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

UNITED STATES ATTORNEY'S OFFICE SOUTHERN DISTRICT OF TEXAS HOUSTON, TEXAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3966 Charging Party	Case No. DA-CA-00888

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 **JANUARY 22, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 19, 2001
Washington, DC

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

MEMORANDUM DATE: December 19, 2001

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: UNITED STATES ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF TEXAS
HOUSTON, TEXAS
Respondent

and Case No. DA-CA-00888

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 3966
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

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ

02-13

WASHINGTON, D.C.

UNITED STATES ATTORNEY'S OFFICE SOUTHERN DISTRICT OF TEXAS HOUSTON, TEXAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3966 Charging Party	Case No. DA-CA-00888

Joseph M. Gontram, Esquire
For the Respondent

Jeanell Nero-Walker, President AFGE, Local 3966
For the Charging Party

Melissa J. McIntosh, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, 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.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent, who had given the Union

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71" of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as, "§ 16(a)(5)."

notice of a suggestion program, refused to bargain by rejecting all eight of the Union's proposals as "substantive," and not negotiable, and then unilaterally implementing its
suggestion program.

This case was initiated by a charge filed on September 14, 2000 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on November 30, 2000 (G.C. Exh. 1 (b)), and set the hearing for April 12, 2001, pursuant to which a hearing was duly held on April 12, 2001, in Houston, Texas, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce testimony and evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Respondent and General Counsel each exercised. At the conclusion of the hearing, May 14, 2001, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed a helpful brief, received on, or before, May 16, 2001, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

FINDINGS

1. The American Federation of Government Employees, AFL-CIO, Local 3966 (hereinafter, "Union"), is the exclusive representative of bargaining unit employees at the United States Attorney's Office, Southern District of Texas (hereinafter, "Respondent") (G.C. Exh. 1(b)).

2. On June 29, 2000, Respondent, by Mr. Michael Mason, Personnel Officer, submitted a draft of a new employee suggestion policy to Ms. Jeanell Nero-Walker, President of the Union (G.C. Exh. 3; Tr. 8) and on July 6, 2000, Ms. Nero-Walker e-mailed a request to negotiate the new policy to Mr. Richard Kelly, Administrative Officer and Mr. Mason's supervisor, in Mr. Mason's absence on vacation (G.C. Exh. 4; Tr. 8, 9). On July 14, 2000, Mr. Mike Watts, Personnel Specialist acting in Mr. Mason's absence, sent an e-mail message to Ms. Nero-Walker asking, prior to meeting with her, what issues the Union wanted to negotiate (G.C. Exh. 5; Tr. 9); and Ms. Nero-walker responded on the same day by e-mail in which she stated, ". . . I would like to negotiate this issuance to the full extent of the law including the

procedure, money amounts and etc. The Union is also request (sic) status quo until negotiation is completed." (id.)

3. On August 3, 2000, Ms. Nero-walker e-mailed Mr. Mason eight Union proposals and requested notice of time and place of negotiations and, again, requested that status quo be maintained until negotiations were completed (G.C. Exh. 6; Tr. 9).

4. On August 16, 2000, Mr. Mason, by e-mail, advised Ms. Nero-Walker as follows:

> "Regarding your proposals . . . I must remind you that our negotiated agreement gives you the right to negotiate only over the 'impact of the implementation' of the policy, not the substance of the policy. The changes you have proposed for both issuances pertain to the substance of the polices and not I & I or appropriate arrangement.
>
> Therefore, the proposals you submitted are not negotiable." (G.C. Exh. 7).

5. On September 11, 2000, Ms. Elizabeth Anderson, the Administrative Officer's Secretary, sent an e-mail message to Ms. Nero-Walker and to all U.S. Attorney's Offices in the Southern District of Texas that the Suggestion Program, signed by the U.S. Attorney on September 5, 2000, was being implemented (G.C. Exh. 8; Tr. 14, 15).

6. The Union's eight proposals, submitted on August 3, 2000, were as follows:

> "Proposal 1. Suggestions will be considered in a fair and equitable manner. Suggestion awards will be appropriate for tangible suggestions, intangible suggestions. The Administration will encourage employees to file suggestions under the U.S. Attorney's Office Program.
>
> "Proposal 2. In the event of a decision regarding adoption or non-adoption of a suggestion is not made within 60 days of submission, the employee, upon request, will be given a written status report.

"Proposal 3. Non-adoption of employee suggestions are to be written and contain specific reasons for non-adoption.

"Proposal 4. If the idea set forth in a rejected suggestion is later adopted, the appropriate suggestion coordinator will, if the matter is brought to his/her attention within the 2 year period after the date of rejection notice, reopen the case for award consideration.

"Proposal 5. An employee who informally submits a suggestion (i.e., orally gives his/her idea to a staff or management person) that is adopted must submit it in writing within 1 year of the date the suggestion is placed in effect. Otherwise, the suggested (sic) will not be considered for a cash award.

"Proposal 6. All types of suggestions will be considered, regardless of working conditions.

"Proposal 7. The amount of suggestion awards approved or recommended will be in accordance with OPM guidelines set forth in _____.

"Proposal 8. Suggestion awards committee and training for that committee." (G.C. Exh. 6).

CONCLUSIONS

Respondent exercised a management right when it proposed an employee Suggestion Policy; nevertheless, Respondent was obligated to negotiate, pursuant to § 6(b)(2) and (3), the impact and implementation of such proposed change (i.e., (2) procedures which management will observe; and/or (3) appropriate arrangements for employees adversely affected), if the proposed change would have more than a de minimis impact on employees. U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Memphis, Tennessee, 42 FLRA 712, 713 (1991).

Respondent very correctly, states, ". . . it must be determined whether the change affects a condition of employment . . . ." (Resp. Brief, p. 4). Respondent proceeds to the Union's proposals but, to remove any

lingering doubt, an employee suggestion program is a condition of employment and placing such a program into effect where, previously, there had been none, changes employees' conditions of employment by adding a new benefit to the employees benefits and emoluments. National Treasury Employees Union and Internal Revenue Service, 27 FLRA 132, 135-37 (1987); International Federation of Professional and Technical Engineers, Local No. 1 and U.S. Department of the Navy, Norfolk Naval Shipyard, 38 FLRA 1589, 1593 (1991).

Awards are governed by 5 U.S.C. §§ 4302; 4502, 4503 and by OPM's Regulations, 5 C.F.R. § 451, Subpart A [§451.101-451.107][Presidential Awards, 5 C.F.R. § 451, Subpart B, 5 C.F.R. §§ 451.201-451.203].

5 U.S.C. § 4302. "Establishment of Performance Appraisal Systems" under subsection (b) provides, in part, as follows:

> "(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--
>
> . . .
>
> "(4) recognizing and rewarding employees whose performance so warrants;
>
> . . . . "[5 U.S.C. § 4302 (b)(4)].

5 U.S.C. § 4505a provides for "Performance-based cash awards[2]. 5 U.S.C. § 4503 provides as follows:

> "§4503. Agency awards
>
> "The head of an agency may pay a cash award to, and incur
> necessary expense for the honorary recognition of, an employee who-

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2/ At one time, "Performance Awards was 5 U.S.C. § 5406; and "Cash Award Program" was 5 U.S.C. § 5407; however, §§ 5401 to 5410 were repealed by Pub. Law No. 103-89, 107 Stat. 981 (Sept. 30, 1993).

> "(1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork; or
>
> "(2) performs a special act or service in the public interest in connection with or related to his official employment." (5 U.S.C. § 4503)

OPM's regulations now are: 5 C.F.R., Part 451 and provide, in part, as follows:

> "§451.101 Authority and coverage.
>
> "(a) Chapter 45 of title 5, United States Code authorizes agencies to pay a cash award to, grant time-off to, and incur necessary expense for the honorary recognition of, an employee (individually or as a member of a group) and requires the Office of Personnel Management to prescribe regulations governing such authority. Chapter 43 of title 5, United States Code, provides for recognizing and rewarding employees whose performance so warrants. The regulations in this subpart, in combination with chapters 43 and 45 of title 5, United States Code, and any other applicable law, establish the requirements for agency award programs.
>
> . . .
>
> "(c) This subpart applies to employees as defined by section 2105 and agencies as defined by section 4501 of title 5, United States Code, except as provided in §§ 451.105 and 451.201(b)." (5 C.F.R. § 451.101)
>
> "§451.102 Definitions.
>
> "Award means something bestowed or an action taken to recognize and reward individual or team achievement that contributes to meeting organizational goals or improving the efficiency, effectiveness, and economy of the Government or is otherwise in the public interest. Such awards include,

but are not limited to, employee incentives which are based on predetermined criteria such as productivity standards, performance goals, measurement systems, award formulas, or payout schedules.

"Award program means the specific procedures and requirements established by an agency or a component of an agency for granting awards under subchapter I of chapter 43 and subchapter I of chapter 45 of title 5, United States Code, and this subpart.

"§451.103 Agency award program(s).

"(a) Agencies shall develop one or more award programs for employees covered by this subpart.

"(b) Agencies are encouraged to involve employees in developing such programs. When agencies involve employees, the method of involvement shall be in accordance with law.

"(c) An agency award program shall provide for--

"(1) Obligating funds consistent with applicable agency financial management controls and delegations of authority; and

"(2) Documenting justification for awards that are not based on a rating of record (as defined in §430.203 of this chapter).

"§451.104 Awards.

"(a) An agency may grant a cash, honorary, or informal recognition award, or grant time-off without charge to leave or loss of pay consistent with chapter 45 of title 5, United States Code, and this part to an employee, as an individual or member of a group, on the basis of--

"(1) A suggestion, invention, superior accomplishment, productivity gain, or other

> personal effort that contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork;
>
> "(2) A special act or service in the public interest in connection with or related to official employment; or
>
> "(3) Performance as reflected in the employee's most recent rating of record (as defined in §430.203 of this chapter), except that performance awards may be paid to SES employees only under §534.403 of this chapter and not on the basis of this subpart.
>
> "(b) A cash award under this subpart is a lump sum payment and is not basic pay for any purpose . . . ." (5 C.F.R. §§ 451.102-451.104).

In National Treasury Employees Union and Internal Revenue Service, 14 FLRA 463 (1984), there were a number of Union proposals relating to the Agency's Incentive Pay System. Union's Proposal 1 proposed that, "The production level at which the employer will begin awarding incentive pay will be computed as follows:

> "a. NTEU and IRS will mutually agree on the standards . . ., or
> "b. Standards will be set no higher than were achieved by the average person in the Philadelphia Service Center . . . ." (id.)

The Authority held that the proposal was inconsistent with management's right to direct employees and assign work (14 FLRA at 464-65). All members of the Authority were in agreement on this proposal and this portion of the Authority's decision was not appealed.

The Union's Proposal 5 sought to set the level of incentive pay (e.g. "Incentive money is paid at the rate of $.09 per one-tenth of an efficiency point over 100 percent . . . ." 14 FLRA at 469). The Authority (Chairman Mahone and Member Frazier) held that the proposal was, ". . . inconsistent with management's rights to direct

employees and assign work under section 7106(a)(2)(A) and (B) of the Statute." (id.) Member Haughton dissented (14 FLRA at 471-74). The Union sought review of the Authority's decision with respect to its Proposal 5 and in National Treasury Employees Union v. FLRA, 793 F.2d 371 (D.C. Cir. 1986), the Court, in an opinion by Judge Scalia, now Mr. Justice Scalia, vacated and remanded the Authority's decision, and stated, in part,

> "The Authority's reasoning--that level of incentive pay 'directly relate[s] to the potential success of the incentive in motivating the performance of particular job tasks', and thus 'to some extent determine[s] the priorities for accomplishing the agency's work,' which is the very objective of the reserved management right to assign work--is an example of a familiar defect of statutory construction that might be called substituting the end for the means. It may well be that the rights to assign work and to reward superior performance of assigned work are both means to the objective of enabling the agency to determine its work priorities, just as the carrot and the stick are both means of getting a donkey to move. But the similarity of purpose does not establish that when Congress says carrot it means stick as well. It is for Congress, and not for the Authority or the courts, to determine what means it is willing to employ to achieve particular ends, and it usurps that prerogative to say that if Congress has rendered work assignment nonbargainable, then also nonbargainable is any activity that has the same effect as work assignment. If the latter principle were applied consistently, it is difficult to imagine any agency prescriptions regarding terms and conditions of work for particular classes of employees that would remain bargainable, since (unless the agency is squandering its resources) they all have the same ultimate objective as assignment and direction, viz., increased production by those employees." (793 F.2d at 374-75)

The Court then concluded,

> "We hold that the level of incentive pay awarded for the performance of agency work, even work that has been 'assigned' or 'directed,' does not come within the nonbargainable management rights to assign work and direct employees. . . ." (793 F.2d 375).

As Judge Scalia noted, two days after its decision in Internal Revenue Service, supra, the Authority, in National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C., 14 FLRA 598 (1984), had held to be negotiable a Union's proposal determining the rate of incentive awards for valuable employee suggestions. Judge Scalia also noted in footnote 2, that,

> "2. Those awards were authorized by the same statutory provision that authorizes the incentive pay here, 5 U.S.C. § 4503 (1982), which permits the rewarding of not only 'superior accomplishment' but also 'suggestion, invention, . . . or other personal effort.' The regulations issued to implement this provision, *see* 5 U.S.C. § 4506, divide awards into the two categories of 'Performance Awards,' 5 C.F.R. Part 531, Subpart F (based on performance within the scope of job responsibilities) and "Special Awards," 5 C.F.R. Part 451, Subpart B (based on employee suggestions, inventions, and actions). *NTEU & FDIC* involved the latter." (793 F.2d at 474, n. 2)[The Regulations have been revised as set forth earlier herein]

The Authority (with only Member Frazier from the original Authority-Chairman Malone and Member Haughton having been replaced by Chairman Calhoun and Member McKee) on remand, National Treasury Employees Union and Internal Revenue Service, 27 FLRA 132 (1987), now held the Union's Proposal 5 negotiable, i.e., within the Agency's duty to bargain, and stated, in part, as follows:

> "We adopt the court's holding, . . . that a proposal
> . . . determining the level of incentive pay awarded for the performance of Agency work does not constitute an exercise of management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. Pursuant to the court's direction, we turn our attention to whether Proposal 5 is rendered nonnegotiable by sections 7103(a)(14)(C) and 7106(a)(1) of the Statute. The issues presented here are limited solely to the rate of incentive award money to be paid to employees and do not in our view concern management's rights under section 7106 of the Statute

to set levels of performance for employees to receive a particular rating. (27 FLRA at 135)

. . .

"In our view the rate at which incentive award money is payable to employees under the Agency's productivity plan concerns those employees' conditions of employment within the meaning of section 7103(a)(14) . . . We find that Proposal 5 is not a condition of employment which is specifically provided for by federal statute so as to be excluded from the duty to bargain under section 7103(a)(14)(C) of the Statute.

"The incentive award money which is the subject of the Union's proposal is not paid to employees pursuant to
5 U.S.C. §§ 5301 et seq. It is not wages or salary authorized by these provisions, in particular 5 U.S.C. § 5332. Rather, as indicated by the record and as found by the court, the incentive award money payable to employees here is authorized pursuant to 5 U.S.C. § 4503 (footnote omitted). OPM itself has acknowledged that money paid to employees pursuant to that provision is
not properly considered pay within the meaning of Chapter 53. . . ." (27 FLRA at 135-36)

. . .

"Because incentive award money is not paid to employees pursuant to 5 U.S.C. §§ 5301 et seq., the Agency's and OPM's contention that incentive rates are specifically provided for by these statutory provisions, particularly 5 U.S.C. § 5332, is without merit.

"Moreover, the rates at which incentive award money is to be paid to employees under the incentive system established by the Agency are not matters specifically provided for under 5 U.S.C. § 4503 so as to be excluded from conditions of employment concerning which the Agency has an obligation to bargain. Section 4503 provides the Agency with authority to award employee performance, but it does not specify the amount to be paid as an award. (footnote omitted). It is clear from the legislative history of section 7103

(a)(14) of the Statute that only those matters specifically provided for by other federal statutes are excepted from the obligation to negotiate under that provision. (footnote omitted) . . . the amount to be awarded as incentive money is left to the Agency's discretion pursuant to 5 U.S.C. § 4503. . . Thus, the rate at which incentive award money will be paid to employees under the Agency's incentive program is not specifically provided for by statute and is within the duty to bargain. . . .

"Further, Proposal 5 would not prevent the Agency from eliminating the program. The proposal only addresses the rate of incentive pay. . . ." (27 FLRA at 137).

The Authority further held that,

". . . We therefore find that Proposal 5 does not directly interfere with management's right to determine its budget under section 7106(a)(1) of the Statute . . . ." (27 FLRA at 139).

In National Association of Government Employees, Local R1-144, Federal Union of Scientists and Engineers and U.S. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 43 FLRA 47 (1991), the Authority stated, in part,

". . . Where a Government-wide regulation provides for a determination to be made by a particular official as a condition precedent to further action, a proposal that preempts the determination to be made by that official is inconsistent with the regulation. . . . (id. at 52).

In American Federation of Government Employees, AFL-CIO, Local 3477 and Commodity Futures Trading Commission, 21 FLRA 90 (1986), (on remand of another part of the Authority's decision, 27 FLRA 440 (1987), note, in particular, the Authority's re-affirmation that the proposal was not inconsistent with 5 U.S.C. §§ 4502 and 4503, at 27 FLRA 442-43), which involved incentive awards for employee suggestions, the union had proposed:

"The minimum cash award will be $37.50 for adopted suggestions resulting in tangible benefits of $250.00.

. . .

"Benefits to Government Amount of Award

up to $10,000 15% of benefits

. . . ." (id. at 92)

The Authority, stated, in part, as follows:

". . . that it would find a proposal inconsistent with an agency's right to determine its budget if the proposal by its terms prescribed a particular program or an amount of funds to be included in the agency's budget or if the agency made a substantial demonstration that the proposal would result in a significant and unavoidable increase in costs which would not be offset by compensating benefits. Union proposals . . . prescribe neither a particular program (footnote omitted) nor an amount of funds to be included in a budget.

. . .

"Nor can the Agency's assertion that the proposals would interfere with its right under section 7106(b)(1) to determine the technology, methods, and means of performing work be sustained. . . An employee whose suggestion is adopted has the right to be considered for an award and an agency is not bound to grant an award upon adoption of a suggestion.

. . .

"Finally, the Agency contends that the proposals are contrary to the provisions of 5 U.S.C. §§ 4502 and 4503, which it describes as reserving to the head of each agency the right to determine the amount of each incentive award. Those statutory provisions vest agencies with the discretion to, among other things, determine the amount to be paid as awards for suggestions. (footnote omitted). The Authority has held that to the extent that an agency has discretion with respect to a matter affecting the conditions of

employment . . . that matter is within the duty to bargain. . . Absent any indication that the discretion provided to agency heads in 5 U.S.C. §§ 4502 and 4503 is intended to be sole and exclusive, the Agency's position cannot be sustained." (id. at 93-95).

In Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 30 FLRA 697 (1987), the Authority held,

". . . union membership and participation on an incentive awards committee does not interfere with management's rights under section 7106(a) of the Statute. . . Clearly, therefore, an exclusive representative may fully participate on an incentive awards committee." (id. at 700).

In International Federation of Professional and Technical Engineers, Local No. 1 and U.S. Department of the Navy, Norfolk Naval Shipyard, 38 FLRA 1589 (1991), the Authority stated,

"Proposals that establish negotiable procedures under section 7106(b)(2) of the Statute are not rendered nonnegotiable because the implementation of the procedure will require action on the part of agency personnel
. . . ." (id. at 1603).

A. Union Proposals

Proposal 1. Contains a variety of proposals. One, "Suggestions will be considered in a fair and equitable manner." (G.C. Exh. 6). Ms. Nero-Walker said only, ". . . my first proposal indicates that it be fair and equitable . . . ." (Tr. 9-10). On the surface, this appears innocuous, but there is an unexplained inference that the Union intended "fair and equitable" to mean "fair and equal" which would be contrary to 5 U.S.C. § 4503 and 5 C.F.R. § 451.104(a)(1), on the basis of,

"(1) A suggestion, invention, superior accomplishment, productivity gain, or other personal effort that contributes to the efficiency, economy, or other improvement of Government operations . . . ." (5 C.F.R. § 451.104(a)(1)).

Because the Statute, 5 U.S.C. § 4503, and Regulations, 5 C.F.R. §§ 451.101 to 451.104, tie an award for a suggestion to the efficiency achieved, economy achieved, or other improvement of Government operations achieved, equality of awards would be contrary to the basis for such awards and outside Respondent's duty to bargain. National Association of Government Employees, Local R4-17 and Veterans Administration Medical Center, Hampton, Virginia, 16 FLRA 992 (1984). Moreover, 5 C.F.R. § 451.102 provides, in part, as follows:

> "Award program means the specific procedures and requirements established by an agency . . . for granting awards under subchapter 1 of chapter 43 and subchapter 1 of chapter 45 of title 5, United States Code, and this subpart." (Emphasis added).

Accordingly, the Union's "fair and equitable" proposal was outside the duty to bargain.

The second proposal of the Union's Proposal 1 was, "Suggestion awards will be appropriate for tangible suggestions, intangible suggestions." Without doubt, this proposal was ambiguous as it gave no indication what was meant either by a tangible or by an intangible suggestion (Tr. 27-28). Ms. Nero-Walker testified that what she meant was that suggestions could be in writing (tangible) or oral (intangible) (Tr. 10); however, Respondent's proposal, "Policy Issuance-Suggestion Program" (G.C. Exh. 3) specifically provided that suggestions must be in writing: a) submitted on plain paper, either typewritten or legibly handwritten; or b) submitted via e-mail. (id. at p. 2). The Union's proposal would have altered Respondent's Suggestion Program contrary to 5 C.F.R. § 451.102. Moreover, the proposal does not address, ". . . procedures which management . . . will observe in exercising any authority under this section;" (5 U.S.C. § 7106(b)(2); nor "appropriate arrangements for employees adversely affected by the exercise of any authority under this section" (5 U.S.C. § 7106(b)(3)).

The third, and final, proposal in the Union's Proposal 1 was, "The Administration will encourage employees to file suggestions under the U.S. Attorney's Office Program." This proposal is wholly consistent with the regulations

("Agencies are encouraged to involve employees in developing such program. . . .") (5 C.F.R. § 451.103(b)) and with Respondent's Policy Issuance and, therefore was negotiable.

Proposal 2. "In the event of a decision regarding adoption or non-adoption of a suggestion is not made within 60 days of submission, the employee, upon request, will be given a written status report." (G.C. Exh. 6). I do not agree with Respondent's assertion that this proposal impacts on its right to hire and assign work in violation of § 6(a)(1) and (2)(A) and (B) (Resp. Brief, p. 9-10). To the contrary, Respondent's Policy Issuance provided, in part,

> "All suggestions will be evaluated in a reasonable period of time by the Executive Assistant United States Attorney. . . ." (G.C. Exh. 3, p. 2); and
>
> "Questions . . . should be referred . . . to Personnel Officer, via E-mail or by calling. . . ." (id.)

The Union's proposal constitutes a procedure within the meaning of § 6(b)(2) of the Statute and accordingly was negotiable. As the Authority has held, proposals that establish negotiable procedures under § 6(b)(2) of the Statute are not rendered non-negotiable because implementation of the procedure would require action by agency personnel. International Federation of Professional and Technical Engineers, Local No. 1 and U.S. Department of the Navy, Norfolk Naval Shipyard, 38 FLRA 1589, 1603 (1991).

Proposal 3. "Non-adoption of employees suggestions are to be written and contain specific reasons for non-adoption." (G.C. Exh. 6). I do not agree with Respondent that the Union's Proposal 3 is contrary to § 6(a)(2)(A) or (B) nor that American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Madison Region, 21 FLRA 870, 874-76 (1986) has any application to this case. Indeed, Respondent's Policy Issuance provided, in part,

> ". . . Those suggestions disapproved will be returned to the suggester with a letter of explanation. . . ." (G.C. Exh. 3, p. 2).

Accordingly, I find that Union's Proposal 3 was negotiable.

Proposal 4. "If the idea set forth in a rejected suggestion is later adopted, the appropriate suggestion coordinator will, if the matter is brought to his/her attention within the 2 year period after the date of rejection notice, reopen the case for award consideration." (G.C. Exh. 6). I do not agree with Respondent's assertion that this proposal infringes on management's right to hire and assign employees. Respondent's Policy Issuance designates the Executive Assistant United States Attorney as the person to evaluate all suggestions (G.C. Exh. 3, p. 2). The fact that the Union used the phase, "the appropriate suggestion coordinator" instead of Executive Assistant United States Attorney does not render it non-negotiable and as General Counsel, states, ". . . in no way creates a new position, assigns work or costs Respondent money." (G.C. Brief, p. 7). Accordingly, Union Proposal 4 was within Respondent's duty to bargain.

Proposal 5. "An employee who informally submits a suggestion (i.e., orally gives his/her idea to a staff or management person) that is adopted must submit it in writing within 1 year of the date the suggestion is placed in effect. Otherwise, the suggested (sic) will not be considered for a cash award." For reasons set forth above concerning Union Proposal 1, the Union's proposal for oral suggestions is not negotiable. Moreover, the Union's proposal of "cash award" implies a fixed payment concept, whereas the Statute, 5 U.S.C. § 4503, and Regulations, 5 C.F.R. § 451.104(a)(1), specifically provide that such suggestions must reflect the ". . . efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork". Moreover, the Regulations also quite specifically provide that, "An agency may grant a cash, honorary, or informal recognition award, or grant time off . . . ." (5 C.F.R. § 451.104(a)), and 5 C.F.R. § 451.102 defines, "Award means something bestowed or an action taken to recognize and reward individual or team achievement that . . . improving the efficiency, effectiveness, and economy of the Government . . . .". Accordingly, Union's Proposal 5 was not negotiable.

Proposal 6. "All types of suggestions will be considered, regardless of working conditions." Respondent's Policy Issuance specifically made ineligible,

> ". . . Ideas or proposals that deal with employee services, benefits, working conditions, housekeeping, routine safety practices or maintenance of buildings and grounds. . . ." (G.C. Exh. 3).

Moreover, Respondent's Policy Issuance provided,

> ". . . To be considered as a suggestion, the contribution must be a constructive proposal that directly contributes to the economy or efficiency, or directly increases the effectiveness of operations. . . ." (id.)

The Union's proposal is contrary both to the Statute and Regulations which authorize such awards only when the suggestion contributes to the efficiency, economy, or other improvement of Government operations and therefore was not negotiable. Moreover, the Union proposal would change Respondent's Policy Issuance and is not either a procedure or appropriate arrangement within the meaning of § 6(b)(2) or (3) of the Statute.

Proposal 7. "The amount of suggestion awards approved or recommended will be in accordance with OPM guidelines set forth in _____." Respondent is correct that, ". . . the union never completed the proposal. . . ." (Resp. Brief, p. 12). Moreover, there is no requirement under the Regulations that suggestions receive money. Rather, as noted previously, "An agency may grant a cash, honorary, or informal recognition award, or grant time off. . . ." (5 C.F.R. § 451.104(a)). Moreover, monetary awards must reflect the, "productivity gain, or other personnel effort that contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork." (5 C.F.R. § 451.104(a)(1)). Since the Union's proposal refers to guidelines which do not exist in fixed form and it has not shown awareness of the relation of monetary awards to achieved efficiency, economy, or other improvement of Government operations, its Proposal 7 was non-negotiable.

Proposal 8. "Suggestion Awards committee and training for that committee." (G.C. Exh. 6). Awards for suggestions by Statute and by Regulation are discretionary to the head of an agency to an employee who, "(1) by his suggestion, invention . . . contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork;. . . ." (5 U.S.C. § 4503); see, also 5 C.F.R. Part 451. Moreover, the Regulations provide,

> "(a) An agency may grant a cash, honorary, or informal recognition award, or grant time-off. . . ." (5 C.F.R. § 451.104).

Further, as noted, any award for a suggestion or invention must reflect the contribution to the efficiency, economy, or other improvement of Government operations or which achieves a significant reduction in paperwork. (5 C.F.R. § 451.104(a)(1)). Because the decision to make an award is discretionary with the head of the agency; the determination of efficiency, economy or other improvement of Government operations is wholly a function of management; and the form of award is wholly a management function, there is nothing an awards committee could determine. I am fully aware that the Authority has held incentive awards committees to be negotiable, Veterans Administration Medical Center, Long Beach, California, 41 FLRA 1370 (1991); but here, where all aspects of the decision to grant an award for a suggestion is lodged with management, the Union has no right to bargain about merits of suggestion nor the form of award. National Association of Government Employees, Local R1-144, Federal Union of Scientists and Engineers and U.S. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 43 FLRA 47, 52 (1991). Accordingly, Proposal 8 was not negotiable.

I reluctantly agree with General Counsel's request for a status quo ante remedy. The facts meet the criteria set forth by the Authority in Federal Correctional Institution, 8 FLRA 604, 606 (1982). The reason for my reluctance is that a status quo ante order will, necessarily, require that operation of Respondent's Suggestion Program be suspended pending completion of bargaining. Nothing suggests that such suspension would have any impact whatever on the efficiency or effectiveness of Respondent's operations. The negative impact will fall on the employees. I believe a

more realistic remedy would leave the program in effect while bargaining on i&i proceeds; but the Authority in Federal Correctional Institution, supra, has decreed otherwise.

Having found that Respondent violated §§ 16(a)(5) and (1) of the Statute by its refusal to negotiate the portion of the Union's Proposal 1 to encourage employees to file suggestions under the program and Union Proposals 2, 3, and 4, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations, 5 C.F.R. § 2424.41(c), and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the United States Attorney's Office, Southern District of Texas, Houston, Texas, shall:

1. Cease and desist from:

(a) Refusing to bargain with the American Federation
of Government Employees, AFL-CIO, Local 3966 (hereinafter, "Union"), the exclusive representative of its employees, concerning the portion of the Union's Proposal 1. to encourage employees to file suggestion under Respondent's Suggestion Program; and Union Proposals 2., 3., and 4.

(b) Giving any effect to its Suggestion Program which it implemented on, or about, September 5, 2000, without first negotiating the impact and implementation of its Program as set forth in Paragraph (a), above.

(c) In any like or related manner, interfering with, restraining, or coercing its 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 Federal Service Labor-Management Statute:

(a) Forthwith suspend operation of the Suggestion Program Respondent unilaterally implemented on, or about, September 5, 2000.

(b) Upon request, negotiate with the Union on the impact and implementation of the Suggestion Program with regard to: i) that portion of Union Proposal 1 dealing with encouraging employees to file suggestions under the Program, and; ii) Union proposals 2, 3, and 4.

(c) Refrain from implementing its Suggestion Program until the completion of i&i negotiations as set forth in Paragraph (b) hereof.

(d) Post at its Houston, Texas facilities, 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 United States Attorney for the Southern District of Texas, 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.

(e) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Dallas Region, Federal Labor Relations Authority, 525 Griffin Street, Suite 926, LB 107, Dallas, Texas, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 19, 2001
Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Attorney's Office, Southern District, Houston, Texas, 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 refuse to bargain with the American Federation of Government Employees, Local 3966 (hereinafter, "Union"), the exclusive representative of our employees, concerning the portion of the Union's Proposal 1 to encourage employees to file suggestions under the Suggestion Program; and Union's Proposals 2, 3, and 4.

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

WE WILL, forthwith, cease giving any effect to the Suggestion Program, which we unilaterally implemented on, or about, September 5, 2000, and WE WILL NOT re-implement that Program until negotiations on the impact and implementation of that Program, as specifically set forth above, have been completed.

WE WILL, upon request of the Union, in good faith negotiate over the impact and implementation of the Proposed Suggestion Program as set forth herein above, i.e., that portion of Union's Proposal 1 dealing with encouraging employees to file suggestions under the Suggestion Program and Union's Proposals 2, 3, and 4.

_____

(Respondent/

Activity)

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, Dallas Region, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202, and whose telephone number is: (214)767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. DA-CA-00888, were sent to the following parties:

CERTIFIED MAIL **CERTIFIED NUMBERS**:

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_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: DECEMBER 19, 2001
WASHINGTON, DC