DEPARTMENT OF VETERANS AFFAIRS WASHINGTON, DC Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, COUNCIL OF CONSOLIDATED VA LOCALS Charging Party	Case No. WA-CA-20795

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **AUGUST 28, 1995**, and addressed to:

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

ELI NASH, JR.
Administrative Law Judge

Dated: July 27, 1995
Washington, DC

MEMORANDUM DATE: July 27, 1995

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC

Respondent

and Case No. WA-CA-20795

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, COUNCIL OF CONSOLIDATED VA LOCALS

Charging Party

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

Enclosures

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

DEPARTMENT OF VETERANS AFFAIRS WASHINGTON, DC Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, COUNCIL OF CONSOLIDATED VA LOCALS Charging Party	Case No. WA-CA-20795

Barry M. Tapp and
Gregory A. Burke, Esqs.
For the Respondent

Stephen G. De Nigris
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

On April 7, 1994 the Acting Regional Director of the Washington Region of the Federal Labor Relations Authority (herein called the Authority), pursuant to a charge filed on June 1, 1992 by the National Federation of Federal Employees, Council of Consolidated VA Locals (herein called the Union), issued a Complaint and Notice of Hearing alleging that the Department of Veterans Affairs, Washington, D.C. (herein called the Respondent), engaged in unfair labor practices within the meaning of section 7116(a)(1) and (5) of the Statute by refusing to negotiate with the Union over a public transit subsidy for bargaining unit employees.

This case has a lengthy procedural history basically because the General Counsel moved for summary judgment in the matter contending that there were no genuine issues of material fact. Since the relevant procedural matters are covered in the body of this decision, I see no necessity to

set them out here. In essence, Respondent answered that material issues of fact surrounding the issue of a waiver existed and urged that the motion for summary judgment be denied. On August 10, 1994, the Chief Administrative Law Judge denied the motion for summary judgment because, in his opinion "factual disputes remain" which required a hearing.

A hearing on the Complaint was conducted in Washington, D.C. at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally.[1] The parties filed timely briefs.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence I make the following:

Findings of Fact

The material facts are as follows:

The Union is the certified exclusive representative of a unit of employees at the Respondent.

On April 22 and May 29, 1992, respectively the Union wrote Daniel Sobrio, the Director of Labor Management Relations proposing to negotiate Respondent payments of a public transit subsidy for unit employees under Pub. L. 101-509.[2] The Union also noted in its May 29, 1992 correspondence that it discovered that transit subsidy monies were being paid to employees in Los Angeles even though Respondent claimed that it "had no position on the payments and a management group was considering the issue and would make a recommendation . . . ."

On June 11, 1992, the Union filed an unfair labor practice charge in the matter stating that Respondent had answered its proposal to bargain the public transit subsidy issue on May 11, 1992, by saying that it would "inform us when they have given the issues a thorough review."

On June 19, 1992, Sobrio responded stating:

> As you are aware, Public Law 101-509, is the govern-ing law which authorizes the transit subsidy. The specific subsidy provision provides that "a Federal agency may participate." The Department has to date made no decision to

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1 At the hearing, the General Counsel renewed its motion for summary judgment.

2 Pub. L. 101-509 expired December 31, 1993. Pub. L. 103-172 contains the current statutory authorization for transit subsidy programs within federal agencies.

participate; therefore, there is no bargaining obligation.[3]

The record shows no further communications between the parties on this particular issue.

Discussion and Conclusions

The Complaint in this case was issued on April 7, 1994 alleging that the Union proposed to negotiate over a public transit subsidy for bargaining unit employees on May 29, 1992 and that Respondent refused to negotiate relying on Pub. L. 101-509 on June 19, 1992. It is worthy of note, that the Complaint in this matter was never amended.

The substance of the Complaint is that Respondent refused to bargain in June 1992 because of its reading of PL 101-509 and because of a previous decision of the Washington Regional Director dismissing a charge concerning the identical issues as found in this case.

At the hearing and in its brief, the General Counsel's position clearly is that Respondent refused to bargain a proposal that was found negotiable by the Authority in National Federation of Federal Employees, Council of VA Locals and U.S. Department of Veterans Affairs, 49 FLRA 923 (1994). The negotiability decision certainly seems to make it clear that the proposal is not, as Respondent contends inconsistent with Pub. L. 103-172. It is firmly established that a respondent violates the Statute where it contends as a reason for its refusal to bargain that a proposal is nonnegotiable although there is Authority precedent holding that the proposal is negotiable. Department of the Air Force, U.S. Air Force Academy, 6 FLRA 548 (1981). Clearly, however, the Authority will not find a violation where no established precedent exists at the time of an agency's refusal to bargain. 182nd Tactical Air Support Group, Illinois Air National Guard, The Adjutant General of Illinois, Springfield, Illinois, 10 FLRA 381 (1982); Department of Health and Human Services, 23 FLRA 738 (1988). Here, Respondent's action in the case was tantamount to declaring the Union's proposal nonnegotiable.

The obvious problem in this case, which the General Counsel does not overcome, is that the negotiability decision on which the General Counsel relies did not exist in June 1992, but was issued almost two years, to the day,

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[3] According to the General Counsel, Respondent premised its lack of a bargaining obligation on Department of Health and Human Services, Social Security Administration, WA-CA-21004, where the Washington Regional Director dismissed a similar charge.

after the Union's request to bargain in the case. Thus, there was no negotiability precedent at the time of Respondent's alleged refusal to bargain. Furthermore, no other requests to bargain over the matter were ever made either before or after the above cited negotiability decision issued in May 1994. Thus, the matter seems to have languished for some time in the Regional Office awaiting the outcome of an negotiability decision concerning the same or similar matters. Addition-ally, for some unexplained reason, the Complaint in the case was issued about a month before the Authority issued its decision on the negotiability matter, but the Complaint, as already noted, was never amended to encompass a new theory of violation. An immediate question is raised as to whether there is any support for the position that the General Counsel now takes, that Respondent refused to bargain over a matter which already had been found negotiable by the Authority. To do so would require intuitiveness on the part of Respondent, since the Complaint issued espousing this theory prior to the Authority's release of the negotiability decision on which the General Counsel now relies. Since the negotiability decision did not exist at the time Respondent allegedly refused to bargain over the transit subsidies or at the time the Complaint in this case issued and, furthermore since the Complaint was not amended to encompass the theory on which the General Counsel now relies, it is my view that it cannot now be used as grounds for a violation which occurred almost two years prior to its issuance.

My search of the record revealed no new requests to bargain or any response by Respondent that it refused to bargain over a matter which already had been found negotiable by the Authority. While the Authority addressed the issue around which this matter should revolve, the issue of transit subsidies for Title 38 employees working for Respondent, it has little effect here since it was neither alleged nor shown that the violation in this case was a continuing violation. In this regard, it is clear that the refusal did not result in any change in conditions of employment of any employee in the bargaining unit. Department of Health and Human Services, supra. Moreover, the dismissal of a similar matter by this same Regional Office most certainly created a basis on which Respondent might believe its refusal to bargain was on solid ground. In fact, Respondent's responses at the time of the request to bargain in 1992 make sense in the total circum-stances and timing of the case.[4] Accordingly, it is found that

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4 Based on the foregoing, it is unnecessary to address Respondent's main contention that the matter is covered by the collective bargaining agreement and that the Union waived its right to file an unfair labor practice charge where the negotiability of a proposal is at issue.

there was no violation of the Statute based on Respondent's position on the matter in June 1992.

Finally, the General Counsel failed to address any reason why Respondent's refusal, even if based on the Washington Regional Director's dismissal of a matter involving the very same issue or why any other of Respondent's reasoning for not bargaining over the matter in 1992, was not a defense for its refusal to bargain, at the time the violation allegedly occurred. The failure to entertain those issues, leaves little question, in my opinion, that the General Counsel relied totally on its theory that Respondent failed to negotiate a proposal that had already been found negotiable by the Authority in the matter. If this is the case, the Complaint was premature and a hearing on the matter can not perfect that mistake by applying a theory to the case which was not possible prior the Authority's issuance of its negotiability decison.

Accordingly, the General Counsel's motion for summary judgment is denied since at the time of the alleged refusal to bargain no established precedent existed which was dispositive of the issue of negotiability of public transit subsidies. It is, therefore, recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in Case No. WA-CA-20795 be, and it hereby is, dismissed in its entirety.

Issued, Washington, DC, June 27, 1995

ELI NASH, JR.
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. WA-CA-20795, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Barry M. Tapp and
Gregory A. Burke, Esqs.
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

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Washington, DC 20036

Dated: July 27, 1995
Washington, DC