

United States of America  
**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges  
WASHINGTON, D.C.

U.S. DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER, LEXINGTON, KENTUCKY	
Respondent	
and	Case No. CH-CA-50399
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES	
Charging Party	

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© through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 29, 1997**, and addressed to:

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

GARVIN LEE OLIVER  
Administrative Law Judge

Dated: August 26, 1997  
Washington, DC

United States of America  
**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges  
WASHINGTON, D.C.

MEMORANDUM  
1997

DATE: August 26,

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER  
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF VETERANS AFFAIRS  
MEDICAL CENTER, LEXINGTON, KENTUCKY

Respondent

CA-50399

and

Case No. CH-

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES

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

**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges  
WASHINGTON, D.C.

U.S. DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER, LEXINGTON, KENTUCKY	
Respondent	
and	Case No. CH-CA-50399
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES	
Charging Party	

Ginny M. Hamm  
Counsel for the Respondent

George L. Reaves, Jr.  
Representative of the Charging Party

Susan L. Kane  
Philip T. Roberts  
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER  
Administrative Law Judge

DECISION

I. Statement of the Case

This unfair labor practice case was submitted in accordance with section 2423.26(a) of the Authority's Regulations based on a waiver of a hearing and a stipulation of facts by the parties, who have agreed that no material issue of fact exists. The Respondent and the General Counsel filed briefs.

The complaint alleges that the Respondent violated section 7116(a) (1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116 (a) (1) and (5), by (1) declaring the Union's proposals concerning the Respondent's plan to have unit employee lab technicians perform certain dental assistant duties to be nonnegotiable, and (2) implementing its plan prior to the completion of bargaining, the Authority having found that

the proposals were negotiable at the election of the Agency under 7106(b)(1) of the Statute<sup>1</sup> and the President of the United States having issued Executive Order 12871, "Labor-Management Partnerships," on October 1, 1993 (58 Fed. Reg. 52201-52203, October 6, 1993) (Executive Order 12871 or Executive Order) concerning the negotiation of section 7106 (b)(1) subjects.<sup>2</sup>

For the reasons explained below, I conclude that the Respondent did not violate the Statute.

## II. Findings of Fact

The parties stipulated as follows concerning the material facts and I so find:

1. The U.S. Department of Veterans Affairs, Medical Center, Lexington, Kentucky (the Respondent or VAMC Lexington) is an agency under 5 U.S.C. § 7103(a)(3).

2. The National Association of Government Employees, (the Union) is a labor organization under 5 U.S.C. § 7103(a)(4).

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Section 7106(b)(1) of the Statute provides, in pertinent part:

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work[.]

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Section 2.(d) of the Executive Order, provides in pertinent part as follows:

Sec. 2. IMPLEMENTATION OF LABOR-MANAGEMENT PARTNER-SHIPS THROUGHOUT THE EXECUTIVE BRANCH.  
The head of each agency subject to the provisions of chapter 71 of title 5, United States Code shall:

\* \* \* \* \*

(d) negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same; . . . .

3. National Association of Government Employees, Local R5-184 (Local R5-184) is an agent of the Union for the purpose of representing the bargaining unit employees at VAMC Lexington.

4. The charge was filed by the Union with the Chicago Regional Director on February 24, 1995. (Jt. Ex. 1(a)).

5. A copy of the charge was served on the Respondent.

6. A Complaint and Notice of Hearing was issued in this proceeding under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV by the Chicago Regional Director of the Federal Labor Relations Authority on March 31, 1997 (Jt. Ex. 1 (b)).

7. The Respondent filed its Answer to the Complaint on April 21, 1997, admitting in part and denying in part the Complaint's allegations. (Jt. Ex. 1(d)).

8. During the time period covered by this complaint, these persons occupied the position opposite their names:

D.C. Schmonsky - Chief, Human Resources Management Service, VAMC Lexington

James Blust - Assistant Chief, Human Resources Management Service, VAMC Lexington

9. During the time period covered by this complaint, the persons named in paragraph 8 were supervisors or management officials under 5 U.S.C. §§ 7103(a)(10) and (11).

10. During the time period covered by this complaint, the persons named in paragraph 8 were acting for the Respondent.

11. The Union is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

12. Prior to July 1994, certain Dental Assistant duties were contained in the Position

Description of Lab Technicians (Jt. Ex. 2, Attachment, page 3, paragraph IV. "Other"), however, the Lab Technicians did not routinely perform these duties. On or about July 11, 1994, the Respondent, by Schmonsky, gave notice to the Union (Jt. Ex. 3) of its intention to implement its plan to have unit employee Lab Technicians perform certain Dental Assistant duties on a regular rotational basis, as described in a memo dated June 30, 1994 (Jt. Ex. 2) and asked that the Union submit any proposals concerning the impact and implementation of this change by July 21, 1994. On or about July 20, 1994, the Union, by Local R5-184 President Jim Green submitted proposals concerning this change. (Jt. Ex. 4). On or about December 13, 1994, the Union requested a written allegation of non-negotiability as to the Union's proposals concerning the change. (Jt. Ex. 5).

13. On or about December 22, 1994, the Respondent declared all of the Union's proposals concerning the proposed change described in paragraph 12 and Joint Exhibit 2 to be nonnegotiable (Jt. Ex. 6).

14. On or about January 3, 1995, the Union filed a negotiability appeal with the Authority concerning the Union's proposals described in paragraph 13. (Jt. Ex. 7).

15. On or about January 9, 1995, the Respondent implemented its plan, described in paragraph 12 and Joint Exhibit 2, to have unit employee Lab Technicians perform certain Dental Assistant duties.

16. Dental Assistant duties as described in paragraph 12 and Joint Exhibit 2 and assigned to Lab Technicians had more than a *de minimis* impact on the working conditions of these bargaining unit employees.

17. The Authority, in *National Association of Government Employees, Local R5-184, and U.S. Department of Veterans Affairs Medical Center, Lexington, Kentucky*, 51 FLRA 386 (1995) and *National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs Medical Center, Lexington, Kentucky*, 52 FLRA No. 106 (1997), found that the Union's proposals described in paragraphs 12 and 13 were

negotiable at the election of the Agency under section 7106(b) (1) of the Statute.

18. From on or about December 22, 1994, and continuing to the present, the Respondent has refused and continues to refuse to bargain over the Union's proposals concerning the proposed change described in paragraph 12, 15 and 16 and Joint Exhibit 2 because the Respondent contends that it has no duty to bargain over these proposals.

### III. The General Counsel's Position

The General Counsel notes that where a union submits bargaining proposals and an agency refuses to bargain over the proposals based on the contention that they are nonnegotiable, the agency acts at its peril if it then implements the proposed change in conditions of employment. If the agency was obligated to bargain over any one of the proposals, the agency will have violated section 7116(a) (1) and (5) of the Statute by implementing the change without fulfilling its bargaining obligation. Accordingly, the General Counsel urges that, as the Authority has already determined in VAMC, Lexington I and VAMC, Lexington II that the proposals in dispute are negotiable at the Respondent's election under section 7106(b) (1) of the Statute, the Respondent violated the Statute.

The General Counsel asserts that by issuing Executive Order 12871, President Clinton exercised the Respondent's discretion and elected to bargain over section 7106(b) (1) subjects. Therefore, the Respondent could not lawfully refuse to bargain over such matters in this case which were found by the Authority to be negotiable at the election of the Respondent under section 7106(b) of the Statute, and it violated section 7116(a) (1) and (5) of the Statute by implementing the change without fulfilling its bargaining obligation. The General Counsel claims he is not enforcing Executive Order 12871, but simply enforcing the Union's statutory section 7106(b) (1) bargaining rights. The General Counsel urges, however, that any conclusion "that the President lacked this fundamental power to direct how Executive agencies will exercise their rights under the Statute and allow agencies such as the Respondent to escape liability by merely claiming that they have not elected to bargain over section 7106(b) (1) subjects, . . . would render meaningless not only section 2(d) of the Executive Order but also the President's stated goals for labor-management relations in the Federal sector."

### IV. The Respondent's Position

The Respondent asserts that there is no statutory right to bargain over section 7106(b)(1) subjects, and the promulgation of Executive Order 12871, by its own terms, was designed to improve the internal management of the Executive branch and creates no rights enforceable administratively or judicially. Therefore, the Respondent urges that the complaint be dismissed for failure of the General Counsel to state a claim for which relief can be granted and for lack of subject matter jurisdiction in the Authority.

#### V. Discussion and Conclusions

Section 7106(b)(1) makes it clear that matters concerning "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" are negotiable only at an agency's election. The Authority in National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs, Medical Center, Lexington, Kentucky, 51 FLRA 386 (1995) (VAMC, Lexington I) and National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs, Medical Center, Lexington, Kentucky, 52 FLRA 1024 (1997) (VAMC, Lexington II) held that the Union's proposals involved here were negotiable at the election of the Agency under section 7106(b)(1) of the Statute.

The Authority did not order the Agency to bargain; rather the Authority dismissed the Union's petition for review under section 2424.10(b) of the Authority's Regulations<sup>3</sup> because it found that the proposals were negotiable at the Agency's election. See American Federation of Government Employees, Council of Prison Locals, Local 171 and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, El Reno, Oklahoma, 52 FLRA 1484, 1490 (1997) (Prison Locals) (similar action based on VAMC Lexington I). The Authority specifically stated that it did not address the claim that Executive Order 12871 compelled the Agency to bargain, VAMC, Lexington I, 51 FLRA at 394 n.12, and it has said the same thing in other cases where it found that a proposal was negotiable at the election of the agency under section 7106(b)(1). Prison Locals, 52 FLRA at 1495 (citing cases).

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Section 2424.10(b) of the Authority's Regulations provides:

If the Authority finds that the duty to bargain extends to the matter proposed to be bargained only at the election of the agency, the Authority shall so state and issue an order dismissing the petition for review of the negotiability issue.

The President of the United States did not exercise the Respondent's discretion as alleged by the General Counsel. Rather, Executive Order 12871 at Sec. 2.(d) provides that "the head of each agency . . . shall . . . (d) negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same[.]" Nevertheless, the Respondent has not exercised its statutory discretion to negotiate pursuant to section 7106(b)(1) in this case. The parties' stipulation reflects that the Respondent "[f]rom on or about December 22, 1994, and continuing to the present . . . has refused and continues to refuse to bargain over the Union's proposals . . . because the Respondent contends that it has no duty to bargain over these proposals."

As the Respondent points out, Section 3 of Executive Order 12871 specifically states that the order "is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any right . . . enforceable . . . against the United States, its agencies . . ., officers or employees. . . ." Therefore, any dispute as to the Respondent's compliance with the President's direction in the Executive Order is a matter for internal resolution within the Executive branch, is not an unfair labor practice under the Statute, and is not subject to administrative review here. However, the Authority noted in Prison Locals, 52 FLRA at 1490, that its assertion of jurisdiction over the union's negotiability appeal under section 7117(c) in that case did not violate section 3 of the Executive Order. Similarly, the assertion of jurisdiction and resolution of this complaint of unfair labor practices under section 7118 of the Statute does not violate section 3 of the Executive Order.

Since the section 7106(b)(1) proposals were negotiable at the Agency's election, the Respondent did not violate section 7116(a)(5) by "refus[ing] to consult or negotiate in good faith with a labor organization as required by this chapter" (emphasis added). It is well settled that a party is not required to bargain over a permissive subject of bargaining. Federal Deposit Insurance Corporation, Headquarters, 18 FLRA 768, 771 (1985) (citing cases). The Respondent was obligated to bargain over negotiable proposals only. Since all of the Union's proposals were negotiable only at the election of the agency, the Respondent's refusal to bargain over such proposals and its unilateral implementation of the changes did not violate the Statute. Department of Health and Human Services, Washington, D.C. and Department of Health and Human

Services, Region X, Seattle, Washington, 19 FLRA 73, 74  
(1985).

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, August 26, 1997

GARVIN LEE OLIVER  
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. CH-CA-50399, were sent to the following parties in the manner indicated:

**CERTIFIED MAIL:**

Ms. Susan L. Kane **P 600 695 461**  
Mr. Philip Roberts  
Federal Labor Relations Authority  
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Mr. George L. Reaves, Jr. **P 600 695 462**  
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36 Wine Street  
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Ms. Ginny Hamm **P 600 695 463**  
Office of Regional Counsel (02-CDD)  
Veterans Affairs Medical Center  
Lexington, KY 40511

**REGULAR MAIL:**

Daniel Sobrio, Director  
Labor Management Relations Service  
Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420

Dated: August 26, 1997  
Washington, DC