UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
Washington, D.C. 20424-0001

U.S. DEPARTMENT OF THE INTERIOR BUREAU OF INDIAN AFFAIRS SOUTHWESTERN INDIAN POLYTECHNIC INSTITUTE ALBUQUERQUE, NEW MEXICO Respondent	
and INDIAN EDUCATORS FEDERATION LOCAL 4524 Charging Party	Case No. DA-CA-01-0120

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 14, 2002**, and addressed to:

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

RICHARD A. PEARSON
Administrative Law Judge

Dated: December 12, 2001
Washington, DC

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

MEMORANDUM DATE: December 12, 2001

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
SOUTHWESTERN INDIAN
POLYTECHNIC INSTITUTE
ALBUQUERQUE, NEW MEXICO

Respondent

and Case No. DA-CA-01-0120

INDIAN EDUCATORS FEDERATION
LOCAL 4524

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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

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

02-12

U.S. DEPARTMENT OF THE INTERIOR BUREAU OF INDIAN AFFAIRS SOUTHWESTERN INDIAN POLYTECHNIC INSTITUTE ALBUQUERQUE, NEW MEXICO Respondent	
and INDIAN EDUCATORS FEDERATION LOCAL 4524 Charging Party	Case No. DA-CA-01-0120

Melissa McIntosh, Esquire
For the General Counsel

Beatrice Chester, Esquire
For the Respondent

Bernadette Rolfs
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

On February 28, 2001, the General Counsel of the Federal Labor Relations Authority, by the Regional Director of its Dallas Region, issued an unfair labor practice complaint, alleging that the U.S. Department of the Interior, Bureau of Indian Affairs, Southwestern Indian Polytechnic Institute, Albuquerque, New Mexico (the Respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by implementing a new personnel policy without providing the Charging Party notice and an opportunity to bargain to the extent required by the Statute. The Respondent filed an answer to the complaint, which denied committing any unfair labor practice.

A hearing on this matter was held in Albuquerque, New Mexico, on May 8 and 9, 2001, at which all parties were represented and afforded the opportunity to be heard, to introduce evidence, to examine and cross-examine witnesses, and to submit post-hearing briefs. The General Counsel and the Respondent filed briefs, which I have fully considered.

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

FINDINGS OF FACT

Background

Southwestern Indian Polytechnic Institute (SIPI), a national two-year college located in Albuquerque, New Mexico, is one of two federally owned and operated Indian colleges in the United States.[1] SIPI is funded by the Department of the Interior, Bureau of Indian Affairs (BIA), Office of Indian Education Programs (OIEP). In order to attend SIPI, a student must be a tribal member or have at least one-fourth degree Indian blood.

Indian Educators Federation, Local 4524 (the Charging Party or the Union) represents employees at SIPI who are included in two bargaining units for which Indian Educators Federation (IEF) holds exclusive recognition. One unit includes professional education employees in the 1710 series at SIPI. The other unit includes non-professional general schedule and wage grade employees at SIPI.[2] At the time of the alleged violation in this case, the former unit was covered by a collective bargaining agreement (CBA) between the Department of the Interior, Bureau of Indian Affairs, Albuquerque and Navajo Areas and the National Council of Bureau of Indian Affairs Educators (NCBIAE), that had been in effect since 1991.[3] As to the latter unit, the parties view a collective bargaining agreement between BIA and NFFE

[1] The other federally owned and operated Indian College is Haskell Indian Nations University (Haskell), a four-year institution that is located in Lawrence, Kansas.

[2] IEF was certified as exclusive representative for this bargaining unit in March 2000 after defeating the former exclusive representative, National Federation of Federal Employees (NFFE), in a representation election.

[3] Subsequent to the execution of the 1991 agreement, NCBIAE changed its name to IEF.

as continuing in effect and applicable to the employees in that unit. There are a total of approximately 80 bargaining unit employees at SIPI.

Authorization to develop an alternative personnel system

According to Dr. Carolyn Elgin, the president of SIPI, management of SIPI and Haskell came to believe that aspects of the civil service personnel system were incompatible with the needs of higher education institutions. In the early 1990's the two colleges began lobbying efforts to obtain authorization to establish a personnel system better tailored to their unique needs. These efforts bore fruit when, on October 31, 1998, the Haskell Indian Nations University and Southwestern Indian Polytechnic Institute Administrative Systems Act of 1998 (the Act) was signed into law.[4] The Act authorized Haskell and SIPI to conduct a 5-year demonstration project to test the feasibility and desirability of alternative personnel systems designed to meet their specific needs. In explaining the need for the legislation that became the Act, the reporting congressional committee pointed to difficulties that SIPI and Haskell experienced in recruiting faculty, and it attributed these difficulties to working within the confines of civil service law. *See* H.R. Rep. No. 105-700, pt. 1, at 2-4 (1998) (Respondent's Exhibit 2).

The Act requires that any demonstration project commence within 2 years after the date of its enactment. Section 4(d)(1). It exempts such demonstration projects from the provisions of title 5 of the U.S. Code and any

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[4] This Act is also known as Public Law 105-337 and is codified as a note at 25 U.S.C. § 3731.

rules or regulations prescribed under that title.[5] The Act also requires that before commencing a demonstration project, the president of the college involved will develop a plan for the project that, among other things, cites any provision of law, rule or regulation that would prohibit the conducting of the project if not waived and publish the plan

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[5] Section 4(a) of the Act provides, in relevant part:

> Each institution . . . may conduct a demonstration project in accordance with the provisions of this Act. The conducting of any such demonstration project shall not be limited by any lack of specific authority under title 5, United States Code, to take the action contemplated, or by any provision of such title or any rule or regulation prescribed under such title which is inconsistent with the action, including any provision of law, rule, or regulation relating to-
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> . . .
>
> (3) the methods of assigning, reassigning, or promoting employees;
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> (4) the methods of disciplining employees;
>
> . . .
>
> (7) the methods of involving employees, labor organizations, and employee organizations in personnel decisions;

in the Federal Register.[6] The Act also prohibits any demonstration project from waiving certain legal provisions (such as those relating to equal employment opportunity or prohibited personnel practices) and from imposing a duty to engage in collective bargaining with respect to specified matters.[7] Finally, the Act provides for the continuation of

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[6] Section 4(b) of the Act provides, in relevant part:

> (b) Consultation and Other Requirements – Before commencing a demonstration project under this Act, the president of the institution involved shall–
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> (1) in consultation with the board of regents of the institution and such other persons or representative bodies as the president considers appropriate, develop a plan for such project which identifies–
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> . . .
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> (J) a specific citation to any provision of law, rule, or regulation which, if not waived, would prohibit the conducting of the project, or any part of the project as proposed;
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> (2) publish the plan in the Federal Register;
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> (3) submit the plan so published to public hearing;
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> (4) at least 180 days before the date on which the proposed project is to commence, provide notification of such project to -
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> (A) employees likely to be affected by the project; and
>
> (B) each House of Congress;

[7] Section 4(c) of the Act provides, in relevant part:

> Limitations–No demonstration project under this Act may–
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> . . .
>
> (2) impose any duty to engage in collective bargaining with respect to–
>
> (A) classification of positions; or
>
> (B) pay, benefits, or any form of compensation;
>
> or
>
> (3) provide that any employee be required to pay dues or fees of any kind to a labor organization as a condition of employment.

any CBA in effect prior to the commencement of any demonstration project for a specified period of time.[8]

Development of an alternative personnel system for SIPI employees

In very early 1999, the Director of OIEP instructed the presidents of Haskell and SIPI to work together to develop a single plan to apply to both schools. Efforts in that direction commenced and lasted until early the following year. In November 1999, SIPI retained a consultant, Joseph Jarrett, to provide technical assistance to the team responsible for developing the plan. According to Mr. Jarrett, he met with the committee that was responsible for developing the plan and advocated adoption of a personnel system within the federal Excepted Service, an idea that Haskell eventually rejected. When the two schools failed to reach agreement on a joint plan, the director of OIEP authorized them to develop separate plans. At that point, which occurred in approximately February or March of 2000, SIPI embarked on developing its own plan, cognizant of the Act's deadline of October 31, 2000, for implementing a plan.

SIPI relied on Mr. Jarrett to assist it in developing its plan for publication in the Federal Register. A notice of proposed rulemaking was published in the Federal Register on May 8, 2000. The notice advised that BIA was amending its regulations to allow SIPI to develop an alternative personnel system. 65 Fed. Reg. 26727 (May 8, 2000) (Respondent's Exhibit 5). The notice stated that "a

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[8] Section 4(h)(3)(D) of the Act provides, in relevant part:

> (h) Applicability-
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> . . .
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> (3)Transition Provisions-
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> . . .
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> (D) Collective-Bargaining Agreements- Any collective-bargaining agreement in effect on the day before a demonstration project under this Act commences shall continue to be recognized by the institution involved until the earlier of--
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> (i) the date occurring 3 years after the commencement date of the project;
> (ii) the date as of which the agreement is scheduled to expire (disregarding any option to renew); or
> (iii) such date as may be determined by mutual agreement of the parties.

separation from Title 5 requirements was necessary" and that under the demonstration project, SIPI employees "will no longer be covered by Title 5 of the CFR, but will be covered by Part 38 of Title 25 (Indians) . . .." 65 Fed. Reg. at 26728. The notice announced that a public hearing would be held on June 8, 2000.

By memorandum dated May 22, 2000, to all divisions, departments and offices at SIPI, Dr. Elgin advised that on or about October 1, 2000, SIPI would begin a demonstration project. The memorandum advised that employees would be converted from the Competitive Service to the Excepted Service, but that all benefits would remain the same. Dr. Elgin's memorandum informed employees that there would be some changes to job descriptions and that the "contract educator" pay system would be adopted. This memorandum also stated that the changes would not result in a reduction in pay and, in fact, some employees would receive pay increases.

The public hearing was conducted on June 8 as announced. According to testimony, approximately three bargaining unit employees attended the hearing. The Union did not have any representative at the hearing.[9]

In June 2000, Mr. Jarrett began preparing a personnel manual that fleshed out the new personnel system, and he completed work on the draft in September 2000. In mid-September, Dr. Elgin hand-carried the draft personnel manual to OIEP headquarters in Washington for review and approval.

On September 27, 2000, the final rule amending BIA's regulations to develop a new alternative personnel system was published in the Federal Register. 65 Fed. Reg. 58181 (Sept. 27, 2000). This final rule, which amended title 25, part 38 of the Code of Federal Regulations, had an effective date of October 27, 2000, and provided:

> (a) The Southwestern Indian Polytechnic Institute has an independent personnel system established under Public Law 105-337, the Administrative Systems Act of 1998 . . . . The details of this system are in the Indian Affairs Manual (IAM) at Part 20. This manual system may be found in Bureau of Indian Affairs Regional and

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9 Bernadette Rolfs, the staff representative employed by the Charging Party, testified that although she requested two bargaining unit members to attend the hearing and speak for the Union or at least take notes, they were denied time off to attend. Tr. 58-59.

> Agency Offices, Education Line Offices, and the Central Office in Washington, D.C.
>
> (b) The personnel system is in the excepted service and addresses the areas of classification, staffing, pay, performance, discipline, and separation. Other areas of personnel such as leave, retirement, life insurance, health benefits, thrift savings, etc., remain under the jurisdiction of the Office of Personnel Management.

65 Fed. Reg. at 58183

By memo dated October 10, 2000, Dr. Elgin informed the SIPI staff and faculty that employees would be converted to the Excepted Service on October 29, 2000.

Once the Director of OIEP approved the draft personnel manual, it was forwarded to the Office of Audit and Evaluation within the Department of Interior for review and approval. On approximately October 24, 2000, SIPI received word that the Office of Audit and Evaluation had given verbal approval to the personnel manual. On hearing this, SIPI prepared a final document for Dr. Elgin's signature. The new system became operational on October 29, 2000.

Union's attempts to negotiate matters relating to the new personnel system

According to Ms. Rolfs, she learned from a bargaining unit employee that SIPI was meeting with employees and discussing a new personnel system. This prompted Ms. Rolfs to send an e-mail dated December 14, 1999, requesting negotiations over the implementation of the Act. Robert Nolan, the Respondent's labor relations officer, testified that he discussed this e-mail with Ms. Rolfs by telephone and advised her that no decision had been made on what the Respondent was going to implement. According to Mr. Nolan, he advised Ms. Rolfs that when he knew anything, he would share it with her. Ms. Rolfs testified that she neither recalled this particular telephone conversation nor had any record of it.

Ms. Rolfs testified that in approximately May 2000, she had a conversation with David Parrish, the administrative officer at SIPI, in which he told her that SIPI was not going to negotiate with the Union over the alternative personnel system. In his testimony, Mr. Parrish described a conversation that he recalled having with Ms. Rolfs in approximately March or April of 2000, in which they

discussed the Act, its impact on employees and the alternative personnel system that SIPI was considering developing; however, he did not recall her raising the issue of bargaining during the conversation.[10]

In an e-mail dated May 31, 2000, addressed to Dr. Elgin and Mr. Parrish, Ms. Rolfs reiterated her request to bargain and stated that the Union would like to meet prior to the public hearing. By e-mail dated June 1, 2000, Mr. Nolan advised Ms. Rolfs that he was unclear as to exactly what she was requesting to bargain on. In this e-mail, Mr. Nolan also advised Ms. Rolfs that the Respondent was not refusing to bargain with the Union prior to implementing any changes in working conditions and would contact the Union before any changes were implemented and provide it with an opportunity to bargain. In an e-mail dated June 2, 2000, Ms. Rolfs informed Mr. Nolan that the Union was aware that SIPI was planning to implement an alternative personnel system and advised him the
Union was demanding to bargain on that change in personnel policies in accordance with the Statute. Mr. Nolan responded by e-mail dated June 5, 2000, that he would check with SIPI to determine if bargaining was required "at this time" and see if SIPI would brief the Union on what was going on. According to Mr. Nolan's account, after checking with SIPI officials, he informed Ms. Rolfs by telephone that there was nothing finalized yet and, consequently, nothing to brief her on. Subsequently, by e-mail dated June 19, 2000, Mr. Nolan advised Ms. Rolfs that at such time as SIPI was ready to implement any changes, the Union would be notified and any bargaining obligations satisfied in accordance with the Statute.

Ms. Rolfs stated that she had numerous conversations with Mr. Nolan in which she brought up the subject of the new personnel system, and he typically responded to the effect that as soon as he knew something, he would let her know. On October 18, 2000, Ms. Rolfs sent an e-mail to Mr. Nolan "once again" requesting the opportunity to negotiate regarding the new personnel system.

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[10] Although Mr. Parrish did not recall Ms. Rolfs expressing a desire to negotiate regarding the implementation of the Act during this particular conversation, it is clear from his testimony that Mr. Nolan informed him of Ms. Rolfs' requests to negotiate and, consequently, he was aware of her desire to do so. Mr. Parrish testified that he found Ms. Rolfs' requests perplexing and asserted that she never articulated specifics as to what she wanted to negotiate about.

By letter dated October 24, 2000, Dr. Elgin informed Ms. Rolfs that a new Excepted Service personnel system would be implemented school-wide on October 29. The letter invited the Union to submit proposals or concerns, if any, regarding the impact and implementation of the new system for review and consideration. Ms. Rolfs did not receive this letter until October 30, but she was contacted by Mr. Nolan and an informational meeting to discuss the new system was arranged for October 27. On that date, Ms. Rolfs, accompanied by David Acuna, another IEF representative, met with Mr. Nolan and Mr. Parrish, and Mr. Parrish gave Ms. Rolfs a copy of the new personnel manual that was marked "draft." Both Mr. Parrish and Mr. Nolan stated at the hearing in this case that during the meeting they told Ms. Rolfs that although the document was marked "draft," it was for all intents and purposes the final version. According to Mr. Parrish, he told Ms. Rolfs that he would make sure the Union got the official approved copy, "signed and all," as soon as it was sent forward. At the hearing, however, Ms. Rolfs insisted that all she was given at the meeting was a draft and that Mr. Parrish told her at the meeting that the manual was not final and had not been approved.[11]

Both Mr. Nolan and Ms. Rolfs testified that during the meeting, Ms. Rolfs requested that implementation of the new system be held in abeyance until negotiations could take place, but her request was denied. By letter dated October 31, 2000, Ms. Rolfs submitted proposals. Each of the ten proposals submitted was confined to identifying a different chapter or appendix of the new personnel manual and proposing that the parties meet, discuss and negotiate its contents. Shortly after receiving the proposals, Mr. Nolan contacted Ms. Rolfs and told her that her proposals were vague (Ms. Rolfs' characterization) or lacked sufficient specificity for SIPI to know what she was proposing to bargain on (Mr. Nolan's characterization). Ms. Rolfs did not submit any further proposals.

DISCUSSION AND CONCLUSIONS

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[11] I find that although it may not have been conveyed to Ms. Rolfs in a manner that was clear to her, the copy of the personnel manual that she was given at the October 27 meeting was the final version, even though it was marked "draft."

Issues and Positions of the Parties [12]

The pivotal issue in this case is the Respondent's bargaining obligation with respect to the new personnel system that the Act authorized it to adopt. More particularly, the conflicting bargaining obligations imposed by the Statute and the Act must be resolved.

The General Counsel argues that the new personnel system imposed many changes in the working conditions of bargaining unit employees, and that under the Statute, the Respondent was obligated to afford the Union the opportunity to bargain over those changes prior to its implementation. In this regard, the General Counsel asserts that some of the changes imposed by the new personnel system were negotiable insofar as their substance, while other changes were negotiable only insofar as their impact and implementation. In its brief, however, the General Counsel does not address the effect, if any, of the Act on the Respondent's obligation to bargain. The General Counsel contends that the Respondent's obligation to bargain arose at the point that it made the decision to implement a new personnel system and asserts that the Respondent could have included the Union in formulating the new system, but chose not to do so. Accordingly, the General Counsel asserts that any claimed "exigent circumstances" were the direct result of Respondent's choice to delay negotiations and do not excuse Respondent from its bargaining obligation under the Statute.

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[12] The Respondent submitted a reply brief accompanied by an "informal" request to do so. In its reply brief, the Respondent objected, among other things, to material that it characterized as "exhibits" in the General Counsel's brief. The General Counsel filed a motion to strike the Respondent's reply brief, and the Respondent filed an opposition to that motion. I hereby grant the Respondent's request to file the reply brief and will consider it. I overrule the Respondent's objection to the material it described as "exhibits" included in the General Counsel's brief. The material in question consists of charts prepared by the General Counsel to illustrate how the General Counsel's proposed remedy would affect employees who received a pay increase as a consequence of the adoption of the new personnel system. The charts are responsive to a request that I made at the close of the hearing that the General Counsel address how a *status quo* remedy could be structured in circumstances where an alleged unilateral change produced a pay increase for employees.

As a remedy, the General Counsel seeks an order requiring a return to the *status quo ante* and the posting of a notice to employees. As to the *status quo ante* portion of the requested remedy, the General Counsel requests that the old personnel system be reinstated until bargaining is completed. This would involve, among other things, returning employees to the federal Competitive Service, but it would not, according to the General Counsel, require that pay raises given under the new system be rescinded.

The Respondent raises several alternative theories in its defense. It first asserts that the Act gave the president of SIPI sole and unfettered authority to develop a new personnel plan; consequently, SIPI had no obligation to bargain over the substance of the plan or its impact and implementation prior to development and approval. The Respondent also argues that its two CBAs permit it to implement changes in working conditions prior to bargaining, when an "exigency of the public business" exists; in the Respondent's view, the impending statutory deadline of October 31, 2000, for implementing any alternative personnel system constituted such an exigency and justified its unilateral implementation. The Respondent contends also that there was no obligation to bargain over the implementation of the new plan because the foreseeable adverse impact of the new plan was *de minimis*. Finally, the Respondent argues that the Union's bargaining proposals were insufficiently specific to trigger an obligation to bargain on the part of the Respondent.

The Respondent further argues that in the event that a violation is found, a *status quo ante* remedy would not be appropriate. It argues that if SIPI were required to retroactively rescind its new personnel system, it would be unable to reinstitute the plan later, as the October 31, 2000 deadline imposed by the Act would have expired. This would defeat the underlying purpose of the Act by depriving SIPI of the ability to change practices which Congress believed were hampering the accomplishment of SIPI's mission. Moreover, the Respondent introduced testimony from officials of SIPI concerning the technical and legal problems that would result from an order to rescind the new personnel system and then, possibly, after bargaining, reinstituting that system. Witnesses described the considerable time and expense that was required for SIPI to convert all employees from the Competitive to the Excepted Service in the fall of 2000; if the Respondent were ordered to transfer all employees back to the Competitive Service (and possibly back to the Excepted Service again after bargaining), this would be technically and legally

impossible and would unduly disrupt SIPI's operations and ability to accomplish its mission.

The Respondent's Bargaining Obligation under the Statute

There is no doubt that the new personnel manual implemented by the Respondent on October 29, 2000 made sweeping changes to conditions of employment at SIPI. The Authority has held that matters concerning conditions of employment are subject to the obligation to bargain when those matters are within the discretion of an agency and are not otherwise inconsistent with law. *Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office*, 53 FLRA 625, 648 (1997)("*PTO*"), citing *International Association of Machinists and Aerospace Workers, Franklin Lodge No. 2135 and U.S. Department of the Treasury, Bureau of Engraving and Printing*, 50 FLRA 677, 681-82 (1995), *aff'd mem. sub nom. Dep't of the Treasury v. FLRA*, 88 F.3d 1279 (D.C. Cir. 1996)("*BEP*"). However, an agency is not required to bargain over the exercise of its discretion when a law or regulation indicates that the agency's discretion is intended to be exercised only by the agency -- this is referred to by the Authority as "sole and exclusive" discretion. *PTO*, 53 FLRA at 648. *See also Illinois National Guard v. FLRA*, 854 F.2d 1396, 1401-02 (D.C. Cir. 1988).

The Authority resolves claims that an agency possesses sole and exclusive discretion by examining the plain wording and the legislative history of the statute relied on. *See, e.g.*, *BEP* at 691-92. The critical language in section 4(a) of the Act, providing that a demonstration project "shall not be limited by" any "inconsistent" provision of 5 U.S.C., is very similar to language in other statutes that the Authority has construed as granting sole and exclusive discretion. *See, e.g.*, *American Federation of Government Employees, Local 3295 and U.S. Department of the Treasury, Office of Thrift Supervision*, 47 FLRA 884, 893 (1993), *aff'd sub nom. American Federation of Government Employees, Local 3295 v. FLRA*, 46 F.3d 73, 76 (D.C. Cir. 1995); *Police Association of the District of Columbia and Department of the Interior, National Park Service, U.S. Park Police*, 18 FLRA 348, 353 (1985). Such language can be compared to other cases, in which the Authority has rejected agency claims of unfettered discretion: *American Federation of Government Employees, Locals 3807 and 3824 and U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 55 FLRA 1, 4 (1998); *National Federation of Federal Employees, Council of VA Locals and U.S. Department of Veterans Affairs, Washington,*

D.C., 49 FLRA 923 (1994); as well as the *BEP* and *PTO* cases, *supra*.

However, the Authority has also noted that a statute need not use any specific phrase or words in order to confer sole and exclusive discretion; rather, as noted above, it looks at the wording of the law and its legislative history to resolve this issue. *Association of Civilian Technicians, Texas Lone Star Chapter 100 and U.S. Department of Defense, National Guard Bureau, State of Texas Adjutant General's Department*, 55 FLRA 1226, 1229 n.7 (2000).

The Act and its Legislative History

The language used in the Act strongly indicates that the presidents of SIPI and Haskell were given unfettered discretion to formulate and implement new personnel management plans and that the institutions were exempted from the collective bargaining (and most other) obligations of title 5 of the U.S. Code. The strongest and most specific language to this effect is the previously-quoted section 4(a), but the context of the entire law supports those conclusions.

By stating that the "conducting of any such demonstration project shall not be limited by any lack of specific authority under title 5, . . . or by any provision of such title . . . which is inconsistent with the action," the drafters of the Act expressed their intent, in the broadest language possible, to exempt SIPI and Haskell from title 5. While such general exclusionary language, by itself, would likely suffice to convey this point, the drafters went further, by listing examples of provisions covered in title 5 that are exempted from the Act: these include most issues related to working conditions of SIPI employees, and even more specifically, "the methods of involving employees, labor organizations, and employee organizations in personnel decisions". The plain meaning of section 4(a) is that SIPI is free to develop and implement its own new personnel system, with or without the involvement of its employees and unions, regardless of any "inconsistent" requirements in title 5, including Chapter 71 thereof (the Statute).

Other portions of the Act support this plain meaning of section 4(a). Section 4(b), for instance, requires the president of SIPI, "[b]efore commencing a demonstration project", to develop a plan for the project "in consultation with the board of regents of the institution and such other persons or representative bodies as the president considers appropriate . . . ." The union certified to represent

SIPI's employees is certainly a "representative body" with which the Respondent would normally be required to bargain before implementing an entirely new personnel management plan, pursuant to the bargaining requirements of the Statute. *See, e.g., Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9, 10-11 (1981). But section 4 (b) of the Act allows SIPI's president to decide whom to consult, "as the president considers appropriate". This is a further indication that SIPI had no obligation to negotiate the new plan with the Union, or even to "consult" the Union, if the president did not consider it "appropriate." In other words, the president had sole and exclusive discretion to consult with the Union or not.

Section 4(c) of the Act, on the other hand, lists certain limitations on the substantive provisions of a demonstration project. A project may not waive any laws or rules relating to equal employment opportunity, Indian preference or veterans' preference; a project may not "impose any duty to engage in collective bargaining with respect to" the classification of positions; and a project may not "provide that any employee be required to pay dues or fees of any kind to a labor organization as a condition of employment." These latter two limitations imposed by the Act duplicate provisions in the Statute. Specifically, section 7103(a)(14) of the Statute excludes from the definition of "conditions of employment" and, by extension, from the obligation to bargain, matters relating to the classification of any position. *See, e.g., American Federation of Government Employees. Local 2031 and U.S. Department of Veterans Affairs Medical Center, Cincinnati, Ohio*, 56 FLRA 32, 34-35 (2000). Section 7102 of the Statute provides that employees have the right to form, join or assist any labor organization or refrain from such activity. Among other things, this provision of the Statute preserves employee rights to refrain from paying dues or comparable fees to labor organizations. *Cf. Service Employees' International Union, AFL-CIO, Local 556 and Department of the Army, Headquarters, U.S. Army Support Command, Fort Shafter, Hawaii*, 1 FLRA 563 (1979) (proposal for agency shop arrangement conflicts with section 7102). If the Act intended demonstration projects to be subject to the provisions of the Statute and to other portions of title 5, there would have been no need to list these particular limitations in section 4(c).

The legislative history of the Act confirms that the discretion given to SIPI to conduct a demonstration project was intended to be unfettered by most provisions of title 5, including the Statute. The House Report accompanying the legislation that became the Act stated that section 4(a)

"exempts the projects from title 5 provisions that are inconsistent with it." H. R. Rep. No. 105-700, pt. 1, at 6 (1998). The House Report also contained a minority report expressing opposition to the legislation because, among other things, "employee organizations would not have any input in the development of the demonstration projects." *Id.* at 12. The minority report also asserted that the legislation "would grant sole authority to the University president to determine the 'methods of involving . . . labor organizations . . . in personnel decisions,'" which would "severely weaken the rights and protections currently available to the universities' employees and their representative organizations." *Id.*

There was, however, a statement made during floor debate over H.R. 4259 (the bill that ultimately became the Act) which might be read to suggest that the Act did not curtail the applicability of any collective bargaining obligations that exist under the Statute. In this regard, during debate on the House floor, Rep. Cummings (Md.) voiced objections to H.R. 4259, asserting, among other things, that granting sole authority to the university presidents to determine the involvement of labor organizations would eliminate the rights and protections currently available to employees and their unions. 123 CONG. REC. H9640 (1998) (Respondent's Exhibit 3 at 1-3). Later in the debate, Rep. Snowbarger (Kan.), the sponsor of H.R. 4259, responded to Rep. Cummings' claims and asserted that "H.R. 4259 does not have any effect on current collective bargaining rights, and in addition, the legislation states that the current collective bargaining agreement will remain in effect until its completion . . ." *Id.* at H9641 (Respondent's Exhibit 3 at 4). I find it hard to fully reconcile the comments of Rep. Snowbarger with the language of the Act, but I do not interpret them to mean that the bargaining obligations of the Statute are fully applicable to demonstration projects under the Act. A more reasonable interpretation of his statement is that he believed that an incumbent union would have bargaining protections by virtue of the continuation of the collective bargaining agreements, even though SIPI would not be obligated to bargain with the Union concerning the contents of the demonstration project prior to implementation. The language of the Act (particularly section 4(a)) is simply too clear to be negated by debate comments as ambiguous as these.

Although I am unpersuaded that Rep. Snowbarger's statement supports a conclusion that the bargaining obligations imposed by the Statute apply to the adoption of demonstration projects under the Act, it raises another issue that bears on the question of SIPI's bargaining

obligation. Under section 4(h)(3)(D) of the Act, any CBAs in effect at the commencement of a demonstration project are to remain in effect (see footnote 8, *supra*, for text). Such preexisting CBAs may afford unions and employees some recourse in matters relating to the demonstration projects. If, for instance, the agreement obligates SIPI to bargain with the Union regarding changes in working conditions, how is that obligation enforced when SIPI is exempt from the Statute? In my opinion, whatever remedies are available to the Union under these contracts can not include remedies that are the creations of 5 U.S.C. chapter 71 (the Statute), from which SIPI has been exempted in order to conduct its demonstration project.

It might be argued that the two CBAs covering the employees at SIPI effectively reinstate the bargaining obligation that section 4(a) of the Act excuses SIPI from. Those two agreements contain provisions that address the obligation to bargain over proposed changes in working conditions. Article 6, section 6, of the contract between NCBIAE and BIA provides that the employer recognizes the union's right to negotiate proposed changes "in accordance with 5 USC Chapter 71." On its face, this provision incorporates the obligation to bargain that exists under the Statute. Article 2, section 5 of the CBA between NFFE and BIA provides that "Management shall negotiate with the appropriate level of recognition over any substantive change in personnel policy, procedure or matters affecting working conditions." Although there is no specific reference to the Statute in this latter contract provision, it certainly appears to extend a bargaining obligation on SIPI management.[13] It was because of such contractual provisions as these that Rep. Snowbarger apparently believed that the unions at SIPI and Haskell would retain a role in labor-management relations at the colleges. I agree that as long as the CBAs remain in effect, those contracts establish rights that may be legally enforceable in some manner; however, those voluntary agreements cannot confer on the FLRA jurisdiction that Congress expressly withdrew pursuant to the Act. It is my opinion that section 4(a), in conjunction with other portions of the Act, gives the Respondent sole and exclusive discretion to decide whether or not to bargain with the Union before implementing its new personnel system, and that the continued applicability of the CBAs did not negate or dilute that discretion.

In interpreting the language and legislative history of the Act, it is also important to note that pre-existing law

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13 The continuing effect, if any, of the NFFE contract after NFFE was decertified is not in issue in this case.

already permitted the Office of Personnel Management (OPM) to conduct demonstration projects to test new personnel management policies at Federal agencies, and that the framers of the Act expressly chose not to include the demonstration projects at SIPI and Haskell within that law. A comparison of the provisions of the Act with those of 5 U.S.C. chapter 47 (5 U.S.C. §§ 4701-4706) reveals many similarities and a significant difference. 5 U.S.C. § 4703 (a), like section 4(a) of the Act, permits OPM and agencies to act without regard to "inconsistent" provisions of title 5 in conducting demonstration projects.[14] Unlike the Act, however, section 4703 expressly requires agencies to consult or negotiate with an exclusive representative before employees in a bargaining unit can be included under any demonstration project.[15] The inclusion of subsection (f) in section 4703 suggests that if left unqualified, subsection (a) would exempt agencies from any provision of title 5 that requires negotiation over demonstration projects. In

[14] Section 4703(a) provides, in relevant part:

> Subject to the provisions of this section, the conducting of demonstration projects shall not be limited by . . . any provision of this title or any rule or regulation prescribed under this title which is inconsistent with the action, including any law or regulation relating to-
>
> . . .
>
> (7) the methods of involving employees, labor organizations, and employee organizations in personnel decisions[.]

[15] Section 4703(f) provides:

> (f) Employees within a unit with respect to which a labor organization is accorded exclusive recognition under chapter 71 of this title shall not be included within any project under subsection (a) of this section-
>
> (1) if the project would violate a collective bargaining agreement (as defined in section 7103 (8) of this title) between the agency and the labor organization, unless there is another written agreement with respect to the project between the agency and the organization permitting the inclusion; or
>
> (2) if the project is not covered by such a collective bargaining agreement, until there has been consultation or negotiation, as appropriate, by the agency with the labor organization.

contrast to Section 4703, the Act lacks a comparable limitation on the exemption from title 5 that section 4(a) of the Act grants. Indeed, it was precisely because of the lack of such bargaining protections to unions that Rep. Cummings opposed the Act as drafted and offered an amendment that would have subjected demonstration projects under the Act to the provisions of chapter 47 of title 5. H.R. Rep. No. 105-700, pt. 1, at 12. That amendment was rejected. *Id.*

For all of the reasons stated above, I conclude that the Act confers on the president of SIPI "sole and exclusive" discretion in developing its new personnel plan, and that the Respondent had no obligation under the Statute to bargain with the Union concerning the plan. The plain language of the Act and its legislative history leave little doubt on this point.

It might be argued that because SIPI did not identify the bargaining obligations of the Statute as authorities it chose to waive in the notices published in the Federal Register, SIPI violated the procedural requirements for invoking the exemption from the Statute that the Act affords. Section 4(b) of the Act requires that before commencing a demonstration project, the president of the institution involved will publish a plan that identifies, among other things, a specific citation to any provision of law which, if not waived, "would prohibit the conducting of the project." In May 2000, SIPI's Notice in the Federal Register indicated that employees would "no longer be covered by the Title 5 of the CFR," but it made no reference to collective bargaining.

I am not at all convinced, however, that section 4(b) requires that the Statute be explicitly identified in the notices published in the Federal Register. In this regard, section 4(a) exempts SIPI from provisions that would otherwise "limit" the conducting of the demonstration project. In contrast, section 4(b) requires identification of legal and regulatory provisions that would "prohibit" the conducting of the demonstration project. This difference in wording suggests that the requirement to identify any provisions being waived is not coterminous with the exemption granted in section 4(a). Rather, section 4(a), by its terms, appears to cover a broader range of legal and regulatory provisions than section 4(b) does. Moreover, although it could reasonably be expected that the bargaining obligations of the Statute would "limit" the conducting of SIPI's demonstration project, it could not be predicted in advance (for purposes of meeting the identification and publication requirements of section 4(b)) that it would operate to "prohibit" that action.

Additionally, I am extremely reluctant to interpret the Act in a manner that effectively invalidates the implementation of the demonstration project based on noncompliance with section 4(b) of the Act. The FLRA is not the agency responsible for administering the Act, and consequently, neither I nor the Authority would receive any deference in interpreting the Act. *See, e.g.*, *American Federation of Government Employees, Local 3295 v. FLRA*, 46 F.3d 73, 76 (D.C. Cir. 1995). Moreover, it does not seem to me that the Authority is authorized to review whether the Respondent fulfilled the requirements of the Act in implementing the demonstration project. Along these lines, it is well established that the FLRA is not authorized to sit in review of other agencies' regulations. *See, e.g.*, *American Federation of Government Employees, AFL-CIO v. FLRA*, 794 F.2d 1013, 1015 (5th Cir. 1986).

Conclusions

Based on the wording of the Act and its legislative history, I find that the Act vested SIPI with sole and exclusive discretion to conduct the demonstration project in a manner that is unfettered by the bargaining requirements of the Statute. In view of that discretion, I find that SIPI had no obligation to bargain prior to the development of the demonstration project or to develop the demonstration project within a time frame that would permit bargaining prior to its implementation. I further find that SIPI had no obligation to delay implementation beyond the deadline for commencing the demonstration project or losing the authorization to do so in order to allow bargaining. Consequently, I conclude that the Respondent did not violate the Statute as alleged.[16]

I want to make clear that I do not reach the question of what, if any, obligation SIPI may have to bargain on a post-implementation basis over matters relating to the demonstration project that would not limit the conducting of the demonstration project. The Respondent indicated it was willing to negotiate over the impact and implementation of the demonstration project once the plan was developed and as long as such bargaining did not prevent the Respondent from meeting the statutorily imposed deadline for the commencement of the project. It is unnecessary to determine in this case whether section 4(a) of the Act would also permit the Respondent to ignore the Statute's bargaining

[16] In view of these findings and conclusion, it is unnecessary to address the other arguments that the Respondent makes in its defense.

requirements (or its other provisions) after the project was implemented, because the violation alleged and argued in this case is that the Respondent failed to bargain *prior* to implementation. *See* General Counsel's Post-Hearing Brief at 12.

Based on the foregoing, I recommend that the Authority issue the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, D.C., December 12, 2001

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RICHARD A. PEARSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. DA-CA-01-0120 was sent to the following parties:

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

Melissa McIntosh, Esq. 7000 1670 0000 1175 0597
Counsel for the General Counsel
Federal Labor Relations Authority
525 S. Griffin Street, Suite 926, LB-107
Dallas, TX 75202-1906

Beatrice G. Chester, Esq. 7000 1670 0000 1175 0580
U.S. Department of the Interior
1849 C Street, NW., Rm. 6525
Washington, DC 20240

Bernadette Rolfs 7000 1670 0000 1175 0573
IEF/AFL, Local 4524
P.O. Box 2020
Farmington, NM 87499-2020

Dated: December 12, 2001
Washington, DC