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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE:
October 25, 2007

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA

Respondent

AND Case
Nos.: DE-CA-07-0059
DE-CA-07-0293

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1547

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

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DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA

Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547

Charging Party

Case Nos. DE-CA-07-0059
DE-CA-07-0293

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 her 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. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **NOVEMBER 26, 2007**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: October 25, 2007
Washington, DC

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

DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA

Respondent

AND

Case Nos: DE-CA-07-0059
DE-CA-07-0293

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1547

Charging Party

Timothy Sullivan, Esquire
For the General Counsel

Phillip G. Tidmore, Esquire
Major Tim Tuttle, Esquire
For the Respondent

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Part 2423.

On October 19, 2006, the American Federation of Government Employees, Local 1547 (Union or Local 1547) filed an unfair labor practice charge with the Denver Region of the Authority against the Department of the Air Force, Luke Air Force Base, Arizona (Respondent or Luke). (Case No. DE-CA-07-0059) (G.C. Ex. 1(a)) On May 3, 2007, the Regional Director of the Denver Region of the Authority issued a Complaint and Notice of Hearing that alleged the Respondent

violated section 7116(a)(1), (5) and (8) of the Statute by failing to comply with section 7114(b)(4) of the Statute when it refused to provide the Union with a copy of mock RIF (hereinafter Reduction-in-Force or RIF) retention registers run in conjunction with a RIF that was to take place at the Respondent. (G.C. Ex. 1(c)) On May 29, 2007, the Respondent filed an answer to the complaint in which it admitted certain allegations and denied others including the allegation that a violation of the Statute occurred. (G.C. Ex. 1(m))

On March 7, 2007, Local 1547 filed another unfair labor practice charge with the Denver Region of the Authority against Luke. (Case No. DE-CA-07-0293) (G.C. Ex. 1(b)) On May 3, 2007, the Regional Director of the Denver Region of the Authority issued a Complaint and Notice of Hearing in this case that alleged the Respondent violated section 7116(a)(1) and (5) of the Statute by issuing specific RIF notices to bargaining unit employees prior to the completion of bargaining. (G.C. Ex. 1(d)) On May 29, 2007, the Respondent filed an answer to the complaint, in which it admitted certain allegations and denied others including the allegation that a violation of the Statute occurred. (G.C. Ex. 1(n))

On June 13, 2007, the Chief Administrative Law Judge issued an order granting Respondent's unopposed motion that the two complaints be consolidated for hearing. (G.C. Ex. 1 (s))

A hearing was held in Phoenix, Arizona, on July 31, 2007, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent have filed post-hearing briefs, which have been fully considered.[1/] Although Respondent's brief was untimely filed, I issued an order granting Respondent's request to waive the expired time limit because extraordinary circumstances existed.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Background

[1/] Respondent's unopposed motion to correct the transcript is granted. See Attachment A.

Luke is an activity of the United States Department of the Air Force, which is an agency under 5 U.S.C. §7103(a)(3).[2/] (G.C. Exs. 1(m) and (n)) The Union is a labor organization within the meaning of 5 U.S.C. §7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Exs. 1(c), (d), (m) and (n))

Based on the undisputed testimony of Brock Henderson who served as the President of Local 1547 from 1997 until 2006, I find that the parties signed a collective bargaining agreement in 1996, which rolled over in 1999.[3/] (Tr. 12-13) There were no provisions in that collective bargaining agreement pertaining to the subject of reduction-in-force. (Tr. 14) In the year 2000, Henderson requested to renegotiate the collective bargaining agreement and the parties began to do so. (Tr. 13-14) During those negotiations, Henderson submitted a proposal addressing reduction-in-force. (Tr. 15) According to Henderson's undisputed testimony, at some point after bargaining began, the parties put negotiation of the new agreement on hold until they could determine how the proposed National Security Personnel System (NSPS) would affect them and, consequently, the parties did not complete bargaining on the reduction-in-force proposal or the collective bargaining agreement itself. (Tr. 14-15)

During Henderson's tenure as President of Local 1547, the Respondent proposed RIFs on numerous occasions. (Tr. 15) I find, based on the record, that these RIFs generally were limited in scope to single, specific organizational units, impacted small numbers of people, and did not result in the separation of employees. (Tr. 15, 150) The parties would negotiate over those RIFs that had an impact on employees on an *ad hoc* basis. (Tr. 15)

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/ In the complaints in this case, the General Counsel alleged that Luke is an "agency" under 5 U.S.C. §7103(a)(3). (G.C. Exs. 1(c) and (d)) In its answers to the complaints, the Respondent denied that Luke is an "agency" but admitted that Luke is an "activity" of the United States Air Force, which is an agency under 5 U.S.C. §7103(a)(3). (G.C. Exs. 1 (m) and (n)) For purposes of this decision, I use the Respondent's characterization of Luke's status.

[3/] Henderson retired from Luke in August 2006 and Harley Hembd became acting President. (Tr. 12, 45)

The July 2005 Memorandum of Understanding

On July 14, 2004, the parties signed a Memorandum of Understanding (MOU) that addressed two RIFs being conducted in two of the organizational entities located at Luke. (G.C. Ex. 2) Although the details are not entirely clear from the record, what does emerge is that a by-product of the negotiations over the 2004 MOU was a recognition by both Henderson and the Respondent's then-labor relations officer, Deborah Clark, that they needed to develop a general agreement that would apply to future RIFs in order to avoid the necessity for negotiations every time a RIF was proposed. (Tr. 21-22, 139, 140-41, G.C. Ex. 4)

As the Union's "first" proposal for the general RIF agreement, Henderson submitted what he described as "the same language that was just agreed to with the minor changes to make it applicable to any RIF" by e-mail dated November 17, 2004, to Clark.[4/] (G.C. Ex. 4) The agreement to which the Union referred was the July 14, 2004, MOU. (Tr. 22-23) The Union's proposal consisted of ten numbered sections with a preface that stated:

> This Memorandum of Understanding (MOU) is between the American Federation of Government Employees, Local 1547 (Union) and Luke AFB, AZ (Employer). It addresses reductions in force (RIF).

(G.C. Ex 4)

The next chronological event in the record that pertains to the negotiation of the Union's proposal is an e-mail dated January 28, 2005, from Clark sent internally within the Department of the Air Force seeking guidance on a negotiability question relating to the Union's proposal.

[4/] During his testimony, Henderson stated that he would have preferred to work from a 4½ page proposal regarding RIFs that he had submitted during the collective bargaining negotiations that became side-lined, but the Agency rejected this idea asserting that it would take too long. (Tr. 19-23; 42-43) I find Henderson's testimony on this point confusing and his description of the communication he had had with the Respondent lacks detail and precision. In any event, Henderson's first proposal in the negotiations leading to that MOU was a modified version of the MOU that the parties signed in July 2004 rather than the proposal he had submitted during the renegotiations over the collective bargaining agreement. (Tr. 22-23)

(Resp. Ex. 1 at 41, Tr. 143) Specifically, Clark questioned the negotiability of a proposed requirement that priority consideration be given to any employee affected by a RIF if the agency reestablished a position within a 2-year period of it being abolished during a RIF.[5/] (Resp. Ex. 1 at 41) In her e-mail, Clark stated that the parties were in the process of negotiating "one final time to cover future RIFs" and indicated that it was a departure from their previous practice of negotiating each individual RIF if the union provided proposals. (*Id.*)

There is no indication in the record of any further communication between the parties about the RIF agreement until April 5, 2005. By e-mail dated April 7, 2005, Clark forwarded a proposed version of the MOU that she "drafted based on our discussions on 5 Apr 05." (G.C. Ex. 5) Neither Clark nor Henderson offered any testimony that described what may have been discussed on April 5. Of relevance to the dispute in this case, the wording in the preface of the draft version of the MOU attached to Clark's e-mail remained the same as set forth in Henderson's November 17, 2004, version, which is quoted above.

Although Henderson testified that most of the negotiations over the MOU between Clark and him took place over the telephone, he provided little specific detail about those discussions. (Tr. 27) At the hearing in this case, Henderson stated that during their discussions, he became aware that the Respondent "was trying to close up RIF negotiations . . . so that we wouldn't be able to negotiate over RIF anymore, period." (*Id.*) Henderson testified that although he wanted a comprehensive RIF MOU, having a one or two page MOU be the final product wasn't acceptable to him and the Union didn't want to "zipper up" the subject of RIF. (*Id.*) With that end in mind, Henderson altered the preface in the next version of the MOU that he sent to the Respondent on or about April 27, 2005, to read as follows:

> This Memorandum of Understanding (MOU) is between the American Federation of Government Employees, Local 1547 (Union) and Luke AFB, AZ (Employer). It addresses reduction in force (RIF). It is not all

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/ In her communication, Clark also expressed the view that she opposed the proposed requirement that was the subject of her e-mail based on the potential it had to burden the Respondent's "ever-dwindling resources." (Resp. Ex 1 at 41)

> encompassing and may require additional bargaining over aspects of future RIFs that are not specifically covered herein or anticipated during the discussions, which resulted in this MOU.

(G.C. Ex. 6)

In an e-mail to Henderson dated May 10, 2005, Clark offered a counterproposal. (G.C. Ex. 7) Although Clark's e-mail refers to a conversation between Henderson and Clark regarding Henderson's proposed revision, neither Clark nor Henderson provided testimony detailing that conversation. Clark's counterproposal revised the third sentence of the preface to read as follows:

> In the event a future RIF involves unusual or unique circumstances not mentioned while developing this MOU and the MOU immediately preceding this one signed by the parties on 14 Jul 04, either party may submit proposals for the purpose of reducing adverse impact to the bargaining unit.

(G.C. Ex. 7)

Henderson sent an e-mail to Clark dated June 27, 2005, that stated "The attached MOU on RIF has the language as I intemperate [sic] our discussion today." (G.C. Ex. 8) Again, neither Henderson nor Clark provided testimony describing the discussion in any detail. The extent of Henderson's description was that Clark "kind of explained what they were looking for" and he knew "what we needed and – and her conversation with me indicated that they weren't trying to prevent that". (Tr. 30) Henderson testified that in his revision of the preface he used the phrase "not contained in this MOU" to convey the understanding that there were some issues that weren't covered and could be discussed later. (Tr. 30) In the MOU attached, the third sentence of the preface was revised and a fourth sentence was added as follows:

> In the event a future RIF involves unusual or unique circumstances **not contained in this** MOU and the MOU immediately preceding this one signed by the parties on 14 Jul 04, either party may submit proposals for the purpose of reducing adverse impact to the bargaining unit. **It is understood that the terms of the 14 July 04 MOU on RIF expire after 30 Sep 05.**

(G.C. Ex. 8) (Emphasis in original)

By e-mail to Henderson dated June 28, 2005, Clark stated "I've suggested something else; how's this?" (G.C. Ex. 9) Clark's suggestion in that e-mail for the third sentence of the preface read as follows:

> In the event a future RIF involves unusual or unique circumstances **not addressed by** this MOU and the MOU immediately preceding this one signed by the parties on 14 Jul 04, either party may submit proposals for the purpose of reducing adverse impact to the bargaining unit

(G.C. Ex. 9) (Emphasis in original)

In an e-mail dated the same day, Henderson advised Clark that he would need to know what the Respondent meant by the change in language. (G.C. Ex. 10) Henderson further stated that it seemed to him that the language could be interpreted as meaning that anything the parties talked about would be excluded from further discussion even if it was not included in the MOU. (*Id.*) Henderson stated that such an interpretation would not be acceptable. (*Id.*)

Clark responded in an e-mail dated July 5, 2005, proposing that the third sentence be revised to read as follows:

> In the event a future RIF involves unusual or unique circumstances **not specifically addressed by** this MOU and the MOU immediately preceding this one signed by the parties on 14 Jul 04, either party may submit proposals for the purpose of reducing adverse impact on the bargaining unit.

(*Id.*)

In her e-mail message, Clark explained that she wanted to ensure against leaving a subject matter, such as retention registers, that was already addressed in the MOU open for further negotiations. (*Id.*) Keeping with that example, Clark opined that using the phrase "contained in the MOU" would allow an opening for new proposals that were completely unrelated and dissimilar to existing language on retention registers because the MOU didn't contain the newly proposed language. (*Id.*) In Clark's view, using the phrase "addressed by the MOU" would not allow an opening because the subject of

retention registers was clearly "addressed" in the previous negotiations. (*Id.*) In her e-mail, Clark refers to a conversation that she and Henderson had that morning as the basis for her proposed modification; however, neither Clark nor Henderson provided testimony describing that conversation. (*Id.*)

In the MOU that the parties signed on July 5, 2005, the preface reads as follows:

> This Memorandum of Understanding (MOU) is between the American Federation of Government Employees, Local 1547 (Union) and Luke AFB, AZ (Employer). It addresses reductions in force (RIF). In the event a future RIF involves unusual or unique circumstances not specifically addressed by this MOU and the MOU immediately preceding this one signed by the parties in 14 Jul 04, either party may submit proposals for the purpose of reducing adverse impact to the bargaining unit. It is understood that the terms of the 14 Jul 04 MOU on RIF expire after 30 Sep 05.

(G.C. Ex. 3)

In his testimony at the hearing, Henderson acknowledged that in negotiating this MOU, he was interested in obtaining an agreement that would eliminate having to bargain every time the Respondent had a RIF. (Tr. 43) Henderson also testified that he was not interested in completely eliminating the ability to engage in further negotiations in the future and sought to prevent the subject matter of RIF from being "zippered up" or "covered by" the MOU that the parties were negotiating. At the hearing, Henderson testified that these desires motivated his efforts to obtain language that allowed for further negotiation regarding RIFs. In his testimony, however, Henderson provided very few details of his oral communications with Clark during which he may have conveyed to her his intentions about the extent to which the subject of RIF was to remain open for future negotiations in the face of the July 5, 2005, MOU.

Similarly, Clark did not present any testimony that detailed her oral communications with Henderson relating to her understanding of the limitations that his addition of the third sentence to the preface of the 2005 MOU would place on the Respondent's ability to claim that future negotiations over RIFs were precluded because the matter was "covered by"

a collective bargaining agreement. In her testimony, Clark asserted it was her understanding that the reference to "unique" and "unusual" was intended to leave open the possibility for negotiations where a transfer of function was involved. (Tr. 141-42) Clark testified that there "was some correspondence" between her and the Union that indicated that they held the same understanding. (Tr. 142) Clark did not, however, explain what correspondence she was referring to and it is not clear what she was alluding to.

In addition to the preface, the 2005 MOU consisted of ten numbered paragraphs relating to the conduct of RIFs. One of the paragraphs is raised by the Respondent in conjunction with the information request that is the subject in one of the complaints in this case and provides as follows:

> 5. The Union may review the retention register used to prepare RIF notices for individual employees and will be provided copies of any section of the retention register for representational purposes upon request.

(G.C. Ex. 3)

2007 RIF and information request

By e-mail dated July 10, 2006, the Respondent notified Local 1547 that there was going to be a RIF in the 944th Fighter Wing that would be effective on or about March 31, 2007.[6/] (G.C. Ex. 11) The notice stated that the total number of affected bargaining unit positions was 190 and included a

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6/ This RIF was necessitated primarily by a 2005 "BRAC"(Base Realignment and Closure) Commission's action calling for the realignment of the 944th Fighter Wing "assets." (Tr. 157-58) Under this realignment, the aircraft and mission of that organization would leave Luke thus eliminating the need for positions at Luke associated with its mission and support. (Tr. 157-58, 164) Additionally, Luke was being required to absorb a reduction of 20 authorized positions in conjunction with a money-saving initiative referred to as "PBD (Program Budget Decision) 720." (Tr. 158) There is also reference in the record to an action that involved converting appropriated fund positions to non-appropriated fund, which added to the scope of the reduction in positions at Luke. (Tr. 159)

list of those positions.[7] (*Id.*) At the hearing, Henderson stated that there had not been a previous RIF of this magnitude in terms of the number of employees affected and that it also differed from previous RIFs at Luke because it involved reserve technicians. (Tr. 35) Henderson testified that the upcoming RIF raised a number of issues that weren't involved in previous RIFs at Luke. (Tr. 35-36) Specifically, Henderson cited priority placement programs; inclusion of both excepted service as well as competitive service; buy-outs, and early retirement. (Tr. 35-36)

By e-mail dated August 16, 2006, addressed to "Luke Civilians," the Respondent informed employees that in preparation for the RIF that would be effective on or about March 31, 2007, a "mock RIF" would be run.[8] (G.C. Ex. 12) The e-mail explained that the mock RIF produced tentative, not final, RIF results and that the official RIF results might vary significantly from the mock RIF because of changing circumstances. (*Id.*) The e-mail further advised that employees who were identified by the mock RIF for potential adverse action would be so notified and afforded the opportunity to register early in the Department of Defense (DoD) Priority Placement Program (PPP). (*Id.*) The e-mail emphasized that any notices sent out were not RIF notices and stated that allowing employees to register early in the PPP and be placed prior to the finalization of the RIF would reduce the adverse impact of the RIF that eventually occurred. (*Id.*)

At some unspecified date prior to September 8, 2006, the Union requested to bargain over the RIF. (Tr. 47-48) According to Hembd's testimony, the parties met to negotiate

[7] Testimony indicated the figure of 190 represented the number of encumbered positions that were "going away" and there were approximately 44 unencumbered positions that were also being abolished. (Tr. 165-66)

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/ As described by Robert Davies, who at some point during the events involved in this case became the Labor Relations Officer at Luke, a mock RIF is essentially a "snapshot" that reflects what would happen if the RIF were run at the point in time the mock RIF is requested. (Tr. 163) One purpose of mock RIFs is to obtain information that will enable pre-RIF planning relating to such things as stock-piling vacancies to allow for placements during the actual RIF and affording employees the opportunity to seek employment alternatives in advance of the RIF. (Tr. 163, 166-69)

on or about September 13, 2006. (Tr. 52)

On September 8, 2006, the Respondent began contacting employees whom the mock RIF identified as subject to possible separation, informing them of that fact, and offering them early PPP registration. (G.C. Ex. 13)

Harley Hembd, who at that point had become acting President of Local 1547, testified that employees began calling the Union to complain that they had received a RIF notice while less senior employees had not. (Tr. 49, 51)

By e-mail dated September 11, 2006, Hembd requested that the Respondent provide the Union with the "most recent Mock RIF(s) that were run for any and all RIFs that are to take place as a result of the BRAC, Program Budget Decision 720, etc." (G.C. Ex. 14) In his request, Hembd stated that the Agency "may sanitize personal identifiers only" and in the event of sanitization should code each employee to allow for comparison. (*Id.*) Asserting the Union generally qualified as a "routine user" of documents such as those requested, Hembd's e-mail advised that if the Agency chose to sanitize anything beyond social security numbers, the Union would require a copy of all applicable systems notices published in the Federal Register. (*Id.*)

As the Union's particularized need, Hembd stated in his request that the Union had received complaints from senior bargaining unit employees that they had been notified of their potential separation and it needed the information in order to understand why this was happening and why these employees were being affected while other employees were not. (G.C. Ex. 14) (*Id.*) Another need cited by Hembd was that the Union "currently has proposals on the table" that excepted service positions be vacated to allow for the placement of more senior competitive service employees and wanted to know whether "this process is being used or disregarded." (*Id.*)

Hembd also contended the Union needed the requested information in order to determine whether the Respondent was complying with legal and contractual responsibilities with respect to working conditions and employee-management relations. (G.C. Ex. 14) Hembd maintained the request was for information the Union had a statutory right to know specifically, the employment status of the employees it represents. (*Id.*) Hembd also asserted the information would enable the Union to monitor compliance with the existing MOU on RIFs, represent all of its bargaining unit employees, and

determine how best to argue its case before a third party. (*Id.*)

According to Hembd's testimony, the parties met on September 13, 2006, and although the Union presented some proposals, the Respondent did not but rather merely listened while the Union explained its proposals. (Tr. 52, 53) Hembd viewed the negotiations as not very fruitful and, subsequently, by e-mail dated September 14, 2006, Hembd forwarded what he characterized as his "final proposal." (Tr. 53, G.C. Ex. 16) At the hearing, Hembd stated that he labeled the proposals as "final" in an attempt to push the Respondent to respond to the Union's proposals. (Tr. 53)

Asserting that he had received no response to his earlier information request, Hembd sent a follow-up inquiry by e-mail dated September 21, 2006. (G.C. Ex. 18) In a reply e-mail dated September 26, Respondent's representative, Anthony Kinnaman, informed Hembd that a mock RIF was not a RIF but merely an internal management tool used in planning for a RIF. (*Id.*) Kinnaman asserted that the mock RIF did not effect any adverse action or result in a specific RIF notice to an individual employee. (*Id.*) Kinnaman's e-mail continued that in view of this, he found Hembd's data request "overly broad" and lacking sufficient information to permit the agency to make a reasoned judgment on whether disclosure of the information was required by section 7114(b)(4) of the Statute. (*Id.*)

By e-mail dated September 28, 2006, Hembd responded disputing the suggestion that the issuance of the mock RIF notices was having no adverse impact on bargaining unit employees, and claiming to the contrary that employees were making "life-changing decisions" based on information given them as a consequence of the mock RIF. (G.C. Ex.19) In particular, Hembd asserted that employees, fearing for their employment future, were placing themselves in the PPP, and applying for early retirement and positions elsewhere based on the mock RIF results. (*Id.*) In his e-mail, Hembd explained that the Union needed the mock RIFs in order to determine whether employees were being given correct information about their potential for harm in the up-coming RIF and for use in filing grievances about any misinformation provided. (*Id.*) Additionally, Hembd cited the Union's desire to assist employees who were seeking its advice in making informed decisions about whether to take actions, such as relocating to other jobs and geographical areas, in anticipation of the

upcoming RIF. (*Id.*) Hembd stated that the Union also intended to use the requested information in formulating proposals for changes in the RIF procedures used at Luke. (*Id.*) Hembd informed the Respondent that the Union was investigating the process being used during the RIF and the information would assist it in determining whether employees were being ranked properly. (*Id.*)

The record does not show any further communication between the parties regarding the Union's data request until October 17, 2006. The parties were scheduled to meet with a mediator from Federal Mediation and Conciliation Service (FMCS) in conjunction with the negotiations over the upcoming RIF on October 18. (Tr. 57-58) According to Hembd's undisputed testimony, he spoke with Kinnaman on the telephone the day before this scheduled meeting and offered to withdraw the Union's data request if the Respondent would let him see the mock RIF retention register. (Tr. 58, G.C. Ex. 20) Although it was Hembd's understanding that Kinnaman was agreeable to doing this, Kinnaman did not bring the material to the meeting but instead informed Hembd that Davies wouldn't allow Kinnaman to show the material to Hembd. (Tr. 58)

The parties had further negotiation sessions with the FMCS mediator present on November 2, 16 and 20, 2006. (Tr. 59) At the hearing, Hembd testified that at the session on November 16, the Respondent offered some counterproposals and declared a couple of the Union's proposals non-negotiable. (Tr. 61) Hembd described the meeting on November 20 as ending with a number of items tentatively agreed to, some declared non-negotiable, and some at impasse. (Tr. 62-63)

On or about November 29, 2006, Hembd submitted a petition to the Authority appealing the Respondent's allegation that three of the Union's proposals were nonnegotiable. (G.C. Ex. 23, Tr. 64) On or about December 5, 2006, Hembd submitted a request for assistance to the Federal Service Impasses Panel (FSIP). (G.C. Ex. 24, Tr. 68) Various documents relating to the processing of the negotiability appeal and the negotiation impasse were submitted into the record. In those documents, there is no mention of the issue of whether the 2005 MOU foreclosed any bargaining obligation on the part of the Respondent with respect to the 2007 RIF. (G.C. Exs. 23, 24, 28, 33, 34, 35 and 36; Resp. Exs. 2, 3 and 4) Although it appears that at the time of the hearing in this case the negotiability appeal (Case No. 0-NG-2924) remained pending before the FLRA, the FSIP issued a Decision and Order in the case before it (07 FSIP 26) on June 1, 2007. (G.C. Ex. 36)

In that decision, the FSIP, which had earlier declined to assert jurisdiction over two of the four proposals, or issues, submitted to it because of a claim by the Respondent that they were non-negotiable (G.C. Ex.33), ordered the parties to adopt one of the Union's proposals.[9/] (G.C. Ex. 36)

During the period involved in the events underlying the complaints in this case, three mock RIFs were run.[10/] (Tr. 162) Hembd testified, without rebuttal, that he repeatedly reiterated his request for the mock RIF retention registers and was consistently rebuffed. (Tr. 70-71) Hembd stated that he was never furnished a copy of the retention registers for the mock RIF or allowed to see them. (Tr. 111)

On or about February 28, 2007, specific RIF notices were issued to employees. (G.C. Exs. 29 and 30, Tr. 184) According to the notices that were submitted into the record, the actions were to be effective on May 5, 2007. (G.C. Exs. 29 and 30) When it was discovered that a required notice to Congress about the RIF had not occurred, the RIF actions were postponed for 5 weeks from their originally planned effective date, in order to fulfill this obligation.[11/] (Tr. 164, 185) According to Davies, the planes and flying mission of the 944th Fighter Wing as well as the related funding were removed from Luke effective March 31, 2007. (Tr. 164) Davies stated that the delay in the effective date

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9/ The FSIP ordered the Union to withdraw the remaining proposal based on its view that the proposal was inconsistent with the NSPS' Workforce Shaping Issuance, which reflected Congressional intent to grant the Department of Defense the authority to create its own personnel system. (G.C. Ex. 36)

10/ Respondent's witness, Davies, testified that nine "iterations," which he defined as a "completed retention register," were done for the RIF at Luke. (Tr. 162) From Davies' testimony it appears that the preparation of the retention registers was an evolving process and the multiple "iterations" represented efforts to perfect the registers by incorporating corrections needed and changes that occurred during the period leading up to the RIF. (Tr. 162)

11/ Originally, it was planned that the effective date of the RIF would be March 31, 2007. (Tr. 185, G.C. Ex. 12)

of the RIF cost Luke approximately $439,000.[12/] (Tr. 165) Davies testified that in September 2006 Luke began stockpiling vacancies so that they would be available for assignment of employees displaced by the upcoming RIF and that because Luke's 2007 budget had been cut to 94 percent of its authorized ceiling, it lacked the funding to fill those vacancies by means other than running the RIF. (Tr. 166-67) Davies asserted that pending implementation of the RIF, Luke could not move the mechanics assigned to the "944th" to vacant positions in the "56th" where they were needed to support Luke's remaining flying mission. (Tr. 166-67, 185-87)

Davies testified that during a conference conducted on May 10, 2007, in conjunction with the Union's negotiability appeal, Hembd made a statement that the Union desired to delay the RIF until 2008. (Tr. 173) According to Davies, Hembd expressed an interest in waiting until excepted service employees were converted to competitive service before conducting the RIF. (Tr. 173) Hembd testified that he didn't recall making such a statement. (Tr. 83-84) Davis also testified the Respondent came to the view that various statements by Hembd, along with his actions such as filing Unfair Labor Practice (ULP) charges (Res. Exs. 5, 6, 7), and "continually put[ting] proposals on the table" demonstrated that Hembd's "only intent" was to delay the RIF. (Tr. 173-76)

The RIF was completed in May 2007. (Tr. 190)

Issues

Whether the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to comply with section 7114 (b)(4) by failing to provide the Union with a copy of mock RIF retention registers that were requested by the Union.

Whether the Respondent violated section 7116(a)(1) and (5) of the Statute by issuing specific RIF notices to employees on or about March 1, 2007, without completing bargaining with the Union.

Positions of the Parties

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/ Davies also testified that the RIF entailed the following costs: VSIP (voluntary separation incentive pay) - $872,000; severance pay - approximately $111,000; change of station costs - approximately $5½ million. (Tr. 165)

General Counsel

The alleged failure to provide information

The General Counsel (G.C.) contends the Respondent violated section 7116 (a)(1), (5) and (8) of the Statute by failing to provide the Union a copy of the mock RIF retention registers that it requested. Citing the requirements of section 7114(b)(4) of the Statute, the G.C. asserts there is no dispute the requested data is normally maintained by the Respondent in the normal course of business, reasonably available, and does not constitute guidance, advice, counsel or training related to collective bargaining. In the G.C.'s view the only matter in dispute is whether the data is necessary for the Union to perform its representational role.

Applying the analytical framework used by the Authority for addressing disputes over information requests that was set forth in *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661 (1995) (*IRS, Kansas City*), the G.C. argues the Union established that the requested information was indeed "necessary." In this regard, the G.C. asserts the Union sufficiently articulated its particularized need at the time of its request. In particular, the G.C. contends Hembd provided an adequate explanation in his request concerning the Union's need for the data and further clarified the Union's need in response to the Respondent's claim that it did not have sufficient information to make a reasoned judgment regarding disclosure. The G.C. characterizes the Respondent's statement that the Union's request was "overly broad" as conclusory.

The G.C. argues Respondent's claim that the Union was not entitled to the mock RIF retention registers because the 2005 MOU did not require it to provide the requested information to the Union was raised for the first time at the hearing and should be disallowed for that reason. Citing *Federal Aviation Administration*, 55 FLRA 254, 260 (1999) (*FAA*), the G.C. maintains an agency may not raise anti-disclosure interests at the hearing that were not raised at the time it responded to a data request. Additionally, the G.C. contends even if this particular claim by the Respondent is considered on its merits, it must fail because the 2005 MOU did not address mock RIFs.

The alleged failure to bargain

The G.C. alleges the Respondent violated section 7116(a)(1) and (5) by issuing specific RIF notices before bargaining was completed. Relying on *Department of the Air Force, Scott Air Force Base, Illinois*, 35 FLRA 844 (1990) (*Scott Air Force Base*), the G.C. maintains the issuance of specific RIF notices to employees constitutes a change in conditions of employment that is greater than *de minimis*. The G.C. asserts the evidence shows the parties engaged in, and had reached impasse in, negotiations regarding the upcoming RIF and while a request for assistance was pending before the FSIP and a negotiability petition was pending before the Authority, the Respondent issued specific RIF notices to employees. The G.C. contends the Respondent was obligated to maintain the *status quo* to the maximum extent consistent with the necessary functioning of the agency pending completion of the bargaining process, including impasse resolution procedures. Additionally, the G.C. argues the Respondent has failed to establish all of the proposals that were on the table when it implemented the change were non-negotiable and, in fact, there were proposals before the FSIP the Respondent had never declared non-negotiable and at least one of the proposals before the Authority in the negotiability appeal was, based on precedent, negotiable.

The G.C. contends bargaining over the RIF was not foreclosed by the 2005 MOU. The G.C. asserts the Respondent's claim it had no obligation to bargain over the RIF because of that MOU is inconsistent with Respondent's actions in engaging in negotiations, mediation, and impasse proceedings. In the G.C.'s view the language in the preface of the MOU preserves the opportunity to bargain where a RIF involves unusual or unique circumstances. The G.C. avers the RIF involved in this case had a number of characteristics that distinguished it from previous RIFs such as: its magnitude; the involvement of Air Reserve Technicians who have unique employment characteristics; the presence of issues relating to excepted service and competitive service employees and early retirement/incentive separation pay; and use of a priority placement program and mock RIFs. The G.C. maintains Henderson's testimony regarding the bargaining history underlying the MOU establishes the parties did not intend the MOU to "zip up" the subject of RIFs and points to Respondent's action in engaging in negotiations as further evidence of that intent.

The G.C. asserts the Respondent has made no showing that issuance of the RIF notices prior to the completion of bargaining was consistent with the necessary functioning of

the agency and has failed to bear its burden of proof with respect to such a defense. The G.C. denies the Union attempted to delay the RIF and avers, to the contrary, the Union acted quickly and sought to expedite negotiations. In response to an argument that delaying the RIF would involve additional cost, the G.C. contends that under Authority precedent, cost alone is not enough to establish a "necessary functioning" defense.

Remedy sought

As remedy, the G.C. seeks an order requiring the Respondent to provide the Union with sanitized copies of the mock RIF retention registers that existed on the date of the Union's request, September 11, 2006; return to the bargaining table, complete negotiations and apply the results of the bargaining retroactively; make whole any bargaining unit employee to the extent that any agreement reached would alter the impact of the RIF on them; and post a Notice to Employees signed by the Commander of Luke Air Force Base throughout Luke Air Force Base.

Respondent

The Respondent denies that it violated the Statute as alleged.

The alleged failure to provide information

The Respondent asserts that paragraph 5 of the 2005 MOU, which it claims addresses the matter of information that it would be required to provide the Union in conjunction with RIFs, does not require it to provide any information regarding the mock RIFs. Relying on the analytical framework set forth in *IRS, Kansas City*, the Respondent maintains that the Union had no need for the requested information because the mock RIFs did not adversely impact anyone and the Union failed to establish a particularized need. Additionally, the Respondent maintains the request for information that frequently changed posed an undue burden on it. The Respondent also contends the requested information implicated privacy rights of employees unless sanitized.

The alleged failure to bargain

The Respondent contends the 2005 MOU was meant to cover RIFs such as the one involved in this case since it was due

neither to a transfer of function nor the closure of Luke. The Respondent argues that in view of the MOU, it had the option of either using the terms of the MOU in implementing the RIF or electing to negotiate additional impact and implementation proposals. Respondent avers that initially it elected to negotiate additional proposals and it intended to complete the bargaining process. However, circumstances along with its belief that the Union was bargaining in bad faith in an effort to delay the RIF, eventually prompted it to implement the RIF before the bargaining process had finished. The circumstances cited by the Respondent in its brief were the costs involved in delaying the RIF; the departure of the 944th Fighter Wing along with the work and funding associated with that organization and mission; and its inability to fill the vacant positions it stockpiled for use in placing employees during the RIF. The Respondent asserts the inability to fill vacancies "would have adversely impacted" Luke's flying mission because without having mechanics to maintain aircraft would mean "pilots would be unable to fly." Resp. Br. at 51.

Analysis

The alleged failure to provide information

The portion of the Statute relevant to this particular issue is section 7114(b)(4), which provides as follows:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation -
>
> . . .
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data-
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]

In its answer to the complaint in this case, the Respondent denied that the information requested by the Union satisfied any of the criteria for disclosure specified in section 7114(b)(4). Respondent has not, however, made any claims or presented any arguments that the information is not normally maintained by the agency or that it constitutes guidance, advice, counsel or training either at the hearing or in its post-hearing brief. I will, therefore, consider Respondent to have abandoned its earlier claims that the requested information was not normally maintained by the

agency and that it constituted guidance, advice, counsel or training within the meaning of section 7114(b)(4)(C) and not consider them further.

In its post-hearing brief, the Respondent asserts providing the requested information would impose an undue burden on it because the request would require it to provide information that changed frequently. I find that although Respondent's argument in this regard is not entirely clear, it appears to relate to the Respondent's representation that there were multiple "iterations" of the RIF retention registers produced. Respondent's "burdensome" argument appears to be based on a view that the Union was seeking copies of all the "iterations." Although it may be possible to read the Union's use of the plural form in referring to the mock RIFs in its communications requesting information as meaning that it wanted a copy of each and every "iteration" of the retention registers developed, I find that a considerable stretch, especially when placed in context. What emerges from the Union's e-mails in which it articulated its data request (G.C. Exs. 14 and 19), is what the Union's focus was on and what motivated its request were the "mock RIF" notices distributed to bargaining unit employees. It is clear to me that the Union was seeking the retention registers on which those notices were based. I do not find any evidence that the Union's request extended to each and every "iteration" developed during the process of perfecting the registers used in the mock RIFS that were run.

More important for purposes of deciding whether the Respondent failed to comply with section 7114(b)(4) in refusing the Union's request for the information is the matter of the Respondent's timing in raising this particular objection to the Union's information request. The Authority has held that an agency is responsible for raising, at or near the time of the union's data request, any countervailing anti-disclosure interest. *E.g., United States Department of Justice, Immigration and Naturalization Service, Western Regional Office, Labor Management Relations, Laguna Niguel, California*, 58 FLRA 656, 659 (2003) (*INS, Laguna Niguel*). Here, there is no evidence the Respondent communicated to the Union any claim that the Union's request was unduly burdensome

at any time before its post-hearing brief in this case.[13/] I find the Respondent failed to raise this basis for denying the request for data in a timely manner and will not consider that defense now. *See Id.*

I find Respondent's unexplained assertion that the 2005 MOU presented a basis for denying the request for the mock RIF retention registers very vague and I am unsure what legal principles or analytical frameworks the Respondent may intend to invoke.[14/] In any event, I find that the Respondent did not raise the 2005 MOU at or near the time of its response to the information request, but, rather, raised it for the first time in its answer to the complaint in this case. That is, there is nothing in Respondent's written response to the request (G.C. Ex. 18) that referred to the 2005 MOU as a reason for denying the Union's request. Additionally, there is no witness testimony showing that the Respondent raised the 2005 MOU as a basis for denying the request at or near the time of the request and response thereto. Consequently, I reject this defense. *See Id.*

Turning to the Respondent's assertion in its brief that the information requested implicated the privacy interests of employees unless it was sanitized, I note that beginning with its initial request, the Union stated the data could be sanitized. Consequently, I do not find any evidence the Union sought the disclosure of information that was inconsistent with the Privacy Act.

[13/] Although the Respondent advised the Union in its response to the request for information that the request was overly broad, I find that claim to be distinguishable from one that providing information would be burdensome. Overly broad is reasonably interpreted as meaning that the requester is seeking more than is necessary or justifiable under the circumstances; burdensome is reasonably interpreted as referring to the degree of difficulty or effort required to provide the information.

14/ For example, if Respondent is attempting to raise the defenses based on contract language discussed in either Internal Revenue Service, Washington, D.C., 47 FLRA 1091 (1993) or U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993) (SSA I), it has not done so in a manner that would give me any confidence that either of these is a legal theory its claim regarding the 2005 MOU is intended to invoke.

What remains is Respondent's assertion that the Union has not demonstrated a particularized need for the information requested. This claim, which was referred to when Luke responded to the Unions' request, brings us to the analytical framework for determining whether information is "necessary" under section 7114(b)(4)(B) that the Authority adopted in *IRS, Kansas City*. Under that framework, the Authority assigns to the union the initial responsibility of articulating with specificity why it needs the information requested including the uses to which it will be put and the nexus between those uses and the union's responsibilities as exclusive representative. *IRS, Kansas City*, 50 FLRA at 669. Conclusory or bare assertions will not suffice to satisfy the union's burden of establishing particularized need. *Id.* at 670. Generally, the question of whether a union has fulfilled its responsibility will be judged by whether it adequately articulated its need at or near the time of its request. *See, e.g., U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 51 FLRA 1467, 1473 (1996) (*INS, Twin Cities*), *Decision and Order on Reconsideration*, 52 FLRA 1323 (1997), *affirmed*, 144 F.3d 90 (D.C. Cir. 1998).

Once the union makes a request, the agency must respond in a timely manner. *See FAA*, 55 FLRA at 260. It may, as appropriate: provide the information; ask for clarification of the request; articulate its countervailing or other anti-disclosure interests; inform the union that information requested does not exist or is not maintained by the agency; or deny the request on some other valid basis. *See, e.g., FAA*, 55 FLRA at 260 (1999); *INS, Twin Cities*, 51 FLRA at 1472-73; *Social Security Administration, Dallas Region, Dallas, Texas*, 51 FLRA 1219 (1996); *IRS, Kansas City*, 50 FLRA at 670; *Social Security Administration, Baltimore, Maryland and Social Security Administration, Area II, Boston Region, Boston, Massachusetts*, 39 FLRA 650, 656 (1991). If the agency's response is to articulate countervailing interests, it must do so with more than conclusory or bare assertions. *See IRS, Kansas City*, 50 FLRA at 670.

IRS, Kansas City, provides that in addressing disputes concerning alleged violations of section 7114(b)(4), the Authority will find an unfair labor practice:

> if a union has established a particularized need, as defined herein, for the requested information and either: (1) the agency has not established a countervailing interest; or (2) the agency has

> established such an interest but it does not outweigh the union's demonstration of particularized need.

50 FLRA at 671.

I find that in response to the Respondent's request for clarification of its need, the Union sufficiently articulated a particularized need for the mock RIF retention registers. In this regard, the Union informed Luke that it was being contacted by bargaining unit employees questioning whether they, rather than other employees, were the correct recipients of a mock RIF notice and indicating that in view of notice that their employment future at Luke might be in jeopardy, they were making "life-changing" decisions and taking actions such as applying for early retirement and seeking employment elsewhere. The Union advised Luke that it needed the information, among other things, to determine whether employees were being given accurate information about their status with respect to RIF retention standing and whether the filing of grievances was warranted. I find that these reasons were adequate to establish a particularized need on the Union's part. *See United States Department of the Army, Army Corps of Engineers, Portland District, Portland, Oregon*, 60 FLRA 413, 415 (2004); *Health Care Financing Administration*, 56 FLRA 503, 506-07 (2000). Moreover, I find that the Union's response to the request for clarification provided Luke with adequate information on which to make a reasoned judgment concerning disclosure. Significantly, I note that if Luke felt the Union's explanation required further elaboration or clarification, it provides no evidence that it requested such from the Union.

In view of my finding that the Union sufficiently established a particularized need for the requested information, the burden was on the Respondent to provide a reason why the information was not subject to disclosure. In this case other than an unexplained and cursory assertion in its response to the initial request that it was overly broad, the Respondent raised no basis at or near the time of the request as to why the information should not be disclosed. As noted earlier, bare assertions are not sufficient to demonstrate countervailing interests. *See, IRS, Kansas City*, 50 FLRA at 670. Moreover, as discussed earlier, the Respondent's other claims justifying non-disclosure were not timely raised.

I find that the Union established a particularized need

for the requested mock RIF retention registers and the Respondent failed to demonstrate countervailing, anti-disclosure interests in a timely manner. Consequently, I find that the Respondent failed to comply with section 7114(b)(4) of the Statute and violated section 7116(a)(1), (5) and (8) of the Statute.

The alleged failure to bargain

The Authority has held that the issuance of specific RIF notices constitutes a change in employee working conditions. *See Scott Air Force Base*, 35 FLRA 844. It is well established that where an agency has the obligation to bargain concerning a change in conditions of employment that, with certain exceptions, it may not lawfully implement the change prior to completing bargaining. *See, e.g., United States Immigration and Naturalization Service, Washington, D.C.*, 55 FLRA 69, 72-73 (1999). This obligation to maintain the *status quo* pending completion of the bargaining process extends to the impasse resolution process where such is timely requested. *See Id.*

The Respondent asserts two defenses to the claim that it was obligated to complete bargaining prior to issuing the specific RIF notices. One, it contends that it had no obligation to bargain because the matter was "covered by" an existing collective bargaining agreement — specifically, the 2005 MOU. Two, it argues that if the delays in the bargaining process were allowed to hinder its implementation of the RIF, its ability to fulfill its mission-related needs would have been hampered.

The "covered by" doctrine was first articulated by the Authority in *SSA I*, 47 FLRA 1004. As construed by the Authority, "covered by" is an affirmative defense that may be raised against failure to bargain claims and requires "that the Authority determine whether the subject matter about which the union seeks to bargain has already been resolved by previous bargaining." *Social Security Administration, Region VII, Kansas City, Missouri*, 55 FLRA 536, 538 (1999) (*SSA, Kansas City*). In applying the "covered by" doctrine, the Authority initially determines "whether the matter is expressly contained in the collective bargaining agreement."[15/] *SSA I*, 47 FLRA at 1018. If the collective bargaining

[15/] For purposes of this doctrine, the Authority has treated a Memorandum of Understanding (MOU) as a contract or collective bargaining agreement. See Equal Employment Opportunity Commission, Washington, D.C., 52 FLRA 459 (1996).

agreement does not expressly encompass the matter, the Authority next determines "whether the subject is 'inseparably bound up with and . . . a subject expressly covered by the contract'." *Id.* In making these determinations, the Authority examines all record evidence to include the provisions of the collective bargaining agreement along with bargaining history. *SSA, Kansas City*, 55 FLRA at 540; *SSA I*, 47 FLRA at 1019.

The Authority has held that the "right" to raise the "covered by" defense is subject to waiver.[16/] *See Social Security Administration*, 55 FLRA 374 (1999) (*SSA II*). For there to be a waiver of such an affirmative defense, specificity is required. *Id.* at 377.

But for the third sentence in the preface of the 2005 MOU, I would find that the "covered by" doctrine precluded the Respondent's obligation to bargain prior to issuing the specific RIF notices. The clear import of that sentence, however, is that the parties agreed to place limitations on the extent to which the MOU would curtail the obligation to bargain over RIFs that occurred while the MOU remained in effect. What is not clear from the sentence on its face is the scope of the limitations agreed to and, more specifically, whether they encompassed the RIF in question in this case.

From the evidence presented regarding the bargaining history of the preface of the 2005 MOU, it appears that although Henderson wanted to avoid having to bargain over every RIF that came up, he also wanted to retain his ability to demand bargaining on matters pertaining to RIFs that were not specifically encompassed or anticipated by the 2005 MOU. In essence, Henderson appears to have had in mind incorporating a broad limitation on the "covered by" effect of the MOU analogous to that of the "Barstow MOU" that was discussed in *SSA, Kansas City*. It is, however, not clear from his testimony whether he conveyed his true intention to Clark. While Clark appears to have been in agreement with the concept of allowing for some limitation on the "covered by" effect of the 2005 MOU, her focus was different from that of Henderson. Rather, she viewed the purpose of the limitation on the

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/ In its decision in National Treasury Employees Union v. FLRA, 399 F.3d 334 (D.C. Cir. 2005), the U.S. Court of Appeals for the District of Columbia Circuit questioned the rationale underlying this finding. As yet, the Authority has neither abandoned nor modified its view on waiver of the defense.

"covered by" effect agreed to as applying narrowly to transfer of function situations that arose in the future. As with Henderson, it is not clear from Clark's testimony whether she conveyed her intent to Henderson. In any event, the evidence does not establish that the negotiators were of a single mind insofar as their intent underlying the third sentence in terms of the scope of the limitations on the bargaining obligation with respect to future RIFs.

Based on the language of the preface that emerged from the negotiations, I find that a more natural reading suggests a broader interpretation of the limitation on the "covered by" effect of the MOU than allowed by Clark's view. In this regard, the third sentence on its face refers to an exception from the "covered by" effect for RIFs that involve "unusual or unique circumstances not specifically addressed" by the MOU and, consequently, suggests considerably more elasticity than confinement to situations involving transfers of function. If the parties had wanted a more limited construction of the exception allowed, they could have very easily specified the type of circumstance that Clark pointed to in her testimony rather than using the more flexible language they ultimately adopted.

Taking the language of the third sentence on its face, it allows for further negotiations for RIFS that involve "unique and unusual circumstances not specifically addressed by this MOU." Although the RIF that gave rise to the failure to bargain allegation in this case was perhaps not unique and unusual when viewed against the universe of RIFs in the Federal government, the evidence in the record reveals that it was considerably larger than any that occurred in the recent history of Luke. When viewed in this universe, which formed the backdrop for the negotiation of the 2005 MOU, the 2007 RIF by virtue of its magnitude could reasonably be construed as involving circumstances that were "unique and unusual" and not specifically addressed by the MOU. Lending weight to this view is the evidence that in agreeing to negotiate the 2005 MOU both Clark and Henderson sought relief from the need to repeatedly bargain on an *ad hoc* basis over the small-scale RIFs that regularly occurred at Luke.

Another factor lending weight to a finding that the 2005 MOU was not viewed by the parties as foreclosing bargaining over the 2007 RIF is that they did not treat it as doing so. The Respondent without apparent objection engaged in negotiations over the 2007 RIF to include proceedings relating to a negotiability petition and a negotiation impasse.

Although during the litigation of this case, the Respondent takes the position that it elected to engage in negotiations despite having no obligation to do so, it expressed a seemingly contradictory position in a submission filed in conjunction with the negotiability appeal that to the extent that any proposals involved were permissive in nature, it chose not to negotiate on them. Resp. Ex. 3 at 10. In view of this posture, I find Respondent's willingness to engage in negotiations that it professes were elective in nature mystifying. This paradoxical conduct suggests that Respondent lacked conviction that the 2005 MOU covered the 2007 RIF.

Additionally, I note that the Respondent has not provided evidence that would support a finding that it informed the Union during the negotiations over the 2007 RIF that it was not obligated to bargain because of the 2005 MOU. Although there was a statement during Davies' testimony that Hembd told him several times that he was tired of Davies using the term "covered by", there was no elaboration or explanation offered regarding Hembd's comments to Davies. (Tr. 173) Consequently, that testimony fails to establish that during the course of the negotiations Davies actually informed the Union that the Respondent viewed the 2007 RIF as "covered by" the 2005 MOU. Also, the record reveals that in response to a March 8, 2007, e-mail from Hembd in which he cited the 2005 MOU in support of a demand that further proposals be considered, Davies did not make any statements that disputed Hembd's opinion that negotiations over the 2007 RIF were authorized under the 2005 MOU. (G.C. Ex. 32) Rather, Davies' response appears to indicate a view that the bargaining that already occurred was in accordance with the MOU. (G.C. Ex. 32)

Based on the foregoing, I reject the Respondent's claim that it had no obligation to negotiate over the 2007 RIF because the matter was "covered by" the 2005 MOU.

The Respondent's second defense asserts that delaying the RIF further would have hampered Luke's ability to fulfill its mission. Although Respondent does not employ terms of art, it appears it is asserting that implementation of the RIF was necessary for the functioning of the agency, which is a long recognized defense to an alleged unfair labor practice based on unilateral implementation. *See, e.g., U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 904 (1999). To prevail in this defense, a respondent "must establish, with evidence, that its actions were in fact consistent with the necessary functioning of the agency, such

that a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission." *Id.*

Initially, I do not construe the Respondent's argument as being that the cost of delaying the implementation of the RIF pending completion of bargaining standing alone impeded its ability to effectively and efficiently carry out its mission. Rather, I understand Respondent's argument to be that it was the effect of costs on its ability to fill positions that impeded its ability to carry out its mission. As averred by the Respondent, a 5-week delay in the RIF resulted in a cost of approximately $439,000. Also, other costs associated with the RIF amounted to a figure approaching $7 million. Respondent contends these costs combined with cuts in Luke's 2007 budget left it with the inability to fill the vacancies that it has been stockpiling for use during the RIF other than through RIF action.[17/] Although Davies asserted during his testimony that delays in filling the vacancies left Luke with a shortage of mechanics where they were needed to support its flying mission, he provided no specific facts and figures to defend this assertion. Rather, Davies provided only generalized statements that if the stockpiled mechanic vacancies remained unfilled, the lack of mechanics assigned to the "56th" would result in the planes associated with that organization being unable to fly. Davies' testimony did not provide details to show that the number of unfilled vacancies had reached a level that Respondent's ability to fly its planes was compromised. Additionally, Respondent does not explain why RIF action was the only means available to fill the need for mechanics at the "56th", at least on a temporary basis until either bargaining could be completed or its financial issues abated, from the surplusage of mechanics left when the 944th Fighter Wing departed from Luke.

I find that Respondent has not supported its claim that implementation was necessary for the functioning of the agency and reject Respondent's defense.

17/ It would appear that some of these cost figures, such as relocation costs associated with the RIF, would not have become known to the Respondent until after it completed implementation of the RIF. Hence, it is unclear to me how the Respondent could reliably use these figures in prospectively making a determination that it needed to implement the RIF because it was not able to fill vacancies by any means other than RIF action because, in part, of the financial impact of the implementation of the RIF.

In conclusion, I find that by issuing specific RIF notices to employees prior to the completion of the bargaining process, Respondent violated section 7116(a)(1) and (5) of the Statute.

Remedy

In view of my findings that Respondent violated the Statute, an order for remedial action is warranted. With respect to Respondent's failure to provide information as required by section 7114(b)(4), the G.C. requests a remedy that includes ordering the Respondent to provide the Union copies of the mock RIF retention registers that existed on the date of the Union's request. The G.C. does not request that copies of any mock RIF retention registers that came into existence subsequent to that date be included in the remedy ordered. Therefore, I will confine my recommended remedy to those retention registers in existence as of September 11, 2006.

Turning to the remedy for Respondent's action of issuing specific RIF notices prior to completion of the bargaining process, the G.C. requests that the Respondent be ordered to complete bargaining over any proposals found negotiable by the Authority as a result of the Union's negotiability appeal and apply any agreements reached retroactively. The G.C. requests make whole relief for employees where such is warranted based on retroactive application of the bargaining agreement. I will recommend that the remedy include an order to bargain over those proposals that are determined by the Authority to be negotiable in the negotiability case before them and apply any agreements reached retroactively. I want to make clear that I am not recommending that the parties be ordered to bargain over any new proposals that are not the subject of the case currently before the Authority.

In addition to these measures, I recommend that the Respondent be ordered to post a Notice to Employees.

It is therefore recommended that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41 of Rules and Regulations of the Authority and section 7118 of the Federal Service Labor-Management Regulations Statute, it is hereby ordered that the Department of the Air Force, Luke Air Force Base, Arizona,

shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, AFL-CIO, Local 1547 (the Union), the exclusive representative of bargaining unit employees, with copies of the mock RIF retention registers as requested by the Union on September 11, 2006.

(b) Implementing changes in conditions of employment affecting bargaining unit employees by issuing specific reduction-in-force (RIF) notices to employees without completing bargaining with the Union over implementation procedures and appropriate arrangements for adversely affected employees.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

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

(a) Provide the Union with copies of the mock RIF retention registers as requested by the Union on September 11, 2006, and that existed on that date. The copies of the registers provided may be sanitized as necessary to comport with requirements of the Privacy Act.

(b) Upon request of the Union, complete bargaining over any proposals found negotiable by the Authority in conjunction with the Union's negotiability appeal in Case No. 0-NG-2924 and apply any agreements reached retroactively. Upon request of the Union, make whole any employees to the extent warranted by retroactive application of the agreement reached.

(c) Post at its facilities where bargaining unit employees are located, 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 Commander of Luke 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's 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.

Issued, Washington, DC, October 26, 2007

SUSAN E. JELEN
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 Department of the Air Force, Luke Air Force Base, Arizona, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the American Federation of Government Employees, AFL-CIO, Local 1547 (the Union), the exclusive representative of bargaining unit employees, with copies of the mock RIF retention registers as requested by the Union on September 11, 2006.

WE WILL NOT implement changes in conditions of employment affecting bargaining unit employees by issuing specific reduction-in-force (RIF) notices to employees without completing bargaining with the Union over implementation procedures and appropriate arrangements for adversely affected employees.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL provide the Union with copies of the mock RIF retention registers as requested by the Union on September 11, 2006, and that existed on that date. The copies of the registers provided will be sanitized as necessary to comport with requirements of the Privacy Act.

WE WILL, upon request of the Union, complete bargaining over any proposals found negotiable by the Authority in conjunction with the Union's negotiability appeal in Case No. 0-NG-2924 and apply any agreements reached retroactively. Upon request of the Union, we will make whole any employees to the extent warranted by retroactive application of the agreement reached.

_____

(Agency)

Dated: _____ 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, Denver Regional Office, whose address is: Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, and whose telephone number is: 303-844-5226.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case Nos. DE-CA-07-0059 and DE-CA-07-0293, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT — **CERTIFIED NOS:**

Timothy Sullivan, Esquire
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204-3581

7005 2570 0001 8450 3665

Phillip G. Tidmore, Esquire and
Major Timothy J. Tuttle, Esquire
Department of the Air Force
AFLSA/CLLO
1501 Wilson Boulevard, 7th Floor
Arlington, VA 22209

7005 2570 0001 8450 3672

REGULAR MAIL:

President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

DATED: October 26, 2007
Washington, DC