64 FLRA No. 5

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3937, AFL-CIO
(Respondent)

and

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND
(Charging Party)

AND

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3937, AFL-CIO
(Respondent)

and

SOCIAL SECURITY ADMINISTRATION
SEATTLE REGION
SEATTLE, WASHINGTON
(Charging Party)

SF-CO-06-0374
SF-CO-06-0560

DECISION AND ORDER

August 31, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This case is before the Authority on exceptions to the decision of the Administrative Law Judge (Judge) filed by the Respondent and the Charging Party. [2] The Charging Party filed an opposition to the Respondent's exceptions and the Respondent filed an opposition to the Charging Party's exceptions. The General Counsel (GC) filed oppositions to both set of exceptions.

The consolidated complaint alleges that the Respondent violated § 7116(b)(5) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to bargain in good faith with regard to negotiations concerning the relocation of the Coeur d'Alene Field Office (Coeur d'Alene Office) and the expansion of the Regional Office of Quality Assurance (ROQA). The Judge found that the Respondent violated the Statute as alleged. For the reasons that follow, we find that the Respondent violated the Statute.

II. Background and Judge's Decision

A. Factual Background

The facts are fully set out in the Judge's decision and are only summarized here. The American Federation of Government Employees (AFGE) represents a nationwide unit of employees of the SSA. The Respondent is an agent of AFGE for the purpose of representing bargaining unit employees in the Activity, which includes the Coeur d'Alene Office and the ROQA. Judge's Decision (Decision) at 3.

AFGE and SSA are parties to a national agreement (NA). Article 4 of the NA provides procedures for mid-term negotiations, including those involving management-initiated changes at the local and regional level. *Id*. Under these procedures, formal negotiations at the field office level are limited to two days and those involving a regional office are limited to 3 days. *Id.* at 18; Joint Exhibit (Jt. Exh.) 1 at 16-18. Article 9 of the NA concerns Health and Safety, and Section 20 of Article 9 concerns "Moves, Expansions, Relocations and Renovations." Decison at 3.

The issues in these cases arise out of negotiations concerning the relocation of the Coeur d'Alene Office and the expansion of the space assigned to the ROQA. Although the two negotiations raise similar issues, each is set forth separately.

1. The Coeur d'Alene Office Relocation

On December 12, 2005, the Activity informed the Respondent that it intended to relocate the Coeur d'Alene Office and provided the Respondent with a proposed floor plan. The Activity stated that it was prepared to negotiate over aspects of the proposed floor plan, but also stated that it did not believe there was a duty to bargain over procedures and arrangements other than the floor plan because these matters were covered by the NA. Pursuant to the procedures provided in the NA, the Respondent requested a briefing and consultation over the proposed relocation. After a brief telephone consultation that failed to resolve all issues,

1. Member DuBester did not participate in this decision.

2. The Social Security Administration (SSA) is the Charging Party in Case No. SF-CO-06-0374. The SSA, Seattle Region is the Charging Party in Case No. SF-CO-06-0560 and is an Activity of SSA. Throughout this litigation, the Charging Parties have participated as a single entity, represented by SSA. Accordingly, the Charging Parties are referred to as the "Charging Party" and the Seattle Region as "the Activity."

formal negotiations were scheduled to begin on January 4, 2006, in the Regional Office. [3] *Id.* at 4-5.

The parties met as scheduled, at which time the Activity presented a revised floor plan that addressed some, but not all, of the Respondent's concerns expressed during the consultation. The Respondent's chief negotiator, its president, was also an AFGE vice-president representing bargaining units [in] the Seattle Region. Decision at 3. The Respondent's bargaining team also included a local representative from the Coeur d'Alene Office. *Id*. At this time the Respondent submitted a proposed Memorandum of Understanding (MOU) containing five articles: Introduction and Background; General Provisions, Floor plan, Workstations; Employee Rights and Benefits; Union Rights; and Duration, Effective Date and Distribution. The Activity's representative reviewed the MOU and stated that many of the proposals were covered by the NA and reminded the Respondent's representative that the Activity did not intend to negotiate over matters that were covered by the NA. *Id*. at 5. The Activity denied the Respondent's request to draft its own floor plan using the computer software used by the Activity's Material Resources Team (MRT), but agreed to take the Respondent's suggested floor plan modifications to the MRT to see if they were feasible. At this point, the Respondent's representative stated that he wanted the Respondent's version of the floor plan, several items that were specific to the floor plan, and the Respondent's proposed MOU. *Id*. at 6.

On January 5, the parties met again and the Activity offered a version of the floor plan containing revisions. The Respondent's representative accepted the revisions, but reiterated that he wanted the Respondent's own floor plan and MOU. The Activity replied that the MOU contained items that were nonnegotiable and others that were covered by the NA. At this point the parties agreed to request a mediator to assist with the negotiations and resumed negotiations later that day with a mediator. *Id.* at 6-7.

After meeting separately with the Respondent, the mediator reported to the Activity that the Respondent was willing to withdraw its MOU in exchange for a list of floor-plan-related items. Subsequently, the mediator returned with a final list of the Respondent's concerns, which included six floor-plan-related items. Although the Activity agreed in writing to almost all of the Respondent's proposals, the Activity indicated that it was not authorized to agree to the Respondent's request for "full spectrum lighting." *Id.* at 7. After preparing a revised floor plan, the Activity's representative believed that full spectrum lighting was the only outstanding issue. *Id*.

The parties and the mediator met again on January 11 and, after some discussion, the Activity agreed to the Respondent's request for full spectrum lighting. However, the Respondent would not agree. Although the Respondent's representative from the Coeur d'Alene Office was willing to agree, the Respondent's chief negotiator refused, still insisting on the Respondent's proposed MOU. At this point, the mediator issued a letter to the parties stating that further mediation would be futile. *Id.* at 8.

On January 17, the Activity advised the Respondent that it would implement its last best offer on January 31. That same day, the Respondent filed its Request for Assistance with the Federal Service Impasses Panel (Panel). On January 24, the Respondent filed an unfair labor practice (ULP) charge against the Activity alleging that the Activity failed to bargain in good faith, which was ultimately dismissed by the Regional Director of the Authority's San Francisco Regional Office (San Francisco Regional Director). [4] On April 10, SSA filed the ULP charge in SF-CO-06-0374. *Id*. at 9.

On April 28, the Respondent replied to the Activity's submission to the Panel, withdrawing three proposals on the ground that they were covered by the NA. *Id.* at 9. On June 15, the Panel declined to assert jurisdiction in the case. *Id*.

2. The ROQA Expansion

On January 17, 2006, the Activity informed the Respondent that it intended to expand the space assigned to the Activity's ROQA in the Seattle Regional Office building. As it did with respect to the Coeur d'Alene relocation, the Activity stated that it was prepared to negotiate over aspects of the proposed floor plan, but further stated that there was no duty to bargain over procedures and arrangements other than the floor plan because these matters were covered by the NA. A copy of the proposed floor plan was also provided to the Respondent. *Id.* at 10.

Consultation sessions were held on January 23 and 27. The Respondent's chief negotiator was the Respondent's president, who was also the chief negotiator in the

3. Subsequent dates refer to 2006, unless otherwise specified.

4. The record does not indicate the reasons for the Regional Director's decision to dismiss the charge.

Coeur d'Alene relocation negotiations. *Id.* During the sessions, the Respondent questioned whether all vacant workstations would be available for selection, requested a copy of the current floor plan, and stated the intent to negotiate the location of some of its file cabinets.[5] The Respondent also expressed concerns regarding disruption to the employees as a result of construction. *Id.* at 10-11.

Formal negotiations were held on January 31, when the Respondent submitted a proposed MOU, which contained sections on Purpose and Principles, Floor Plans, Workstations, Employee Rights and Benefits, Health and Safety, Union Bulletin Boards, and Union Facilities and Space. The Activity's representative stated that he would review the MOU. The representative also indicated that most of the Union's proposals were covered by the NA. *Id.* at 11. Regarding the floor plan, although the Respondent made a few suggestions to which the Activity agreed, the Respondent would not agree to the floor plan and indicated that it wanted its MOU as part of any agreement. *Id.* at 11-12. At this point, the parties enlisted the aid of a mediator. After speaking with the Respondent, the mediator presented the Activity with an annotated MOU, in which the Respondent noted the provisions it considered vital and ones on which "conceptual" agreement had been reached. *Id.* at 12. After reviewing the annotated MOU, the Activity representative stated, among other things, that much of the MOU was outside the duty to bargain. *Id.* At this point the mediator declared an impasse. *Id.*

On February 14, the Activity informed the Respondent that it intended to proceed with the expansion beginning on March 1, that the Respondent was insisting to impasse over matters outside the duty to bargain, and that the Activity had fulfilled its bargaining obligations. *Id.* at 12. On February 3, the Respondent submitted a request for assistance to the Panel, stating that the parties were at impasse over the Respondent's entire six-page MOU and the Agency's proposed floor plan. As it had in the Coeur d'Alene case, the Activity alleged that that the Respondent had engaged in bad faith bargaining by, among other things, insisting to impasse on proposals that are "covered by" the NA. The Respondent replied by withdrawing three of its proposals on the ground that they were covered by the NA. *Id.* at 13. On June 15, the Panel declined to assert jurisdiction. *Id.*

On July 13, as it had with respect to the Coeur d'Alene Office negotiations, the Respondent filed a ULP charge alleging that the Charging Party had engaged in bad faith bargaining. The charge was dismissed by the San Francisco Regional Director.[6] The Activity filed the ULP charge in SF-CO-06-0560 on July 17. *Id.*

B. Judge's Decision

The complaints were consolidated and submitted to the Judge. Stating that it is the totality of conduct during bargaining that determines whether a party has met its obligation to bargain in good faith, the Judge found that the Respondent engaged in bad faith bargaining in violation of § 7116(b)(5) of the Statute. The Judge found, in this regard, that the Respondent's proposed MOUs contained many matters that were "clearly" covered by the parties' NA and, therefore, outside the Activity's obligation to bargain. Decision at 20-21. The Judge concluded that, by insisting to impasse over these matters, the Respondent violated § 7116(b)(5) of the Statute. *Id.* at 23-24 (citing *FDIC, Headquarters*, 18 FLRA 768, 771-72 (1985)(FDIC).

The Judge emphasized that there was no claim that a union engages in bad faith bargaining merely by presenting nonnegotiable proposals at the table or that aggressive bargaining violates the Statute. Decision at 24. However, the Judge noted that in both sets of negotiations, the Respondent insisted to impasse on matters that had already been bargained in the NA. *Id.* at 24 – 25. Further, the Judge concluded that the totality of the Respondent's conduct was not designed to advance negotiations toward agreement. In this regard, the Judge noted that after the negotiations and mediations, the Respondent returned to its original proposed MOUs. The Judge found such "regressive bargaining" further evidence of bad faith on the part of the Respondent.[7] *Id.* at 25.

To remedy the Respondent's violations of the Statute, the Judge recommended that the Respondent cease and desist from such conduct and that the Respondent post an appropriate notice at its business office and its

5. The issue of the permanent placement of the Respondent's file cabinets related to the earlier reassignment of the Respondent's chief negotiator from Portland, Oregon to Seattle, Washington. Decision at 11. The Activity considered this issue separate from the ROQA expansion. *Id.*

6. The record does not indicate the reasons for the Regional Director's decision to dismiss the charge.

7. The Judge relied on private sector precedent finding that regressive bargaining — withdrawing concessions previously made — is evidence of bad faith bargaining. Decision at 25 (citing *Golden Eagle Spotting Co., Inc.*, 319 NLRB 64 (1995)).

normal meeting places, including all places where notices to its members and other employees of the Seattle Regional Office are customarily posted. *Id.* at 25-26.

III. Positions of the Parties

A. Respondent's Exceptions

The Respondent contends that the Judge misapplied the "covered by" doctrine, which, according to the Respondent, is an agency defense to a charge that it illegally refused to bargain. Respondent's Exceptions (R. Ex.) at 3. The Respondent argues that, in this case, the Judge misapplied the doctrine to hold that a union may not pursue proposals once an agency declares that they are covered by an agreement. According to the Respondent, where a union pursues a matter that is covered by an agreement, the appropriate action on an agency's part is to refuse to bargain, not to invoke the ULP provisions of the Statute. *Id.* at 9. The Respondent also claims that whether a matter is covered by an agreement is a determination for the Authority, not the agency.

The Respondent also excepts to the Judge's use of the concept of "regressive bargaining." *Id.* at 15 (quoting Decision at 25). According to the Respondent, the Authority has never adopted the private sector's application of this concept. R. Ex. at 15.

Finally, the Respondent contends that the totality of its conduct does not evidence bad faith bargaining. In this regard, the Respondent notes that it willingly met and participated in consultation and negotiations as called for by the parties' NA. *Id.* at 16 The Respondent emphasizes that it participated in mediation in both cases and contends that it was understood in mediation that parties could revert to previous bargaining positions if a total agreement was not reached. *Id.* at 17.

B. GC's Opposition to the Respondent's Exceptions

According to the GC, "covered by" matters are properly considered permissive subjects of bargaining, and the Judge correctly concluded that a party may not insist on bargaining to impasse over permissive subjects. GC's Opposition to the Respondent's Exceptions (GC Opp. to R. Ex.) at 4-5. *Id.* at 4-5, 5n.2. The GC notes that the Authority has applied the "covered by" doctrine to find specific proposals outside the obligation to bargain. *Id.* at 7 (citing *Prof'l Airways Sys. Specialists*, 56 FLRA 798, 803-805 (2000)(PASS)). In addition, the GC contends that the Respondent should have known that many of its proposals were covered by the NA. GC Opp. to R. Ex. at 7-8.

Noting that where provisions of the Statute and the National Labor Relations Act (NLRA) are comparable it is appropriate to consider private sector precedent, the GC contends that the Judge did not err in applying the concept of "regressive bargaining." GC Opp. to R. Ex. at 9-10. Moreover, the GC asserts that the Judge properly considered and rejected the Respondent's contention that the totality of the Respondent's conduct did not evidence bad faith bargaining. *Id*. at 10.

C. Charging Party's Opposition to the Respondent's Exceptions

The Charging Party states that the Judge properly found that the Respondent violated the Statute by bargaining to impasse over permissive subjects of bargaining. Charging Party's Opposition to the Respondent's Exceptions at 2-3. The Charging Party also contends that the Respondent engaged in regressive bargaining. *Id*. at 5-6.

D. Charging Party's Exceptions

The Charging Party contends that the posting should be nationwide in scope. According to the Charging Party, the Respondent's chief negotiator has held national, as well as regional, positions in AFGE. Charging Party's Exceptions at 2-3. In addition, the Charging Party asserts that the Respondent violated the Statute when it initially insisted in bargaining over matters covered by the NA, not only when the Respondent insisted to impasse over these matters. *Id.* at 3-5.

E. GC's Opposition to the Charging Party's Exceptions

The GC states that notices are typically posted where the violation occurred and that here, the violation was limited to negotiations in the Seattle Region. GC's Opposition to the Charging Party's Exceptions at 5-7. In addition, the GC argues that, as the consolidated complaint did not allege that the Respondent's pursuit of permissive matters prior to impasse violated the Statute, the Charging Party's claim may not be considered. *Id.* at 3-5.

F. Respondent's Opposition to the Charging Party's Exceptions

The Respondent states that the complaint names only the Respondent, and that the Charging Party did not request a nationwide posting before the Judge. Respondent's Opposition to the Charging Party's Exceptions (R. Opp. to CP Ex.) at 2-6. The Respondent also contends that finding that a union violates the Statute by insisting on proposals alleged to be outside the obliga-

tion to bargain during bargaining, but prior to impasse, would set "dangerous" precedent. *Id.* at 7. According to the Respondent, under the Charging Party's theory, an agency could preclude bargaining merely by declaring that the union's proposals were covered by an existing agreement. *Id.* at 8-9.

IV. Analysis and Conclusions

A. The Respondent bargained in bad faith by insisting to impasse on matters covered by the parties' national agreement

It is well established that insisting to impasse on a permissive subject of bargaining violates the Statute. *United States. Food and Drug Admin., Ne. & Mid-Atlantic Regions*, 53 FLRA 1269, 1273-74 (1998) (*FDA*) (agency violated § 7116(a)(1) and (5)); *SPORT Air Traffic Controllers Org. (SATCO)*, 52 FLRA 339, 347 (1996) (union violated § 7116(b)(1) and (5)); *United States Dep't of Agric., Food Safety & Inspection Serv.*, 22 FLRA 586, 587-88 (1986) (agency violated § 7116(a)(1) and (5)); *FDIC, Headquarters*, 18 FLRA at 771-72 (agency violated § 7116(a)(1) and (5)). In cases alleging such conduct, there is no need to apply a "totality of the circumstances analysis," as the Judge did here. Rather, if the GC establishes that a respondent insisted to impasse on a single proposal that concerned a permissive subject of bargaining, then the respondent will be found to have violated the Statute. *See, e.g.*, *FDIC*, 18 FLRA at 772-74 (violation established where one of two proposals submitted to the Panel was a permissive topic). Thus, to establish a violation, the GC must prove that: (1) the Respondent insisted to impasse over the disputed proposals; and (2) at least one of the disputed proposals concerns a permissive subject of bargaining.

As to the first element, it is not disputed that, by invoking the Panel's processes, the Respondent insisted to impasse over the provisions of its proposed MOUs. Although under Authority precedent, "reaching impasse" does not require invoking the procedures of the Panel, *see FDA*, 53 FLRA at 1277-78 (impasse "describes a situation where a party insists on its position on such a subject as a precondition to bargaining"), where a party has invoked Panel proceedings over a permissive subject of bargaining, the Authority has found a violation of the Statute. *See e.g.*, *FDIC*, 18 FLRA at 771-72. As to the second element, the Authority has not dealt squarely with the issue of whether insisting to impasse on a matter that is covered by an existing agreement constitutes a violation of the Statute. However, as discussed below, relevant precedent supports the Judge's conclusion that it does, and the Respondent's objections to this application of the "covered by" doctrine are unpersuasive.

In this regard, the "covered by" doctrine is the principle that a party is not obligated to bargain over matters contained in or covered by an existing agreement between the parties. *AFGE, Local 225,* 56 FLRA 686, 689 (2000). The Authority has held that, while not obligated to bargain over matters contained in or covered by an existing agreement, a party may elect to do so. *NAGE, Local R3-32*, 61 FLRA 127, 131 (2005) (*Local R3-32*). As such, matters covered by agreements are properly considered "permissive" subjects of bargaining.

As set forth above, the Respondent argues that the "covered by" doctrine has no application in this case because the doctrine "was established to provide a defense an agency may use in refusing to bargain *at all*[,]" R. Ex. at 1 - 2 (emphasis added), and is not applicable to a "proposal-by-proposal" application. *Id*. at 12. According to the Respondent, if an agency acknowledges an obligation to bargain over a matter, then the "covered by" doctrine does not apply.

The Respondent is correct that the covered by doctrine *has been applied* to excuse an agency from negotiating at all. *See, e.g., Dep't of the Treasury, Internal Revenue Serv., Kansas City Serv. Ctr., Kansas City, Mo.,*, 57 FLRA 126 (2001). However, the doctrine is not so limited. In particular, it has been applied not only as an agency defense to bargaining over both management- and union-initiated mid-term proposals, *e.g. Soc. Sec. Admin., Tucson Dist. Office, Tucson, Ariz.*, 47 FLRA 1067 (1993), but also in negotiability cases regarding specific proposals. *NATCA,* AFL-CIO, 62 FLRA 174, 176-179 (2007)(finding one proposal outside the obligation to bargain because it was covered by the parties' agreement, but determining that a second proposal was not covered by the agreement); *see also PASS*, 56 FLRA 798, 803-805 (2000) (same).

The Respondent further contends that application of the "covered by" doctrine in situations such as the one here will subject unions to ULP liability whenever they pursue bargaining over a matter that an agency has declared "covered by" an agreement. This contention misconstrues the Judge's decision and its application of precedent. In this regard, ULP liability is triggered not because the Respondent insisted to impasse on proposals *alleged to* be covered by the NA, but because the proposals *were, in fact, covered by* the NA. A respondent in such cases may assert as a defense that the matter taken to impasse is a not a permissive subject of bargaining. However, as in other situations, a party

insisting to impasse on a matter alleged to be a permissive subject "acts at its peril." *Cf. United States Dep't of Hous. & Urban Dev.*, 58 FLRA 33, 34 (2002) (an agency refusing to bargain on the grounds that all proposals are outside the obligation to bargain "acts at its peril" and, if any of the proposals are found to be negotiable in subsequent proceedings, then the agency will be found to have violated the Statute).

The foregoing leads to the conclusion that a party violates the Statute if it insists to impasse on a matter covered by an existing agreement. Thus, the question remains whether any of the provisions of the proposed MOUs submitted to impasse were covered by the parties' NA. *See FDA*, 53 FLRA at 1275-77 (analysis requires determination that proposals taken to impasse are permissive subjects of bargaining). In this regard, the Judge found a number of the provisions of the proposed MOUs were covered by the NA. Decision at 20-22. The exceptions challenge only whether the "covered by" analysis may be used in this case and do not challenge the Judge's findings that numerous provisions of the proposed MOU were in fact, covered by the NA. We, thus, adopt the findings as undisputed. [8] *See Air Force Logistics Command, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 43 FLRA 736, 737 (1991) (Authority adopted undisputed findings of fact).

Based on the foregoing, we deny the Respondent's exception to the Judge's determination that the Respondent violated the Statute by insisting to impasse over matters covered by the parties' NA. [9]

B. The Judge properly ordered regionwide posting

The Charging Party contends that the posting should be nationwide, rather than regionwide. Typically, a notice is posted at the location and/or organizational level where the violation occurred. *See NATCA. MEBA/AFL-CIO,* 55 FLRA 601, 607 (1999) (Authority ordered regionwide posting where conduct of union's regional vice-president violated the Statute); *see also*, *United States Dep't of the Treasury, Customs Serv., Wash., D.C. and Customs Serv., Region IV, Miami, Fla.*, 37 FLRA 603, 605 - 06 (1990) (regionwide posting is appropriate where regional office of the agency was the party involved). Here the alleged violations occurred during two sets of negotiations in the Seattle Region. In each case, the Respondent is AFGE Local 3937, which is an agent of AFGE for the purpose of representing SSA employees in the Seattle Region. No higher level component of AFGE was named in the complaint and there is no evidence of higher level union involvement in the negotiations. Accordingly, a regionwide posting is consistent with Authority precedent. We note in this regard, that although the Respondent's chief negotiator may have participated in national level negotiations on other occasions, he was acting here solely in his institutional role as negotiator for the Respondent. Decision at 4, 10.

C. The Charging Party's other exception is not properly before the Authority

The Charging Party contends that the Respondent's violation occurred prior to submission of the dispute to the Panel: when the Respondent "persisted in its attempts to bargain . . . after the Agency raised its covered by defense[.]" C.P. Ex. at 3. As the Judge noted, the complaint alleged only that the Respondent insisted to impasse on matters covered by the NA. *See* Decision at 24; Complaint ¶¶ 13-15 and 17-19. Accordingly, the Respondent's conduct prior to impasse was not litigated before the Judge and is not properly before the Authority. *See Dep't of Justice, United States Immigration & Naturalization Serv., El Paso Dist. Office*, 25 FLRA 32, 38 (1987) (allegation not encompassed by the complaint not properly before the Authority).

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby

8. We note that, even if the findings had been challenged, they are supported by the record and Authority precedent. In this regard, the parties' "extensive" Safety and Health articles in their national agreements have been addressed by the Authority previously. In particular, in *Soc. Sec. Admin., Douglas Branch Office, Douglas, Ari.z*, 48 FLRA 383, 386-87 (1993) (*SSA, Douglas*), the Authority found that the parties had negotiated, as part of the national agreement, "procedure[s] for identifying, investigating, and resolving all health and safety concerns[,]" and held that the agency had no obligation to bargain over specific health and safety measures at the local level because those matters were covered by the national agreement. *Id.* at 386-87. The relevant wording of the agreement in effect then is substantially similar to that in the NA. *Compare SSA, Douglas*, 48 FLRA at 388 *with* Jt. Ex. 1 at 39-40.

9. In view of this determination, it is unnecessary to reach the Respondent's other exceptions. However, with respect to the Judge's finding that the Respondent engaged in "regressive bargaining,", Award at 25, we note that, under both Authority precedent and that of the National Labor Relations Board, withdrawing a tentative agreement does not, by itself, establish bad faith. *See Army and Air Force Exch. Serv.*, 52 FLRA 290, 304 (1996) ("A party's withdrawal of a tentative agreement or a previous proposal, without good cause, is evidence of bad faith bargaining, but withdrawal does not establish *per se* an absence of good faith."); *see also Chicago Local No. 458-3M v. NLRB,* 206 F.3d 22 (D.C. Cir. 2000)(same principle applied under NLRA).

ordered that the American Federation of Government Employees, Local 3937, AFL-CIO shall:

1. Cease and desist from:

(a) Engaging in bad faith bargaining by insisting to impasse on permissive subjects of bargaining, including proposals on matters "covered by" provisions of the current National Agreement or which are permissive under the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its business office and its normal meeting places, including all places where Notices to members and employees of the Social Security Administration, Seattle Region are customarily posted, copies of the attached Notices on forms to be furnished by the Federal Labor Relations Authority. On receipt of such forms, they shall be signed by the President of the American Federation of Government Employees, Local 3937, AFL-CIO and shall be posted and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to members and employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) The Labor Organization will submit signed copies of said Notice to the Regional Director who will forward them to the Agency whose employees are involved herein, for posting in conspicuous places in and about the Agency's premises where they shall be maintained for a period of at least sixty (60) consecutive days from the date of posting.

(c) Pursuant to э2423.41(e) of the Authority's Regulations, notify the Regional Director of the San Francisco 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.

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

The Federal Labor Relations Authority has found that the American Federation of Government Employees, Local 3937, AFL-CIO, 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 MEMBERS AND BARGAINING UNIT EMPLOYEES THAT:

WE WILL NOT engage in bad faith bargaining by insisting to impasse on permissive subjects of bargaining, including proposals on matters "covered by" provisions of the current National Agreement or which are permissive under § 7106(b)(1) of the Federal Service Labor-Management Relations Statute.

____
American Federation of Government
Employees Local 3937, AFL-CIO

Dated: _________ By: ______________________
(Signature) (Title)
President, AFGE Local 3937

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, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: 415-356-5000.

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