ARMY AND AIR FORCE EXCHANGE SERVICE Respondent	
and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE NO. 2333 Charging Party	Case No. CH-CA-40546

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MARCH 29, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

JESSE ETELSON
Administrative Law Judge

Dated: February 27, 1995
Washington, DC

MEMORANDUM DATE: February 27, 1995

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: ARMY AND AIR FORCE EXCHANGE SERVICE

Respondent

and Case No. CH-CA-40546

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE NO. 2333

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

ARMY AND AIR FORCE EXCHANGE SERVICE Respondent	
and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE NO. 2333 Charging Party	Case No. CH-CA-40546

Gary J. Lieberman, Esquire
For the General Counsel

Peter A. Campagna, Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

This case concerns an agency's termination of bargaining on one approach to a negotiable subject while it remained willing to continue bargaining on an alternative approach, at a time when the parties had reached a tentative partial agreement that, by its terms, was to be implemented upon successful completion of negotiations on the terminated approach. The General Counsel alleges that the Respondent agency, Army and Air Force Exchange Service (AAFES) violated its duty to negotiate in good faith with the Charging Party (the Union), and unlawfully repudiated a ground rules agreement, by withdrawing its proposals on Pay for Performance (PFP), and notifying the Union that it would no longer negotiate about PFP, after signing an agreement for annual 4 percent pay increases upon the employees' conversion to PFP status. AAFES defends its actions on several grounds.

A hearing was held in Dayton, Ohio, on December 6, 1994. Counsel for the General Counsel and for AAFES filed

post- hearing briefs that were thoughtful and of great assistance.

Findings of Fact

A. Undisputed Matters and Events

The parties' general bargaining status and obligations are not in dispute. This case concerns wage negotiations for certain unit employees of AAFES' Wright-Patterson Air Force Base Exchange. The Wright-Patterson Exchange and the Union are parties to a collective bargaining agreement executed in 1984 and still in effect pending their reaching a new agreement. Negotiations for a new agreement began in 1992, upon the Union's request, under ground rules which included the following:

> 8. AGREEMENT: When tentative agreement on a proposal has been reached, it shall be initialed, in two (2) copies, by the Chief Negotiator of each team, and it may be reopened only upon mutual consent of both parties. No article of the agreement will become effective or ratified until all dispute resolution procedures--impasse as well as negotiability--have been concluded.
>
> 12. EXCEPTIONS TO GROUND RULES: Conditions and requirements established by these ground rules may be waived or changed by mutual consent of the parties.

The chief negotiators were Richard M. Miller for AAFES and Dennis E. Clifford for the Union. The parties met in February 1992 and quickly resolved all non-economic issues. Wage negotiations proved to be more difficult.[1] The Union had submitted proposals for across-the-board increases. AAFES countered with a proposal for "pay banding," involving a conversion of the existing wage grade structure to a 3-level system. Within each level, pay advancements would depend on performance evaluations instead of "steps" (time of service). The Union resisted the pay banding concept, and negotiations foundered. They broke off for over a year while the Union filed a request for assistance from the Federal Service Impasses Panel and an unfair labor practice charge with the Authority, attempting to prevent AAFES from forcing it to negotiate over pay banding. Meanwhile, however, the parties did reach a side agreement that any

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[1] Apparently these were the parties' first negotiations over wages, which previously had been set by the results of "wage surveys."

negotiated wage increase would take the place of, and not be "stacked on" to any increases based on wage surveys.

The Impasses Panel declined to assert jurisdiction and the unfair labor practice charge was either withdrawn or dismissed. The parties met again in April 1993 at Wright-Patterson, in Dayton, Ohio. AAFES came in with a new pay banding proposal, now labelled as "A Pay for Performance (Pay Banding) System." It included an across-the-board increase upon the conversion of covered employees to the new system. With the assistance and encouragement of a Federal mediator, the Union was persuaded to entertain the concept of pay for performance, and submitted a counter-proposal that included a higher across-the-board increase than provided for in AAFES' proposal. AAFES had proposed a 4 percent immediate increase and two subsequent 3 1/2 percent annual increases. According to Clifford's recollection, the Union had demanded 5 percent and 4 percent respectively. AAFES responded with an offer of 4 percent and 4 percent, plus a "ratification bonus" of $75.00 for each covered employee. The Union accepted this proposal, with the understanding that other aspects of the PFP system were still open for negotiation. The Chief Negotiators signed a one-page document, labelled as the Union's "Final Pay Proposal," as modified to conform to the numbers agreed upon. The document introduces the money provisions with the following language:

> 1. The pay for performance described in this agreement shall apply to all AS and PS bargaining unit employees of WPAFB, including employees located at DESC.
>
> 2. Beginning with the first full pay period following the approval-ratification of this agreement, covered employees shall be converted to the appropriate pay level, tier and job code, according to procedures outlined below[.]

In order to memorialize their understanding about how this partial agreement stood with respect to the issues still open, the Chief Negotiators signed the following memorandum, drafted by Clifford after discussions with Miller:

> Negotiations AAFES and
> LL 2333
> Position Statement April 21, 1993
> 3:20 P.M.
>
> The proposals of Local Lodge 2333 to AAFES on April 21, 1993 concerning Pay for Performance (No.

> 1 and No. 2) are not part of a package proposal but is merely a proposal (counter) on only Articles 1 and 2 of the management Pay for Performance proposal. All other articles and or sections of this proposal are unsettled and open for negotiations.

As discussed below, the participants have different impressions about the intent behind these two documents. They continued negotiations on the following day, April 22, but had somewhat different recollections of where they stood by the end of that day's session, when Miller left to return to his home base in Dallas, Texas. One aspect of the PFP system was agreed to in writing--that disputes arising over "Performance Evaluation Reports and/or Performance Pay Adjustments will be resolved in Expedited Arbitration, if not resolved through the negotiated grievance procedure."

Miller quickly faxed to Dennis a draft agreement for a PFP system, based on what he represented to be his understanding of a consensus reached at the April 21 and 22 sessions. Clifford responded by telephone with a minor correction, in which Miller acquiesced, but the Union did not respond with a complete PFP proposal of its own at that time. Miller sent a corrected document on May 12, representing it to be "the finalized copy of the language the Parties agreed to on Pay for Performance." Miller signed the document on behalf of AAFES, in order, as he stated on the covering letter, "[t]o facilitate the finalization of the Collective Bargaining Agreement for approval and ratification by the Union[.]"

Further phone conversations led to a meeting on June 3 at which Julia Hope Schaffer, Human Resources Manager for the Wright-Patterson Air Force Base Exchange and previously a member of the AAFES bargaining team, represented management. Certain details of events leading to that meeting are in dispute, but there seems to be agreement that in one or more phone conversations Clifford had asked Miller about his coming back to Wright-Patterson and Miller told him that Schaffer could handle the matter and would act as AAFES' spokesperson.

On June 3 the Union presented a proposal to Ms. Schaffer. As represented by Mr. Clifford and Union Chief Steward and bargaining team member Beatrice Arnold at the hearing, it contained the Union's version of what had been discussed at the parties' April 22 meeting. The Union's proposal differed from the document Miller had sent to Clifford on May 12 chiefly with respect to the degree of specificity with which scores on each employee's "Performance Evaluation Report" (PER) would result in a pay

increase of a fixed percentage. AAFES had proposed three broad ranges of PER scores, resulting in a discretionary range of pay adjustments, while the Union's proposal broke the PER scores into nine narrower ranges, with corresponding **fixed** pay adjustments, *e.g.*, 1 percent, 1.5 percent, 4 percent.[2]

Schaffer had not expected a "new" proposal, and left the meeting to call Miller for instructions. She returned to inform the Union team that its proposal was unacceptable. The meeting ended. Clifford phoned Miller, probably the following day, June 4, to inquire about where matters stood. The remainder of their conversation failed to yield any agreement to renew negotiations.[3]

On June 17, Miller wrote Clifford a two-paragraph letter. Its first paragraph stated:

> In my letter dated 12 May 1993, I forwarded to the Union for signature a proposal on pay for performance to which the parties had verbally agreed on 22 April 1993. In view of the Union's failure to honor its verbal commitment by subsequently offering further proposals on this item, Management's proposal on pay for performance is hereby withdrawn.

The letter's second paragraph discussed Miller's phone conversation with Clifford on June 4. Miller represented in the letter (as he did in his testimony) that, during that conversation, the Union was offered the option of renewing the current collective bargaining agreement for another year and reopening negotiations during the next "window" period. The letter states that the Union had not responded and that, since a "wage survey" adjustment was scheduled to go into effect on June 19, management intended to implement it, and considered "the current contract to be extended until the next available renegotiation period."

Clifford responded to Miller's June 17 letter on June 18, representing that:

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2 Other parts of the Union's proposal either duplicated provisions in Miller's May 12 document or differed in ways that, in Miller's view as explained at the hearing, were less significant than the PER matter.

3 It was Clifford's recollection that Miller affirmatively took the "position" at that time "that there would be no further negotiations" (Tr. 63). Miller testified that he told Clifford he "really wasn't sure" where they would go from there, because he felt that the Union had bargained in bad faith by bringing in these new proposals, but that they then briefly discussed alternatives to PFP (Tr. 188-89).

> Contrary to your understanding and subject to the agreement you and I signed April 21, 1993 (enclosed) the Union did not fail to honor any commitment but did exactly as it stated it would by submitting further proposals in an obvious attempt to finish these negotiations. These proposals were rejected by management and we responded that we would contact you in order to proceed, which we did and at that point made offers to continue further negotiations on wages and ratification bonuses.

The letter continues by requesting further negotiations, listing a number of available dates, and confirms that the previous collective bargaining agreement remains in effect until negotiations are complete. The enclosure Clifford referred to was the April 21, 3:20 P.M. "Position Statement."

The parties' correspondence came to a close with Miller's June 22 reply to Clifford. He summarized his understanding of the bargaining history as follows:

> I acknowledge the 21 April 1993 agreement you enclosed[.] [H]owever, that memorandum was signed the day prior to the parties' reaching agreement on the remaining sections of pay for performance. The Union submitted proposals on 22 April 1993, all the Union's proposals were dealt with, and the parties reached a verbal agreement on the pay for performance article. The final proposal which I forwarded to you on 12 May 1993 reflected that agreement. Subsequently, on 3 June 1993, the Union offered new proposals which attempted to change the pay for performance article to which the parties had already agreed.

Miller's June 22 letter also reiterated that "the current contract will remain in effect until at least the next contractual opportunity for reopening the parties' collective bargaining agreement occurs."

On July 1, Clifford signed an unfair labor practice charge on behalf of the Union, alleging that "[o]n or about 22 June 1993," AAFES refused to negotiate in good faith "on the matter of wages and or any other open issues, while negotiating a contract for Wright-Patterson Air Force Base Exchange." The remedy requested was: "[f]or all parties to return to the bargaining table to bargain." The charge was filed on July 19 and was settled informally by the parties' agreement to resume bargaining. They resumed in March 1994.

When the parties met, a difference soon surfaced as to the parties' understanding of how they were to proceed. Clifford expressed the belief that they would be negotiating further on PFP, picking up where they had left off. Clifford said that he expected AAFES to put its last proposal back on the table. Miller "reminded" the Union that the PFP proposal had been withdrawn and said that AAFES had no desire to pursue the subject of PFP any further. Miller offered to discuss proposals for other approaches to the subject of wages. Clifford took the position that the Union was there to negotiate over PFP and would not abandon the PFP negotiations. Miller's final position was that PFP was, and would remain, off the table. The negotiations ended in that posture.

B. Additional Findings, Including Resolution of Disputed Material Facts

I have included in the above narrative of undisputed facts only statements that were both uncontroverted **and** more or less acknowledged as true on all sides according to my understanding. As I commented at the hearing, I believed, and still believe, that every witness testified honestly, recounting the events to the best of his or her recollection. However, almost all of the non-documentary evidence consisted of recollections of conversations, including extended negotiating sessions, some of which occurred years before the hearing. At times, the witnesses did not even purport to recount the words spoken but recalled only their impressions of the meaning of what others said. (Some of the testimony, arguably relevant because the case involves questions of good faith, describes only the witnesses' internal thought processes in reaction to events as they saw them.)

To the extent that the subjective impressions of the witnesses differed, in many cases each of the different impressions was reasonable. This is to be expected when the participant-witnesses are honest. The very reasonableness of varying impressions, however, makes it all the more difficult to ascertain what was actually said. It is with some trepidation, therefore, that I proceed.

The April 21, 1993 Agreements

There was some conflict in the testimony regarding the authorship of the April 21 "Final Pay Proposal." Although the one-page signed document has the Union's name on its heading, comparison with the AAFES document called "Management Proposal[,] a Pay for Performance (Pay Banding) System," (Jt. Exh. 10) makes it clear that everything but the amount of the agreed-upon wage increase for the

anniversary dates after conversion derives from that management proposal.

Clifford and Miller had different slants on the understanding giving rise to the two signed April 21 documents, the "Final Pay Proposal" (Jt. Exh. 11) and the "Position Statement" (Jt. Exh. 12). According to Clifford, the Union remained anxious upon agreeing to the provisions of the "Final Pay Proposal," because, aside from the across-the-board increases agreed to, the other aspects of PFP were still open. Clifford drafted the "Position Statement," after discussing his concerns with Miller, in order to separate the provisions on which final agreement had been reached from those parts of the management proposal on which agreement had not been reached. Clifford's explanation was clouded somewhat by the fact that his statement of purpose was imbedded in the question asked him by the General Counsel (Tr. 51). However, I understood the tenor of his testimony to be that the Union wanted to preserve the across-the-board increases irrespective of the final form of the PFP system.

Miller testified that, once the Union agreed to consider a PFP proposal, he suggested that the parties focus first on guaranteed wage increases. He thought it would be easier to reach agreement on these than on the other aspects of PFP. Clifford, Miller says, expressed concern that agreement on the across-the-board increases would commit the Union to the rest of management's PFP proposal. Miller further attributed to the Union the concern that it would be committed to PFP as a concept, even if it could not get the deal it wanted on those aspects still to be negotiated. Miller testified that, in view of these Union concerns, he suggested a sidebar agreement indicating that the across-the-board agreement was only a part of the PFP "and that it was really contingent upon the parties reaching agreement of the remainder of pay for performance, that was the intent of the sidebar." Miller viewed the sidebar (Jt. Exh. 12) as "providing an escape valve, if you will, for either party, from concluding the pay for perform- ance." Miller further explained that Jt. Exhs. 11 and 12, together, "indicated that these would be the numbers that would be plugged in to the final [PWP] agreement . . . if we reached agreement on it. But it was not the intent to apply [these percentages to] a pure wage proposal." (Tr. 175-78.)

Even after rereading the documents themselves in light of this testimony, it is difficult to fathom just what Jt. Exh. 12 is supposed to do. I see only the most tenuous connection between Clifford's explanation and the language of that document, which he drafted, but I have at least as much difficulty with Miller's explanation that it served to

make the across-the-board agreement (Jt. Exh. 11) "contingent." What is contingent about Jt. Exh. 11 is obvious on its face: it goes into effect only in connection with a conversion to a PFP system. Jt. Exh. 12 adds nothing to this state of "contingency". Moreover, Miller understood that the sidebar agreement he suggested would indicate that the across-the-board agreement "was only a part of the [PFP]," yet the sidebar itself states that it is "not part of a package proposal." I see this not as a contradiction but as evidence of a lack of mutual understanding of the document's purpose.

Apart from the text of Jt. Exh. 12, I derive from a synthesis of Clifford's and Miller's testimony that, if there was any common understanding, it was that the agreement reached with respect to across-the-board increases did not bind the parties to the particular PFP package then proposed by management. Miller thought that the Union sought the sidebar as an "escape valve" from using PFP as the basis for **any** wage agreement, but the source of his belief is unclear (Tr. 175). The evidence does not establish, in my view, a mutual understanding that the phrase, "not part of a package proposal," or the sidebar as a whole, had that effect. Even if the Union had hoped it could use that language to "escape" from PFP, there was neither any express acknowledgement nor any other objective evidence of **agreement** to an "escape valve" such as Miller described.

The April 22 Negotiating Session

Negotiations on April 22 dealt with the operation of PFP. The only item on which a written agreement was reached was that for expedited arbitration. Both Clifford and Miller, as well as AAFES negotiator Schaffer, believed the respective bargaining teams had achieved a meeting of the minds on a complete package. Clifford recognized some remaining differ- ences, but characterized them as "final details to be worked out." Union team member Beatrice Arnold had a less sanguine view of the results of that day's negotiations. She identi-fied the unresolved "details" as the differences between the management concept--broad bands for performance-related wage increases--and the Union's insistence on definite correlations between performance evaluation scores and pay increase percentages. Miller, on the other hand, thought that the Union had acceded to management's position. In any event, Miller had a plane to catch and left before any more of an agreement could be reduced to writing. (Tr. 53-54, 98, 143-45, 160, 179-183, 252-53, 261, 290, 296-97, 300-05.)

Before leaving, Miller attempted to have some or all of the remaining items initialed off in the form that his handwritten notes indicated had been agreed upon. The Union refused to initial anything except an agreed-upon proposal in final form. (Tr. 144, 183, 225, 242, 271, 306.)

Clifford and Arnold testified that it was understood that both sides would refine their proposals in preparation for further contacts (Tr. 54-55, 144-45). However, even Arnold thought the parties were close enough, at least on some points, that the proposal she expected the Union to receive from Miller would be a consensus reflecting agreements already reached in principle (Tr. 306). There was some discussion about a future meeting. Although there are three different versions of the outcome of that discussion (Tr. 55, 184-85, 253-54), suffice it that I find there was no consensus that further face-to-face negotiations would be necessary or that Miller, whose presence the Union requested, would return. The closest the parties appear to have come to a consensus was that Miller would send the Union a proposal and that they would, in Arnold's words, "go from there" (Tr. 144).[4]

I find that the parties had different perceptions as to what had and what had not been agreed upon. It would appear that the Union team itself was not of one mind as to where matters stood.[5] One or more members of the Union team may well have given the AAFES team the impression that they had conceded on pay bands and any other material issues. Still, the Union unmistakably refused to bind itself before having the opportunity to read over the final language.

Exchanges and Conversations Leading to June 3 Meeting

Miller faxed his version of an agreement to Clifford. Miller's version was a compilation of the last typed-up package submitted by AAFES at the April negotiating sessions and his handwritten notes from those sessions, augmented by what he remembered but had not previously written down (Tr. 241-45). Clifford responded by calling Miller with a minor correction. Clifford testified that it was only after that exchange that he compared notes with Arnold, who, after

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4 I reject the suggestion of counsel for AAFES that "Arnold does not listen carefully enough to prevent misunderstand- ings." Arnold testified that she did not "thoroughly listen to all the details" of a conversation that occurred during a different meeting. I found Arnold to be a highly credible witness, candid in admitting what she did not know.

5 Clifford was more inclined than Arnold to believe that the parties were essentially in agreement. Considering his reaction when he received Miller's first post-session draft, as described below, Clifford's understanding may not have been much different from Miller's.

receiving a copy of (what was probably the corrected version of) Miller's draft, told Clifford there were differences and problems (Tr. 272-73, 279-83). I credit this testimony. However, this must have meant that Clifford had not realized that Miller's version was unacceptable to at least one member of the Union team. It suggests that, up to that point, Clifford himself may have been amenable to Miller's version.

In any event, however, Clifford stood behind Arnold's objections and did inform Miller that some adjustments had to be made. Clifford testified that he called Miller and told him there were problems with his language and that they needed to sit down and discuss them (Tr. 59, 273, 283). Miller testified that Clifford had asked him about coming back to Wright-Patterson to negotiate but that Miller had the impression that Clifford had in mind such minor adjustments as Schaffer could handle (Tr. 187, 288). Clifford did not testify that he told Miller what the "language" problems were, and I am inclined to believe that, for his own reasons, he did not. Miller, for his own reasons, did not ask. He assumed they were like the minor correction from the earlier fax that had been cleared up without difficulty (Tr. 288).

When the parties actually met on June 3, Schaffer, attending for AAFES, expected no more than the signing of an agreement based essentially on Miller's last submission to the Union. When the Union team came in with what AAFES regarded as new proposals, the meeting ended. The parties then corresponded, culminating in Miller's June 17 withdrawal of the AAFES May 12 PFP proposal and his June 17 and June 22 declaration that the old contract was extended and that negotiations could resume only during the next contractual "window" period. The Union's unfair labor practice charge, and its informal settlement, followed.

March 1994: The Parties' Final Positions Revisited

The parties met for the last time on March 15, 1994. The Union wanted to pick up the negotiations over a PFP system where they had left off, with the parties' last proposals on the table. AAFES had withdrawn its proposal and, for various reasons, had abandoned the PFP concept for purposes of these negotiations. Arnold testified that Miller stated, "Pay banding was gone and pay for performance was gone and we were starting over again" (Tr. 148). Schaffer's recollection of the meeting was that Miller made it clear that AAFES was not going to consider PFP any longer, that was withdrawn, and that Miller offered to discuss some other proposals, but the Union refused to discuss anything except PFP (Tr. 255-56). I believe these

statements capture the essence of what occurred at that meeting.

Discussion and Analysis

Section 7114(a)(4) of the Federal Service Labor-Management Relations Statute (the Statute) requires agencies and exclusive representatives to "meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement." The duty to negotiate in good faith is described in section 7114(b) as including, among other things, the obligation (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement and (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment.

In determining whether a party has fulfilled its bargaining obligation, the Authority considers the totality of the circumstances in a given case. *U.S. Department of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 531 (1990). 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. *Department of Treasury, Internal Revenue Service, Memphis Service Center*, 15 FLRA 829, 845 (1984); *Division of Military and Naval Affairs, State of New York, Albany, New York*, 7 FLRA 321, 338 (1981). On the other hand, certain conduct has been held, by its very nature, to violate a party's duty to bargain, although examination of the circumstances is required to determine that such conduct has occurred. Thus, a failure or refusal to honor an agreement, where the nature and scope of that breach amounts to a repudiation of an obligation imposed by the agreement's terms, violates the duty. *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211, 1218-20 (1991).

The Statute's description of the duty to bargain contains most of the same elements as the definition of the bargaining duty in section 8(d) of the National Labor Relations Act.[6] In one of the leading section 8(d) decisions, the Supreme Court stated that a party may be found to violate its duty to bargain when, irrespective of its subjective good faith, it engages in conduct that "directly obstructs or inhibits the actual process of

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Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . .

discussion." *N.L.R.B. v. Katz*, 369 U.S. 736, 747 (1962). Applying that principle, the National Labor Relations Board has held, for example, that an employer violated its duty to bargain when, mistakenly believing it could do so because it had lawfully implemented certain terms and conditions of employment after impasse, it refused to bargain over any mandatory subjects other than the implemented terms. *Southwestern Portland Cement Co.*, 289 NLRB 1264, 1282-83 (1988).

The circumstances presented in the instant case are unusual if not unique. One party agreed, at first reluctantly, to explore a certain approach to a subject in dispute, and the parties reached agreement on one aspect of that bargaining subject. After delays and disputes about how to complete negotiations, the party's positions switched: the party that first proposed the approach being negotiated withdrew its proposal and refused to pursue negotiations under that approach any further; the once reluctant party insisted on pursuing negotiations over the approach on which the parties had been proceeding.

AAFES' Interpretation of the Facts

Only AAFES' conduct is directly under attack here. It has given the following reasons for refusing to continue negotiating for a PFP system.[7] AAFES contends that negotiations broke down three times due to the Union's inept or possible bad faith bargaining. First, the Union erroneously believed that it did not have to negotiate over AAFES' wage proposals. Then, in April to June 1993 the Union misled AAFES as to whether there was an agreement. In March 1994 the Union was not satisfied with putting its own proposals on the table. It insisted in dictating management's

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7 AAFES argues that, to the extent that any alleged violation is based on the June 1993 withdrawal of its PFP proposal, the unfair labor practice charge initiating this case is barred under section 7118(a)(4) of the Statute, the 6-month statute of limitations. The complaint is not based on this withdrawal but on the March 1994 notification that previous proposals had been withdrawn and that AAFES would no longer negotiate over PFP. In June 1993 Miller withdrew the PFP proposal that he had forwarded to the Union on May 12, 1993. He also declared the current contract extended until the "next available renegotiation period." The Union filed an unfair labor practice charge alleging a refusal to bargain. Upon informal settlement of that charge, it was understood that the parties would return to the bargaining table, without any commitments as to how negotiations would proceed. It is debatable to what extent, if any, the March 1994 conduct is only a further manifestation of what AAFES announced in June 1993. However, to whatever extent the complaint might otherwise be time-barred, the Union's pursuit of the 1993 unfair labor practice charge warrants a tolling of the running of the 6-month period. *See Department of the Air Force, Headquarters, 832D Combat Support Group, DPCE, Luke Air Force Base, Arizona*, 24 FLRA 1021, 1025-26 (1986).

position as well, and refused to discuss alternate ways of resolving the dispute.

Miller, it is argued, signed the 4 percent agreement in an attempt to reach a total agreement, but the deal he thought he had slipped away, and he worried that AAFES would be "tricked into paying double"--the 4 percent plus the wage survey increase that was to go into effect in the absence of a complete agreement. In June 1993, realizing that a PFP article acceptable to the Union would not be acceptable to AAFES, he withdrew the PFP proposal. In March 1994 Miller went further and refused to discuss the PFP issue further, but he did so, says AAFES, with a "sincere intent to find another way to reach agreement."

While AAFES concedes that it withdrew a proposal after part of it had been agreed upon, it argues that the bargaining history shows a mutual intent that the partial agreement was tentative only, not binding either party to continue to seek a PFP agreement of which the 4 percent agreement would be a part.

Analysis of these Contentions

The context of the later events may best be placed by dealing first with the last-mentioned part of AAFES' argument, There can be little question that the ground rules agreed to when these contract negotiations began made the parties'
April 21, 1993 agreement for the across-the-board wage provision binding, although it would become effective only as part of a PFP article in a completed collective bargaining agreement.[8] I take AAFES' position to be that the second document signed by the parties on April 21, the handwritten "Position Statement," (Jt. Exh. 12), along with Miller's explanation of its intent, constitutes evidence of mutual consent to permit reopening of the across-the-board provision.

My previous analysis of Jt. Exh. 12 led me to conclude that, whatever the parties did intend in signing it, there was no mutual understanding that it was an "escape valve" from PFP. There is simply nothing in the language, drafted by Clifford, or in Clifford's explanation as I understand it, that supports Miller's subjective conclusion that the "Position Statement" is designed to free the parties to abandon PFP bargaining or otherwise to start from scratch

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The parties made a conscious choice to have their negotiations governed by such ground rules. Having done so, they still could have reconsidered their tentative agreements as the progress of negotiations dictated. *See Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office*, 41 FLRA 795, 803 (1991). Only now such reconsideration must be by mutual consent.

regarding the partial agreement on across-the-board wage increases. Therefore the parties entered into the April 22 negotiating session with a partial agreement that, although "tentative" in the language of paragraph 8 of their ground rules, was not subject to unilateral withdrawal.

On April 22, AAFES negotiators Miller and Schaffer thought they had an agreement in principle on a complete PFP system, but they later learned that they did not. Miller thought the Union had bargained in bad faith, but I cannot infer any more from the evidence than a lack of complete accord within the Union team.[9] While such a division could have been merely tactical, real lack of unanimity is not totally unexpected, especially among Federal employee union negotiators who, though sharing a basic affinity of interests, individually may have different priorities.[10] Miller's reaction in June 1993 was to withdraw the PFP proposal and to declare the old contract to be extended, during which extension the scheduled wage survey adjustments would take the place of any negotiated changes.

When the parties met to resume negotiations in March 1994, Miller continued to act on his assumption that the Union only wanted to wring more concessions while not committing itself to PFP. Besides, AAFES itself was not as enthusiastic about the PFP concept as it had been (Tr. 191-92). The Union, probably motivated, at least in part, by a desire to preserve its 4 percent across-the-board agreement, insisted in moving ahead to complete a PFP agreement. Miller refused to put PFP back on the table, the Union refused to consider any other approach, and negotiations broke down again.

Conclusions

The duty to bargain in good faith is an affirmative duty. As noted above, it has both objective and subjective components, and the components in both categories, although not always clearly distinguishable, must be satisfied before the duty is fulfilled. *See also* 1 *The Developing Labor Law* 612 (Patrick Hardin, ed., 3d ed. 1992). Thus, section 7114 (a)(4) of the Statute requires both a sincere resolve to reach agreement and representatives prepared to discuss and negotiate on any condition of employment.

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9 AAFES' brief states that: "The testimony made it clear that the union's bargaining team was not in agreement with itself on 22 April 1993, and Respondent was adversely prejudiced by relying upon one of the union team's representations."

10 Clifford was a business representative for the inter- national union. The other two bargaining team members were local union officials. One or both were AAFES employees.

Irrespective of whether AAFES had a sincere desire to reach an agreement, its representatives placed an unwarranted barrier to agreement by **prematurely** cutting off negotiations along the path that had produced a partial agreement. The "Final Pay Proposal" (Jt. Exh. 11) identifies the employees to whom "the pay for performance described in this agreement" shall apply, and provides for the conversion of covered employees to PFP "[b]eginning with the first full pay period following the approval ratification on this agreement[.]" Such language signified a commitment at least to pursue an agreement for a PFP system. Recognition of this commitment must have played a part in the parties' signing of the sidebar agreement that Miller, unpersuasively, characterized as an "escape valve."[11] It also manifested itself in the agreement for expedited arbitration.

This is not to say that AAFES was absolutely barred from suggesting a different approach, or even from taking the position, at an appropriate time, that further negotiations over PFP would have been futile. Miller apparently believed that they would have been. What AAFES did, however, was to tell the Union that it would not consider any PFP proposal. It did not even hold open the opportunity, unlikely as such an eventuality may have been, for the Union to accept something substantially similar to AAFES' withdrawn proposal. It did not put its supposition of futility to the test.[12]

The Union was not wholly without responsibility for the final breakdown. To the extent that it framed its position as a demand that AAFES put its last proposal back on the table, the Union did appear to be attempting to "dictate management's position." However, that was only the Union's immediate expression of its expectation. AAFES was not entitled to treat it as though it was the Union's bottom-line condition to continue negotiations. Schaffer's credited account shows that she understood the Union to be insisting that PFP--not necessarily a specific proposal--be negotiated. In these circumstances, AAFES cannot be relieved of its bargaining obligation because it was not satisfied with the Union's formulation of its request to bargain. *See U.S. Department of the Army, Lexington-Blue*

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A party's erroneous but good faith belief that it is acting according to its agreement does not by itself excuse actions that otherwise would constitute a refusal to bargain. *See Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, and Newark Air Force Station, Newark, Ohio*, 21 FLRA 609, 612 (1986).

12
Whatever else might be said about the Union's bargaining conduct, it had gone to considerable trouble to bring AAFES back to the table.

Grass Army Depot, Lexington, Kentucky, 38 FLRA 647, 662 (1990); *Department of the Navy, Philadelphia Naval Shipyard*, 18 FLRA 902, 915-16 (1985).

It is true that either party might have declared an impasse on whether PFP or a different approach to the wage issue was more appropriate. The further assistance of a Federal mediator might have been helpful. However, in the absence of specific proposals, any neutral person or body would have been severely handicapped in attempting to resolve the dispute. Section 7114(a)(4) and (b) of the Statute required the parties to continue negotiating at least until the dispute was susceptible to resolution with outside assistance. *See United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Houston District*, 25 FLRA 843, 850-51 (1987) (*IRS Houston*).[13]

It could be argued that both parties, by refusing to consider the other's approach(es), are equally at fault. However, I believe that AAFES was not entitled to force the Union to abandon summarily the path in which negotiations had been proceeding, notwithstanding AAFES' belief that the Union had reneged on a previous agreement in principle and that further PFP negotiations would be futile. By refusing to consider any PFP proposal the Union might have submitted, AAFES frustrated the negotiating process and the chances of reaching agreement. This had the inhibiting effect condemned in *N.L.R.B. v. Katz, supra*. It amounted to a failure to "discuss and negotiate on any condition of employment," for even though AAFES was prepared to discuss and negotiate on the subject of wages in a different manner, the prior course of bargaining made PFP at least **an** approach to setting wages that the parties agreed to consider.

Counsel for the General argues that AAFES further violated its duty to bargain by repudiating the ground rules agreement. I have found that the ground rules did make the parties' tentative agreement on a partial "Final Pay

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13
Section 7119 of the Statute provides impasse resolution services and assistance that substitute for the economic weapons available in the private sector. It is to be expected that the availability of these services influences the course of pre-impasse bargaining to some extent. Their availability should therefore be taken into account in assessing the parties' bargaining behavior. Here, even as the Union sought a resumption of negotiations through its July 1993 unfair labor practice charge, it surely envisioned the possibility that ultimate resolution would come only under the auspices of the Federal Service Impasses Panel. I believe that AAFES also foresaw future Impasses Panel involvement, and that both parties positioned themselves with this possibility in mind. However, AAFES has not argued that the dispute, in its present posture, is a matter to be resolved as an impasse under section 7119 rather than an alleged unfair labor practice.

Proposal" (Jt. Exh. 11) binding, although not effective before all other issues have been resolved. However, Miller acted on an erroneous belief that the "Position Statement" (Jt. Exh. 12) evidenced mutual consent to permit reopening of that tentative agreement. By so doing, he breached the ground rules agreement but did not repudiate it. His act purported to conform to the agreement. He did not disown, reject, or refuse to recognize its binding force. *See U.S. Patent and Trademark Office*, 45 FLRA 1090, 1111-12 (1992).

In summary, I have concluded that AAFES has violated its bargaining obligation by refusing to resume negotiations over PFP, a matter that was, or had become in the course of bargaining, a negotiable subject within the subject of wages.
I have also concluded that AAFES did not further violate its obligation by repudiating the ground rules agreement.

The Remedy

Counsel for the General Counsel requests a bargaining order directing that the parties' final agreement include the "Final Pay Proposal" that provides for 4 percent across-the-board wage increases. Counsel also requests that the bargaining order direct that the terms of the final agreement be retroactive to either June 1993 or March 1994 and that AAFES be ordered to abide by the ground rules during the negotiations. AAFES states that, in the vent that a violation is found, it has no objection to an order "requiring it to negotiate some way to give life to the tentative agreement, dealing with step increases and the wage survey increases."14

I do not know whether to interpret AAFES' stated willingness to "give life to the tentative agreement" as a consent to have the "Final Pay Proposal" included in whatever complete agreement the parties reach. I have some concern about interpreting it that way in view of AAFES' vigorous arguments, not contested by the General Counsel, that the "Final Pay Proposal" could not be implemented without an agreement on PFP. I am left with the impression that AAFES now is willing to include the 4 percent increases in any final agreement reached, if such increases are substituted for any wage survey increases. However, there is no indication of consent to such increases retroactively.

14
AAFES states further that it would object strenuously to any order requiring it to adopt the proposal it submitted on May 12, 1993 (Jt. Exh. 15), either as the parties' agreement or as AAFES' position. The General Counsel has not requested any such order, and in any event I am not inclined to think one would be appropriate. I commend both counsel again here for avoiding extreme positions with regard to the remedy.

I shall therefore address the issue of retroactivity first. AAFES does not specifically argue against retroactivity, but I find no consent by silence.

The Authority has stated that it will "continue to examine, and fashion, remedies in individual cases, including retroactive bargaining orders, appropriate to effectuate the policies and purposes of the Statute." *U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts*, 38 FLRA 989, 993 (1990). I have previously interpreted the Authority's policy as one of making bargaining orders retroactive in cases involving refusals to bargain over negotiable rates of pay. *U.S. Patent and Trademark Office*, 45 FLRA 1090, 1115-16 (1992) (no specific exception taken to recommended remedy). That policy is based on the Authority's finding that, in pay bargaining cases, "such a remedy is the only way that the affected employees could be made whole." *U.S. Department of Defense Dependents Schools, Mediterranean Region, Madrid, Spain*, 38 FLRA 755, 759 (1990) (*DODDS*). In *Federal Deposit Insurance Corporation*, 40 FLRA 775, 784-85 (1991), the Authority expounded on the development of its policy:

> In the past, the Authority has imposed retroactive bargaining orders in certain defined situations.
> * * * * * * * * *
> Further, we have ordered retroactive bargaining orders in cases involving refusals to bargain over negotiable proposals [citing *DODDS*].
>
> [T]hese examples do not exhaust the type of cases in which retroactive orders would be appropriate . . . .

Thus, the stated policy is to impose retroactive bargaining orders in certain defined situations, without limiting the availability of such orders to such "defined situations." The decision in *DODDS* makes it clear that bargaining over pay is one of those defined situations. Therefore, although there is a general policy of examining individual cases to fashion appropriate remedies (*Customs Service*), there appears to be at least a presumption that retroactivity is appropriate in all pay bargaining cases. Further, the Authority's unequivocal statement that retroactivity is "the only way" to make affected employees whole suggests that only in unusual circumstances--if even then--may such a remedy be avoided.[15]

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The Authority has given no indication that, when considering retroactivity in pay bargaining cases the willfulness of the agency's conduct is a relevant factor as it is when the Authority considers a *status quo ante* remedy in unilateral change cases.

These considerations dictate that I recommend here that the party's agreement be required to be retroactive, but only with respect to pay. Counsel for the General Counsel has given no reason why any other parts of the final agreement should be given retroactive effect. If the parties agree that retroactivity is appropriate for any other parts of the new agreement, they may, of course, provide for it. *Customs Service* at 992-93.16 As to the non-economic provisions, although the parties agreed to them long ago, there is no evidence that they ever contemplated operating under any but the provisions of the current contract, until a new final agreement is reached.

Concerning the date to which the pay provisions should be retroactive, no conduct of AAFES prior to March 15, 1994 was alleged to constitute an unfair labor practice in this proceeding. I do not find it appropriate to purport to remedy any prior conduct, and will recommend a retroactivity date of March 15, 1994, when the unfair labor practice found here occurred.

If the pay provisions are to be retroactive, the question of requiring the inclusion of the 4 percent pro- vision remains. I am not satisfied that the bargaining process that is to follow in the wake of the Authority's order will be furthered by prescribing not only retroactivity but also another substantive term of the parties' agreement. AAFES may be willing to adhere to the 4 percent formula, even it is retroactive, but **requiring** it to include that provision retroactively may limit the options available as the parties develop different packages of proposals. Notwithstanding the Authority's recent emphasis on the types of cases where dictating a contract term such as retroactivity is approp- riate, it has not disavowed the countervailing interest in leaving the parties, and the Impasses Panel if necessary, as much flexibility as possible in fashioning an agreement that meets the parties' needs. *Customs Service* at 992-93; *IRS Houston* at 850; *Environmental Protection Agency*, 21 FLRA 786, 788-90 (1986), and cases cited there.

It is true that here the parties have already made a "tentative," but, as I have found, binding agreement with respect to across-the-board wage increases. However, the agreement appears to be binding only as part of some form of PFP system. The Union need not release AAFES from the agreement unless AAFES offers a sufficient inducement, but it cannot force AAFES to abandon a non-PFP approach any more

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By the same token, I see no reason why the parties would be prohibited from agreeing mutually to waive the retro-activity of the pay provisions in order to fashion an agreement that would better suit their interests.

than AAFES was entitled to force the Union to abandon PFP. If the parties ultimately require the services of the Impasses Panel to resolve their differences, the Panel can be expected to give appropriate weight to the fact that such an agreement exists. *See, e.g., Department of the Army, Army Corps of Engineer, Baltimore District, Baltimore, Maryland and Local 639, National Federation of Federal Employees*, Case No. 94 FSIP 146 (December 21, 1994), Panel Release No. 367. AAFES will be entitled, however, to urge before the Panel that a pay proposal other than one involving PFP be adopted. Ordering the parties to include the "Final Pay Proposal" (Jt. Exh. 11) in their contract would add a constraint on the Impasses Panel that would impair its ability to execute its statutory function. *See Federal Aviation Administration, Washington, D.C.*, 19 FLRA 436, 437-38, 450 (1985).

Finally, I see no need to order AAFES to abide by the ground rules. As found, AAFES has not repudiated the ground rules and has given no indication that it will fail to honor them. Consistent with the conclusions I have reached on the merits, AAFES may not unilaterally withdraw from the agreement for across-the-board increases. It has never attempted to withdraw from the parties' tentative agreements on non-economic matters.

I therefore recommend that the Authority issue the following order.[17]

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Army and Air Force Exchange Service:

1. Shall not:

(a) Refuse to bargain with International Association of Machinists and Aerospace Workers, Local Lodge No. 2333, the exclusive representative of a unit of its employees, over a Pay for Performance system for inclusion in a new collective bargaining agreement.

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17 The recommended order is phrased in an attempt to avoid the awkward formulation of "cease and desist" from **failing** to do something. It also departs from the language of the traditional bargaining order by omitting the usual opening phrase, "[u]pon request." Where, as here, the Union has already requested bargaining, I recommend that the Authority not require a second request.

(b) In any like or related manner interfere with, restrain, or coerce its employees in the exercise of rights assured by the Statute.

2. Shall take the following affirmative action to effectuate the purposes and policies of the Statute:

(a) Bargain with International Association of Machinists and Aerospace Workers, Local Lodge No. 2333 over a
Pay for Performance system for inclusion in a new collective bargaining agreement.

(b) Apply any agreement over pay matters reached by the parties retroactively to March 15, 1994.

(c) Post at its facilities in Chicago, Illinois, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Army and Air Force Exchange Service, Wright-Patterson Air Force Base, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Chicago Region, 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., February 27, 1995.

JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with International Association of Machinists and Aerospace Workers, Local Lodge No. 2333, the exclusive representative of a unit of our employees, over a Pay for Performance system for inclusion in a new collective bargaining agreement.

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 Federal Service Labor-Management Relations Statute.

WE WILL bargain with International Association of Machinists and Aerospace Workers, Local Lodge No. 2333, the exclusive representative of a unit of our employees, over a Pay for Performance system for inclusion in a new collective bargaining agreement.

WE WILL apply any agreement over pay matters retroactively to March 15, 1994, the date we refused to bargain over Pay for Performance.

(Agency or Activity)

Date: By:
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Chicago Region, 55 West Monroe,

Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: (312) 353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. CH-CA-40546, were sent to the following parties in the manner indicated.

_____

CERTIFIED MAILL:

Gary J. Lieberman, Esquire
Federal Labor Relations Authority
55 West Monroe, Suite 1150
Chicago, IL 60603-9729

Peter A. Campagna, Esquire
Army & Air Force Exchange Service
P.O. Box 660202 (GC-E)
Dallas, TX 75266-0202

Mr. Dennis Clifford
International Association of Machinists
and Aerospace Workers, District #82
728 W. Main Street
Fairborn, OH 45324

REGULAR MAIL:

Major Gen. Robert F. Swarts
Army & Air Force Exchange Service
P.O. Box 660202
Dallas, TX 75266-0202

Dated: February 27, 1995
Washington, DC