UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: July 30, 1998

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
REGION VII
KANSAS CITY, MISSOURI

Respondent

and Case No. DE-CA-70818

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1336

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(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

SOCIAL SECURITY ADMINISTRATION REGION VII KANSAS CITY, MISSOURI Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1336 Charging Party	Case No. DE-CA-70818

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 31, 1998**, 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: July 30, 1998
Washington, DC

OALJ 98-35

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION REGION VII KANSAS CITY, MISSOURI Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1336 Charging Party	Case No. DE-CA-70818

Bruce E. Conant, Esquire
For the General Counsel

Wilson Schuerholz
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

An unfair labor practice complaint issued by the Regional Director for the Denver Region of the Federal Labor Relations Authority (the Authority) alleges that Respondent (SSA) violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute). The nature of the alleged violation is that SSA supported the elimination of smoking in the cafeteria of a building in which SSA is a tenant, without providing the Charging Party (the Union), the agent of the exclusive representative of a nationwide unit of SSA employees, with advance written notice of such action, and that SSA refused the Union's request to negotiate over the cessation of smoking in the cafeteria. SSA defends its action by asserting that it had no duty to bargain about this matter because the parties' collective bargaining agreement "covers" it and, in the

alternative, because the Union clearly and unmistakably waived its right to bargain over this subject.

A hearing on the complaint was held on June 10, 1998, in Kansas City, Missouri. Counsel for the General Counsel and for Respondent filed post-hearing briefs.

Findings of Fact

A. Events Leading to Unfair Labor Practice Charge

SSA houses its Mid-America Program Service Center in the Richard Bolling Federal Center, an 18-story building in downtown Kansas City, Missouri. SSA is one of a number of Federal agency tenants of the Bolling Center, occupying several of its floors and employing approximately 1500 employees represented by the Union, making SSA the Bolling Center tenant with the largest work force. A substantial number of the bargaining unit employees, estimated variously at between 25% to 50%, are smokers. While the work areas and most other areas accessible to the bargaining unit employees had been designated as "no smoking" areas since 1987, there was a designated smoking area in the cafeteria until 1997.

The agency-tenants of the Bolling Center have formed a Cooperative Administrative Support Unit (CASU), which operates through a Board of Directors on which representatives of each agency serve. The Board meets to discuss and decide issues regarding the building and facilities. In May 1997, following a series of discussions on the matter, the subject of elimi-nating smoking in the cafeteria was raised at a Board meeting. GSA's representative stated that GSA adhered to its previously announced position that it would eliminate smoking in the cafeteria when all the tenant agencies approved. A motion was made, and carried unanimously, to give such approval. Among those voting was SSA's representative, Stuart Bent, sitting in for Michael Grochowski, SSA's Regional Commis-sioner. It was understood, however, that this approval was contingent on each agency's notifying the union representing its employees and discharging its bargaining obligations, if any.

SSA's Labor Relations Supervisor, Marvin Reed, told Acting Union President William Clause, on or around May 28, 1997, that there had been talk at the Board meeting about banning smoking in the cafeteria (Tr. 61-62). On June 12, Union President Arthur Johnson sent SSA management a written request to negotiate on the substance, impact, and

implementa-tion of “Cessation of Smoking in the Richard Bolling Building Cafeteria Effective August 1, 1997.” On June 26, Marvin Reed, acting for Human Resources Center Director Margaret May, responded to Johnson’s request with a letter stating that the request was not timely under the terms of National Agreement between SSA and the Union’s parent organization, American Federation of Government Employees (AFGE). The request to

negotiate was, therefore, denied, but the Union was invited

"to discuss any concerns you have."[1]

Between July 2 and 9, the members of the "CASU Tenant Board" (apparently another name for the Board of Directors) signed a Memorandum of Understanding (MOU), for presentation to GSA, affirming their request "to prohibit smoking in the entire cafeteria dining area effective August 1, 1997." The July 1997 MOU states further that the members understand "that GSA has agreed that a unanimous consensus of the Agency Heads in the building will serve as the basis for banning smoking in the cafeteria dining area." Regional Commissioner Grochowski signed the MOU for SSA.

On August 1, the ban went into effect and has continued in effect.

B. Relevant Prior Agreements and Their Bargaining History

1. Developments preceding first "National Agreement" "no smoking" provision

Until 1987, SSA employees were permitted to smoke in their work areas and generally throughout the Bolling Center. In April 1987, SSA and the AFGE component representing the nationwide SSA bargaining unit entered into an MOU agreeing to "work toward a smoke-free work environment in all SSA instal-lations." Meanwhile, smoking was prohibited in all "general work areas" except those portions of the general office space designated as smoking areas, in all private offices and suites, and in other areas where smoking was specifically prohibited by GSA regulations. The MOU also contained provisions for SSA's providing and maintaining designated smoking areas. (R. Exh. 1.)

In August 1987, the Department of Health and Human Services, then the parent agency of SSA, issued an updated Chapter 1-60 of its General Administration Manual, entitled "Policy on Smoking in HHS Occupied Buildings and Facilities" (R. Exh. 2). The chapter's stated general policy is "to establish a smoke-free environment in all *HHS building space"* (emphasis added). Under "Applicability and Scope," the chapter provides that:

> In multi-tenant buildings, the Departmental policy will apply within the confines of the assigned space over which HHS elements have exclusive

[1] SSA no longer relies on the alleged untimeliness of the bargaining request, and I shall not explore it further.

custody and control including corridors, rest rooms, cafeterias, stairways and other public space on floors or within blocks of space assigned to HHS elements.

Next, in a section setting forth the responsibilities of HHS officials, Chapter 1-60 provides that, in "HHS occupied buildings, facilities, and space," the senior HHS official is responsible for implementing the Secretary's policy "as it relates to space under his or her jurisdiction and control," and, further, for "negotiat[ing] . . . to insure that, as a minimum, the GSA smoking policy is enforced in non-HHS occupied space in the building. Additionally, the senior HHS official is encouraged to seek adoption of the HHS policy by all occupants in a multiple occupancy building."

A final instruction in the "Responsibilities" section provides in pertinent part that, "[p]rior to implementation of this chapter or any provision thereof, the organizational element shall meet its obligation under 5 U.S.C. Chapter 71, as appropriate, where there is an exclusive representative for the employees."

On the same date that it issued the updated Chapter 1-60, HHS issued "Instruction 792-3, Workplace Smoking Policy: Guidance on Personnel Issues" (R. Exh. 3). A covering memorandum describes the instruction as being effective immediately, provided, however, that "changes in conditions of employment for bargaining unit employees must be implemented consistent with labor relations responsibilities in 5 U.S.C. Chapter 71 and provisions of negotiated agreements." Within the text of the instruction, the Department's policy is restated as the establishment of "a smoke-free environment in all *HHS controlled building* space (Exhibit 792-3-A)" (emphasis added). The referenced Exhibit 792-3-A is a memorandum signed by the Secretary of Health and Human Services in which he directed Department officials "to move to establish a smoke-free environment *in all building space where they have space management responsibility* consistent with local labor-management agreements" (emphasis added).

2. The successive "no smoking" provisions in "National Agreement[s]"

Over several months in 1988, SSA and AFGE negotiated to reach a contract to replace their expiring National Agreement. They reached a tentative agreement in July 1998, but the AFGE membership failed to ratify it. However, the Federal Service Impasses Panel imposed the rejected portions

on AFGE. Following the Panel's decision, the parties signed the agreement and it became effective on January 25, 1990.

Article 9 of the 1990 National Agreement is entitled "Health and Safety." Its Section 17, entitled "Smoke Free Environment," provides in pertinent part:

> In keeping with the parties' concern for the health, safety and well-being of all SSA employees, there shall be "no smoking" [quotation marks in original] in any SSA facility beginning October 3, 1988, in accordance with HHS Chapter 1-60, General Administrative Manual, and HHS Instruction 792-3, Personnel Manual.

The October 1988 date for implementation of the "no smoking" provision was the date agreed upon in July 1988 on the assumption that the agreement would have been ratified by that date.

When Section 17 was implemented, all SSA-controlled spaces, including cafeterias, were declared smoke-free. In addition, the entire Federal Building that SSA shares with other Federal agencies in downtown Manhattan, including two cafeterias, became smoke-free without further negotiations with the local AFGE affiliate. The record does not reveal how this policy meshed with GSA's policy concerning spaces shared with other tenants. On the other hand, as noted above, the cafeteria in the Bolling Center maintained a designated smoking area.

When the national parties met to replace the 1990 agreement, AFGE proposed a Section 17 that omitted all of the existing language after "SSA facility." SSA accepted this proposal, and the new Section 17 became: "In keeping with the parties' concern for the health, safety and well-being of all SSA employees, there shall be 'no smoking' in any SSA facility." Lionel Hall, a member of SSA's team that negotiated the 1993 agreement, testified that he had no specific recollection of discussions regarding the omission of the language referring to the HHS manual provisions, but that he believed it to have been understood that the meaning of Section 17, to the extent that it was derived from those HHS directives, was unchanged. The 1993 language was incorporated into Article 9, Section 17, of the parties' 1996 National Agreement without further substantive negotiations.

Discussion and Conclusions

A. Issues Presented

SSA does not contest that it had a duty to negotiate over the substance of its smoking policy, to the extent that such duty was not satisfied through its prior negotiations. There is, therefore, no issue as to the General Counsel's having presented a *prima facie* case. In essence it is that SSA violated sections 7116(a)(1) and (5) of the Statute by supporting the change in smoking policy, in a manner that was calculated to cause such change, while refusing to negotiate with the Union over that support.

SSA presents two defenses to this *prima facie* case. The first is that the subject matter is "covered by" the parties' contracts, viewed in light of their bargaining history. The second is that AFGE waived its right, and that of its affiliates, to bargain over this subject.

B. The Effect of the Parties' Prior Agreements

1. The applicable framework for analysis

The General Counsel and SSA have argued this case as one involving, principally, the Authority's "contained in"/"covered by" analysis (also known simply as the "covered by" doctrine, or analysis) for determining whether the subject matter in dispute has been foreclosed from further bargaining. *See U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993) (*SSA*). With all due respect to their superior familiarity with this case, but also with full appreciation of the difficulty of navigating the precedential landscape in this area of the law of bargaining obligations, I view this case as falling rather within the ambit of the Authority's almost contemporaneous decision in *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993) (Decision and Order on Remand) (*IRS*), in which it prescribed an analysis for deciding a different class of cases involving defenses based on prior collective bargaining agreements.[2]

The "covered by" analysis applies when an agency defends its refusal to bargain over a specific mid-term proposal based on the contention that what the parties' collective bargaining agreement has to say about the subject matter, explicitly or implicitly, has foreclosed further

[2] In expressing my disagreement with the parties' framing of the issue to be resolved, I see no need to characterize them as having "erred," or otherwise to imply that a superior source of wisdom resides in this office.

bargaining on that matter. *Department of Health and Human Services, Social Security Administration*, 47 FLRA 1206, 1210 n.2 (1993). It is not clear in what other situations, if any, the Authority intended the "covered by" defense to be available.[3] However, where, as here, an agency claims as a defense that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair practice, the Authority resolves the complaint by determining the meaning of the provision on which the agency relies. *IRS*, 47 FLRA at 1103.

The analysis required in cases governed by *IRS* is different from that employed in cases involving the *SSA* "covered by" defense, and they are neither interchangeable nor necessarily conducive to the same results. *See Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858, 860, 864 n.7 (1996); *U.S. Department of the Navy, Marine Corps, Washington, D.C.*, 48 FLRA 278, 281-82 (1993) (Decision and Order on Remand)[4]; *U.S. Department of the Navy, Navy Exchange, Naples, Italy*, Case Nos. CH-CA-60197, *etc.*, ALJDR No. 125 at 9 (1996) (Authority did not, in *SSA*, authorize an agency to take unilateral action inconsistent with the parties' agreement; rather, under *IRS*, Authority will interpret a provision of the agreement when relied upon as a defense or authorization for the unilateral action taken).

IRS prescribes an analysis pursuant to which the Authority applies the same standards and principles in interpreting collective bargaining agreements as arbitrators apply in both the Federal and private sectors and as the

[3] In *Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 53 FLRA 1092, 1104-05 (1998), Judge Devaney, affirmed by the Authority, held that the fact that the parties' contract covered the assignment of duties was not a defense to the allegation that the agency changed the employees' duties without bargaining over the impact and implementation of that change.

[4] By its action in the cited case, remanding for application of both the *IRS* and the *SSA* tests, the Authority made it possible to believe that it would entertain either or both as measures of appropriate defenses in unilateral change cases not involving mid-term proposals. However, that case was resolved without any further substantive decision. The Authority was never forced to confront the implications of the dual-defense suggestion -- for example -- that an agency might justify its unilateral action by relying on a contractual provision expressly prohibiting it.

Federal Courts apply under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, giving controlling weight to the parties' intent. In order to rebut the General Counsel's showing of a *prima facie* case, however, a respondent must establish by a preponderance of the evidence that the parties' collective bargaining agreement allowed its actions. *IRS* at 1110.

2. Application of the *IRS* analysis

The Bolling Center cafeteria is under the control of GSA, not SSA (Tr. 23, 31-33, 39, 149, 154). More generally, the Authority has long since found that "GSA has exclusive jurisdiction, custody and control of all public space in Government-owned and leased buildings." *Department of Health and Human Services, Health Care Financing Administration*, 24 FLRA 672, 675 (1986) (Decision and Order on Remand), *petition for review denied, sub nom. American Federation of Government Employees, AFL-CIO v. FLRA*, 840 F.2d 947 (D.C. Cir. 1988) (*AFGE v. FLRA*). Such public space includes cafeterias. *AFGE v. FLRA* at 951 n.4. While the record in this case does not reveal whether the cafeteria in the Bolling Center is "public" in the ordinary sense of the term, it is undisputed that, as noted above, it is under GSA's control.[5]

Article 9, Section 17, of the parties' current National Agreement provides that "there shall be 'no smoking' in any SSA facility." The question, then, is whether the cafeteria, which is the area concerning which the alleged unlawful action was taken, is an "SSA facility" within the meaning of Section 17. Given GSA's control of the cafeteria, and given what the precedential background reveals about the common understanding of the role of GSA, as opposed to SSA, in matters concerning spaces like cafeterias, this cafeteria seems an unlikely candidate for

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[5] GSA's unequivocal control of the cafeteria distinguishes this situation from one in which, the facility in question being operated jointly by SSA and GSA, the Authority has left open the question of whether or not the areas involved in the dispute were SSA's "facilities" for statutory purposes. *See Social Security Administration*, 52 FLRA 1159, 1161, 1163, 1182 (1997) (Decision and Order on Remand). The Authority expressly recognized the distinction between these types of situations when it previously had the cited case before it. *Social Security Administration*, 45 FLRA 303, 316-18 (1992) *remanded, sub nom. National Treasury Employees Union v. FLRA*, 986 F.2d 537 (D.C. Cir. 1993).

"SSA facility" status and cannot be so considered absent some persuasive evidence derived from Section 17's history.

Witnesses from both sides testified, with apparent conviction but with some conflicting impressions, about the parties' intent when negotiating Section 17. In evaluating their testimony, I employ the insight articulated by a commentator with vast experience across the spectrum of the field of dispute resolution:

> It is relatively common knowledge that two people rarely perceive the same visual scenes or the same written words wholly identically . . . . [T]wo people entering into a contract will think they are perceiving its terms identically and even smile confidently as they sign the document binding themselves to its terms. Later, when events cause the parties to refer to the contract's terms for guidance, it is likely that they will perceive the pertinent contract provisions in somewhat different lights, interpreting the provisions, inclusively or exclusively, as best suits their separate needs.

John W. Cooley, *Mediation and Joke Design: Resolving the Incongruities*, 1992 J. Disp. Resol. 249, 288.

SSA's principal basis for contending that the parties understood the term, "SSA facility," to encompass such shared spaces as this cafeteria is Section 17's reference to the HHS directives. These directives supposedly demonstrate a broader meaning for this term. I am not persuaded that, whatever the overall aims of these directives, they signify an agreed-upon mandate to implement, within the period covered by the contract, smoking policies for shared, GSA-controlled spaces.

Both the updated Chapter 1-60 of the HHS General Administration Manual and HHS Instruction 792-3, to which the 1990 version of Section 17 refers, speak of applying HHS smoking policies within HHS-controlled space. While Chapter 1-60 refers to cafeterias in multi-tenant buildings as one of the types of spaces in which HHS policy is to apply, all of the examples given are qualified by the description, "within the confines of the assigned space over which HHS

elements have *exclusive custody and control"* (emphasis added).[6]

The only references to space that is not controlled by HHS are those in Chapter 1-60 directing the senior HHS official to negotiate to insure that *GSA smoking policy* is enforced and encouraging such officials to seek adoption of HHS policy by all other tenants in the building. Neither the direction to negotiate nor the encouragement to seek adoption of HHS policy has the effect of converting into an HHS facility any space not under HHS control.[7] It is, of course, reasonable to argue that from 1995 on (when SSA separated from HHS and became an independent agency), Section 17's references to "SSA facilities" should be read to encompass facilities that had previously been controlled by SSA as part of HHS. However, neither Chapter 1-60 nor Instruction 792-3 provides any indication that the Bolling Center cafeteria would have been so considered in 1987, when HHS issued these documents.

The objective of these documents -- to establish a "smoke-free environment in all HHS building space" -- might ultimately require some accommodation on the part of GSA or other tenants, as is reflected in Chapter 1-60. However, this is insufficient basis on which to conclude that Section 17's ban of smoking "in any SSA facility beginning October 3, 1988, in accordance with" these documents, incorporates those portions of the HHS documents that deal with space that was not under HHS or SSA control.

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SSA negotiator Nancy Ann Williams testified that she understood, when Section 17 was negotiated in 1988, that the Chapter 1-60 reference to cafeterias meant that Section 17 covered cafeterias in multiple-tenant buildings, and that such understanding was effectuated at her Manhattan location (Tr. 173-74, 183). However, there is no probative evidence that this understanding was shared by any AFGE representatives. Moreover, Williams also testified that Section 17's "no smoking" meant "no smoking in SSA controlled facilities
or where you have any jurisdiction over the space" (Tr. 172). The ambiguity of her own understanding belies a mutual under-standing that "SSA facilities" included spaces controlled by others.

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There has been no contention that GSA, by failing to eliminate all smoking in the Bolling Center cafeteria until all agencies approved, was failing to enforce its own smoking policy.

First, the provision's effective date of October 3, 1988, indicates that the smoking ban contemplated in July 1988, when the parties tentatively agreed on Section 17, encompassed only spaces with respect to which the contracting parties could, by themselves, effect the necessary changes. Second, even if the HHS documents, viewed apart from Section 17, articulated policies that apply to space not under HHS control, the smoking ban in Section 17 applies, by its plain language, to "SSA facilities" and only "SSA facilities." In this context, the phrase, "in accordance with," might suggest that the *nature* of the smoking ban, including the general policies underlying it, should reflect the objectives of the referenced documents, but does not suggest any modification of the express limitation as to the space covered by the ban.

Nor does the fact that Section 17 is part of a comprehensive plan to create a smoke-free environment require a different reading. Section 17 provides what it provides, and apparently has wholly eliminated smoking in the vast majority of facilities that SSA occupies. If Section 17
does not cover areas controlled by others in multi-tenant buildings, the plan might be considered less comprehensive in degree but not in kind. Viewed another way, it is a plan, not a self-effectuating program, and Section 17 was not intended to provide the sole means to implement it.

But to the extent that Section 17 incorporates the contents and philosophy of Chapter 1-60 and Instruction 792-3, both of these documents contain relevant references to procedures for implementing their substantive provisions. Especially relevant are those concerning the agency's labor relations obligations. Chapter 1-60 specifically requires, prior to implementation of any of its provisions, satisfaction of any bargaining obligation under the Statute. In order to avoid the implications of this requirement, SSA must show that, by virtue of Section 17 and the negotiations leading to that provision, it had satisfied any statutory bargaining obligation.

If Section 17's reference to Chapter 1-60 and Instruction 792-3 can be read to permit application of the smoking ban to areas not otherwise considered "SSA facilities," it seems hazardous to presume a mutual understanding that such expansion of the negotiated phrase would be exempt from the bargaining obligation to which Chapter 1-60 refers. Stated otherwise, even if AFGE agreed in principle that the smoking ban might ultimately reach areas that were not then considered "SSA facilities," there

is no basis on which to conclude that it acquiesced in such contemplated expansion without the further negotiations that the Statute would normally have required.[8]

SSA relies also on the fact that the AFGE membership voted against ratification, at least in part because of the smoking ban, as evidence that the parties construed the 1988 smoking ban as covering facilities like the Bolling Center cafeteria. I find this unpersuasive for two reasons. First, the membership's rejection does not, in itself, reveal either how it understood the smoking ban's application in multi-tenant buildings or whether its understanding corresponded to that of AFGE's negotiators. Second, AFGE's position before the Impasses Panel, following the failure to ratify, was mainly to the effect that smoking policy should be determined locally, through employee voting and separate memoranda of understanding, not as part of a national contract (R. Exh. 6 at 2). This, again, does not reveal any specific understand-ing of Section 17's application in multi-tenant buildings.

The 1988 tentative agreement and the negotiations and events proximately surrounding that agreement provide SSA with its best opportunity to establish a contract defense through textual analysis or bargaining history. If SSA cannot make its case there it cannot make it anywhere. I regard as too remote to warrant detailed discussion most of the evidence presented as to previous and subsequent bargaining history relating to a smoking ban. Thus I have considered this evidence, including evidence concerning the parties' April 1987 MOU and its continuing viability, and do not find it probative except in one respect. I am persuaded that the parties did not mutually intend, by omitting any reference to HHS documents in Article 9, Section 17, of the 1993 National Agreement, to change that section's meaning from whatever it meant under the 1990 National Agreement (See Tr. 196-98, 205-07, 212-13).

Finally, the practice of the parties on a national level, in applying the 1990 agreement at facilities clearly identi-fied as multi-tenant buildings, is, if viewed most favorably to SSA, inconclusive. The only examples this record provides are the Bolling Center cafeteria, where the designated smoking area was retained until 1997, and the New

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[8] SSA negotiator Williams testified as to her understanding of the "bargaining obligation" language of Chapter 1-60 (Tr. 181-82). However, as suggested in note 6, above, testimony about what any witnesses understood, or their speculations about what other participants understood, are insufficient to establish any *mutual* understandings.

York Regional Office (Manhattan) facility, where, presumably with the cooperation of GSA or all the other tenants, a total "no smoking" policy was implemented in or around 1990.

For all these reasons, I conclude that SSA has not established a defense to its bargaining obligations under the *IRS* standard. For many of the same reasons, I would have concluded that SSA had not established an *SSA* "contained in"/"covered by" defense if that were the proper analysis to be applied.[9]

C. The Defense of Waiver by Bargaining History

SSA's "waiver" defense suffers from the same problems as does its contract defense, regardless of which analysis is applied to the latter. A defense of waiver by bargaining history requires a showing that the matter about which a party seeks to be relieved from bargaining was "fully discussed and consciously explored during negotiations and [that the other party] consciously yielded or otherwise clearly and unmistak-ably waived its interest in the matter." *Headquarters, 127th Tactical Fighter Wing, Michigan Air National Guard, Selfridge Air National Guard Base, Michigan*, 46 FLRA 582, 585 (1992).

As discussed above, there is more than a reasonable doubt that the parties' negotiations even addressed smoking policy in spaces not controlled by SSA or HHS. SSA argues that AFGE received certain concessions and, in Nancy Ann Williams' words, "[SSA] paid a high price for a no smoking policy" (Tr. 172). However, SSA obtained a no smoking policy for the price it paid. That such no smoking policy covered non-SSA space, or that AFGE otherwise waived its interest in the smoking policy for such space, is far from clear and unmistakable.

I conclude that SSA has failed to establish a defense to the General Counsel's *prima facie* case and has violated sections 7116(a)(1) and (5) of the Statute.

The Remedy

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[9] As I concluded in a recent decision, an MOU attached to Article 4 of these parties' 1996 National Agreement precludes SSA's reliance on the "covered by" prong of the "contained in"/"covered by" defense when the issue is SSA's duty to bargain mid-term concerning management-initiated changes in conditions of employment. *Social Security Administration*, Case No. WA-CA-80113, OALJ 98-30 (June 23, 1998) slip opinion at 3-5, 12-13.

Although the violation found here is a refusal to bargain over the substance of a change in conditions of employment, the General Counsel has not requested a *status quo ante* bargaining order. Instead, he has requested that SSA be required, upon request, to negotiate with the Union over actions it will take to remedy its unilateral support of the smoking ban in the cafeteria, including the possibility of changing its vote and requesting that the ban be rescinded. This appears to be an appropriate remedy in these circumstances. I shall recommend an order and notice based in substance on the proposed order and notice submitted by the General Counsel but modified to eliminate superfluous language and to conform to Authority usage. Accordingly, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Social Security Administration, Region VII, Kansas City, Missouri shall:

1. Cease and Desist from:

(a) Unilaterally changing conditions of employment by supporting the banning of smoking in the cafeteria of the Richard Bolling Federal Building without first completing bargaining with the American Federation of Government Employees, Local 1336, AFL-CIO, the exclusive representative of its employees.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

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

(a) Upon request, negotiate with the American Federation of Government Employees, Local 1336, AFL-CIO, the exclusive representative of its employees, over its support for the banning of smoking in the cafeteria of the Richard Bolling Federal Building.

(b) Post at its facilities at the Richard Bolling Federal Center copies of the attached notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 30, 1998

JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Social Security Administration, Region VII, Kansas City, Missouri violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT fail and refuse to bargain with the American Federation of Government Employees, Local 1923, AFL-CIO (the Union), the exclusive representative of our employees, concerning proposed changes in the working conditions of bargaining unit employees represented by the Union, including proposals to prohibit smoking in the cafeteria of the Richard Bolling Federal Building in Kansas City, Missouri.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the Union, bargain to the full extent of our discretion concerning actions to be taken by the Social Security Administration to support a rescission of the ban on smoking by our employees in the cafeteria of the Richard Bolling Federal Building and/or to reduce the impact of that ban on bargaining unit employees.

(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 its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, and whose telephone number is: (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. DE-CA-70818, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: July 30, 1998
Washington, DC