPTE and NAIL was contrary to §7114(a)(1) of the Statute because the detailed guidance regarding precedence in the assignment of assigned parking spots directly affected the conditions of employment for bargaining unit employees represented by AFGE, Local 53 as they were placed last in priority for the assignment of parking spaces when an insufficient number of spaces were available. Thus, parking that was previously provided to the Local 53 bargaining unit would be unilaterally taken away without bargaining. In view of this, the Respondent's action in refusing to implement the Revision J agreement bargained with two other unions, did not constitute unlawful repudiation.

For the reasons outlined above, I recommend that the Authority grant the Respondent's cross-motion for summary judgment and dismiss the consolidated complaint. Accordingly, it is recommended that the Authority adopt the following Order:

ORDER

It is ordered that the consolidated complaint be, and hereby is, dismissed.

Issued, Washington, D.C., March 29, 2010.

CHARLES R. CENTER
Chief Administrative Law Judge