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

| | |
|---|---|
| DEPARTMENT OF THE AIR FORCE<br>AEROSPACE MAINTENANCE AND<br>REGENERATION CENTER<br>DAVIS-MONTHAN AIR FOR BASE<br>TUCSON, ARIZONA<br><br>Respondent | |
| and<br><br>AMERICAN FEDERATION OF GOVERNMENT<br>EMPLOYEES, LOCAL 2924<br><br>Charging Party | Case No. DE-CA-02-0172 |

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 **OCTOBER 27, 2003**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, Suite 300
Washington, DC 20424-0001

_____

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 26, 2003
Washington, DC

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

MEMORANDUM DATE: September 26, 2003

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: WILLIAM B. DEVANEY
ADMINISTRATIVE LAW JUDGE

SUBJECT: DEPARTMENT OF THE AIR FORCE
AEROSPACE MAINTENANCE AND
REGENERATION CENTER
DAVIS-MONTHAN AIR FOR BASE
TUCSON, ARIZONA

Respondent

and Case No. DE-CA-02-0172

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924

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 transmittal form sent to the parties, and the service sheet. Also enclosed are the pleadings, motions, exhibits and briefs filed by the parties.

Enclosures

OALJ 03-48

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

| | |
|---|---|
| DEPARTMENT OF THE AIR FORCE<br>AEROSPACE MAINTENANCE AND<br>REGENERATION CENTER<br>DAVIS-MONTHAN AIR FOR BASE<br>TUCSON, ARIZONA<br><br>Respondent | |
| and<br><br>AMERICAN FEDERATION OF GOVERNMENT<br>EMPLOYEES, LOCAL 2924<br><br>Charging Party | Case No. DE-CA-02-0172 |

Major Douglas C. Huff
Thomas J. Burhenn, Esquire
For the Respondent

Matthew L. Jarvinen, Esquire
Sue T. Kilgore, Esquire
For the General Counsel

Mr. John Pennington
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

**DECISION**

Statement of the Case

A. PRELIMINARY MATTER

The charge in this case was filed December 20, 2001, and provided as follows:

> "On November 28, 2001, at Davis-Monthan AFB, Charles Fraley, Chief, Woodmill Branch, presented Dennis Robinson, who worked at Davis-Monthan AFB AMARC/LGLW with a letter of termination, effective the same day.
>
> "Management repudiated and continues to repudiate Article 27 (Alcoholism and Drug Abuse Programs) of

> the Collective Bargaining Agreement and has violated its statutory obligation not to repudiate agreements." (G.C. Exh. 1(a)).

On December 17, 2001, Mr. Robinson had signed a "Designation of Representative" and appointed Mr. Barry Gatcomb, then President of Local 2924 as his legal representative. On December 18, 2001, two days before the charge was filed, Mr. Gatcomb filed a Step 1 Grievance on behalf of Mr. Dennis Robinson (Case No. 1090) for his improper termination (Res. Exhs. 6, Attachment to Motion To Dismiss) and a Step 2 Grievance on January 17, 2002 (Res. Exh. 9, Attachment to Motion To Dismiss).

On April 29, 2002, a First Amended charge was filed which provided as follows:

> "AMENDED CHARGE: [First Paragraph identical to first paragraph of G.C. Exh. 1(a)]
>
> "Management repudiated and continues to repudiate Article 27 (Alcoholism and Drug Abuse Programs) of the Collective Bargaining Agreement and continues to violate its statutory obligation not to repudiate said Agreement. Management has since terminated Vernon Holloway, John Nimrichter, and Dana Clark, who were employed at Davis-Monthan AFB AMARC." (G.C. Exh. 1(b)).

On January 8, 2002, Mr. David Shanstrom, Chief Steward, filed a Step One Grievance on behalf of Mr. Dana Clark (Jt. Exh. 20). (See, also Jt. Exhs. 22, 23, 24, 25 and 26).

On March 27, 2002 (Tr. 28), Minnette Burges, Esquire, filed an Appeal Form with the Merit Systems Protection Board on behalf of John A. Nimrichter (Jt. Exh. 15); Appellant's Amended Corrected Submission (Jt. Exh. 16) and at the time of hearing herein, Mr. Nimrichter's MSPB case was set for hearing in December, 2002. On April 3, 2002, Mr. Vernon Holloway, represented by Don Awerkamp, Esquire, filed an Appeal Form with the Merit Systems Protection Board (Jt. Exh. 8) and a settlement was reached on May 2, 2002, which was entered on the record (MSPB Docket No. DE-0752-02-0232-I-1) for enforcement purposes (Jt. Exh. 9).

Both the original and First Amended charge were filed by Ms. Jean M. Southam, a National Representative of American Federation of Government Employees, District 12 which includes Local 2924 (Tr. 36-37). The Complaint issued July 16, 2002, did not name Mr. Dennis Robinson but did name Messrs. Clark, Nimrichter and Holloway.

On October 18, 2002, Respondent filed a Motion To Dismiss, received October 21, 2002. On October 25, 2002, General Counsel filed an Opposition To Respondent's Motion To Dismiss, received on October 31, 2002. Respondent's Motion To Dismiss asserted that the Complaint was barred by 5 U.S.C. § 7116(d), asserting that both the original and the amended charges, alleged, ". . . management violated Article 27 of the parties collective bargaining agreement by repudiating the agreement and terminating an employee. . . . The Complaint in paragraph 14 alleges that the Respondent in this case violated Article 27 of the parties collective bargaining agreement . . . The Complaint . . . alleges the Respondent repudiated the agreement [collective bargaining agreement] . . . when it terminated employees." (Respondent's Motion To Dismiss, pp. 1-2).

At the pre-hearing conference call on November 5, 2002, I stated that I did not agree with Respondent's position, as stated in its Motion To Dismiss, that the charges and the Complaint alleged a single and unified cause of action; that, rather, it appeared to me that the original charge stated two quite independent causes of action: (a) the termination of Dennis Robinson; and (b) Respondent's repudiation of Article 27 of the collective bargaining agreement; that this dichotomy was continued in the First Amended charge and in the Complaint. Ms. Southam, at the pre-hearing conference, stated that it was her intention in filing the charges to file an institutional, i.e., Union, charge that Respondent repudiated Article 27 of the collective bargaining agreement. I further indicated, at the pre-hearing conference, that it appeared to me that the individual claims, i.e., terminations of Messrs. Holloway, Nimrichter and Clark, were barred by § 7116(d) of the Statute; but because it appeared that the Union asserted a separate cause of action, namely, repudiation of Article 27 of the parties' Agreement, I was not going to grant Respondent's Motion To Dismiss.

At the hearing, I repeated that in the prehearing conference I had told Ms. Southam, who was the national representative who filed the charges in this case, ". . . that I would accept her claim that she intended to file an institutional grievance (sic) [charge], but that I would not consider as part of that institutional grievance (sic) [charge] the individual relief for the persons named in the complaint" (Tr. 10).

Section 7116(d) of the Statute provides as follows:

> "(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures." (5 U.S.C. § 7116(d)).

Mr. Robinson filed a grievance under the collective bargaining agreement before the original charge was filed; Mr. Clark filed a grievance before the First Amended Complaint naming him was filed; and Messrs. Nimrichter and Holloway filed appeals to the MSPB before the First Amended Complaint naming them was filed. Because each individual claim concerned a removal, sole jurisdiction rested in the MSPB under the first sentence of § 7116(d) or in the negotiated grievance procedure under the second sentence of § 7116(d). Department of Commerce, Bureau of the Census v. FLRA, 976 F.2d, 882, 888 (4th Cir., 1992); United States Small Business Administration, Washington, D.C. and Robert Wildberger, 51 FLRA 413, 422-423 (1995), petition to review proposed removal and threat complaint denied, disparate treatment remanded for consideration on the merits by the Authority, Robert W. Wildberger, Jr. v. FLRA, 132 F.3d 784, 790, 792-794 (D.C. Cir. 1998), on remand, 54 FLRA 837 (1988). Not only did the Authority lack jurisdiction to entertain removals from federal service, but in each case the employee had filed a grievance or an appeal to the MSPB before the charge naming each had been filed.

Indeed, at the hearing, Ms. Southam testified as follows:

> "Q Why did you file this charge, Ms. Southam?
>
> "A I filed the unfair labor charge because the Local leadership had made me aware of the fact that there had been a violation of the contract. The Article 27 of the collective bargaining agreement had been repudiated.
>
> "Q . . . What were you trying to accomplish by this charge?

"A The reason I filed the charge and what we hoped to accomplish was that the continuous, habitual violations of the contract would end.

"Q Were you looking to vindicate individual employee rights or union rights?

"A The reason that I filed the charge was because the union's institutional rights had been violated. It was my understanding that the individual employees had taken another route." (Tr. 37) (Emphasis supplied).

Even though Ms. Southam may not have intended the charge and First Amended charge to allege unfair labor practice charges on behalf of any individual employee, the Regional Director in issuing the Complaint obviously interpreted the charges as alleging two distinct and separate causes of action: one the institutional (Union) unfair labor practice allegation of repudiation of its Collective Bargaining Agreements as set forth in Paragraphs 14, 15 and 23 of the Complaint; the second individual unfair labor practices on behalf of Messrs. Clark, Nimrichter and Holloway as set forth in Paragraphs 16, 17, 18, 19, 20, 21, 22, and 24 of the Complaint. Because the decision of Respondent ". . . to remove unit employees Dana Clark, John Nimrichter, and Vernon Holloway . . . without complying with the contractual obligations. . . ." (Par. 22, was an issue which was properly raised in the grievance of Mr. Clark and in the MSPB appeals by Messrs. Holloway and Nimrichter, claims on their behalf are barred by § 7116(d) of the Statute.

The separate institutional (Union) unfair labor practice of repudiation of its Collective Bargaining Agreements, as set forth in Paragraphs 14 and 15 of the Complaint is not barred by § 7116(d). United States Small Business Administration, Washington, D.C., supra, at 422.

Testimony of Messrs. Holloway, Nimrichter and Clark, as well as other testimony concerning their removal from federal service was received solely as it bears on the Union's institutional assertion of repudiation of Collective Bargaining Agreements and will not be considered in vindication of individual rights for the reason, as stated above, jurisdiction of removals from federal service is vested exclusively in the MSPB or negotiated grievance procedure and may not be brought as unfair labor practices.

## FINDINGS

1. The American Federation of Government Employees, Local 2924 (hereinafter, "Union") is the exclusive representative of an appropriate bargaining unit of Respondent's employees.

2. The charge in this case was filed on December 20, 2001 (G.C. Exh. 1(a)); a First Amended Charge was filed on April 20, 2002 (G.C. Exh. 1(b)); and the Complaint issued on July 16, 2002 (G.C. Exh. 1(c)).

3. On September 15, 1986, President Reagan issued Executive Order 12564 (Jt. Exh. 3) entitled, "Drug-Free Federal Workplace". In his findings, President Reagan stated, in part, as follows:

> "The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace." (id.).

Section 1 of the Executive Order provided as follows:

> "Section 1. Drug-Free Workplace
>
> "(a) Federal employees are required to refrain from the use of illegal drugs.
>
> "(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.
>
> "(c) Persons who use illegal drugs are not suitable for Federal employment." (id.).

Section 2(a) of the Executive Order required each Executive Agency to develop a plan for achieving the objective of a dr ug free workplace, ". . . with due consideration of the rights of the government, the employee, and the general public." (id.). Section 2(b) provided as follows:

> "(b) Each agency plan shall include:
>
> "(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

"(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

"(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

"(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

"(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order." (id.).

Section 5 of the Executive Order provided as follows:

"Sec. 5. Personnel Actions.

"(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate. (Emphasis supplied).

"(b) Agencies shall initiate action to discipline an employee who is found to use illegal drugs, provided that such action is not required for an employee who:

"(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means:

"(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

"(3) Thereafter refrains from using illegal drugs.

"(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee

Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

"(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

"(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

"(2) Does not thereafter refrain from using illegal drugs. (id.). (Emphasis supplied).

4. On January 29, 1990, the Department of the Air Force's Civilian Drug Testing Plan was issued (Jt. Exh. 4). Paragraph 1. b. provided, in part, as follows:

"1. b. . . . The Department of the Air Force is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity. The intent of the policy is to offer a helping hand to those who need it, while sending a clear message that any illegal drug use is, quite simply, incompatible with Federal service." (id.). (Emphasis supplied).

Paragraph 8. m., provided as follows:

"m. Rehabilitation. Generally, a prolonged process, either on site, or off-site (inpatient or outpatient) whose goal is to restore the employee to a well functioning non-substance abusing employee. This process includes the learning of skills to help the person to remain substance free, and should include a period of aftercare, during which the person may be allowed to return to full duties." (id.).

Paragraph 8. q., provided as follows:

"q. Social Actions Office. The base-level Social Actions Office provides initial assessment of employee substance abuse problems and provides evaluation and referral service. The Social Actions Office is responsible

for referring employees to the appropriate treatment and rehabilitation facility, and to monitor their progress and encourage successful completion of the program. Also known as the Substance Abuse Control Program." (id.).

Paragraph 9., provided, in part, as follows:

> "Air Force Substance Abuse Control Program.
>
> "The Air Force Substance Abuse Control Program, as carried out by the Social Actions Office, plays an important role in preventing and resolving employee drug use by: demonstrating the Air Force's commitment to eliminating illegal drug use; providing employees an opportunity, with appropriate assistance, to discontinue their drug use; providing educational materials to supervisors and employees who have performance and/or conduct problems and making referrals for appropriate treatment and rehabilitation to track their progress and encourage successful completion of the program. . . . Specifically the Social Actions Office will:
>
> "a. Provide evaluation and referral to employees who self-refer for treatment or whose drug tests have been verified as positive, and monitor the employees' progress through treatment and rehabilitation.
>
> "b. Provide needed education and training to all levels of the Air Force on types and effects of drugs, symptoms of drug use and its impact on performance and conduct, and related treatment, rehabilitation, and confidentiality issues.
>
> . . . ." (id.).

Paragraph 10. a., provided, in relevant part, as follows:

> "Referral and Availability.
> a. Any employee found to be using drugs will be referred to the Social Actions Office. That office will be administered separately from the testing program, and will be available to all employees without regard to a finding of drug use. . . ." (id.) (Emphasis supplied).

Paragraph 11., provided as follows:

"Leave Allowance. Employees may be allowed up to one hour (or more as necessitated by travel time) of excused absence for each counseling session, up to a maximum of three hours during the assessment/referral phase of rehabilitation. Absences during duty hours for rehabilitation or treatment must be charged to the appropriate leave category according to law and Air Force leave regulations." (id.).

Paragraph 21., provided, in part, as follows:

"Social Actions Substance Abuse Control Officer (SACO).
The SACO will:

"a. Provide substance abuse evaluation and referral services to all employees referred by their supervisors or on self referral, and otherwise offer employees the opportunity for substance abuse counseling and rehabilitation through referral agencies.

. . .

"e. Monitor the progress of referred employees during the rehabilitation program; communicating with supervisors in the following circumstances if the employee has signed a consent statement providing for the release of information:

"(1) At each phase of program completion (in-patient/outpatient, follow up).

"(2) The employee's failure to complete or successfully progress through the program.

. . . ." (id.)

Paragraph 27 provides that supervisors shall, inter alia:

"(3) Refer employees to Social Actions for assistance in obtaining counseling and rehabilitation, upon a finding of illegal drug use.

"(4) Initiate appropriate disciplinary action upon a finding of illegal drug use, in coordination with the CCPO.

. . . ." (id.)

Paragraphs 35., 36., 37. and 38., provide as follows:

"35. Mandatory Administration Actions. An employee found to use illegal drugs will be referred for substance abuse counseling and rehabilitation, and, if the employee occupies a TDP, must not be permitted to remain in that position. At the discretion of the activity commander, however, and as part of rehabilitation, an employee may return to duty in a TDP if the employee's return would not endanger public health, safety, or national security.

"36. Range of Consequences:

"a. The severity of the disciplinary action taken against an employee found to use illegal drugs will depend on the circumstances of each case, and will be consistent with the Executive Order, and includes the full range of disciplinary actions, including removal. The supervisor will initiate disciplinary action against any employee found to use illegal drugs except that such action is not initiated against an employee who voluntarily admits to illegal drug use during the 30 or 60 day notice period and obtains counseling or rehabilitation and thereafter refrains from using illegal drugs.

"b. The following disciplinary action must be initiated and be consistent with the requirements of any applicable collective bargaining agreement, and the Civil Service Reform Act and other statutes, and Air Force and DOD policy. The appropriate management official may consult with and inform the security officer when initiating disciplinary action. Actions may include any of the following measures:

"(1) Reprimanding the employee in writing.

"(2) Placing the employee in an enforced leave status.

"(3) Suspending the employee for 14 days or less.

"(4) Suspending the employee for 15 days or more.

"(5) Suspending the employee until the employee successfully completes rehabilitation or until the agency determines that action other than suspension is more appropriate.

"(6) Removing the employee from service."

"37. Initiation of Mandatory Removal From Service:

"a. The agency will initiate action to remove an employee for:

"(1) Refusing to obtain counseling or rehabilitation through a rehabilitation program as required by the Executive Order after having been found to use illegal drugs.

"(2) Having been found not to have refrained from illegal drug use after a first finding of illegal drugs.

"(3) Having been found to have altered or attempted to alter a urine specimen or substitute a specimen for their own or that of another employee.

"b. All letters of proposal and final decision must be coordinated according to AFR 40-750."

"38. Refusal to Take Drug Test When Required:

"a. An employee who refuses to be tested when so required will be subject to the full range of disciplinary action, including removal.

"b. No applicant who refuses to be tested will be extended an offer of employment or placement into a TDP." (id.).

Paragraph 39., provided, in part, as follows:

"Voluntary Referral:

"a. Under Executive Order 12564, the Air Force is required to initiate action to discipline

any employee found to use illegal drugs in every circumstance except one. If an employee (1) voluntarily admits his or her drug use; (2) completes counseling or rehabilitation; and (3) thereafter refrains from drug use, such discipline 'is not required'.

"(1) Because the Order permits an agency to create a 'safe harbor' for an employee who meets all four of the following conditions, the Air Force has decided to create such a 'safe harbor' and will not initiate disciplinary action against employees who self-identify during the 60 and 30 day notice period. However, if the employee occupies a position requiring access to classified information, the provisions of AFR 205-32 still apply.

"(2) A fundamental purpose of the Air Force Civilian Drug Testing Plan is to assist employees who themselves are seeking treatment for drug use. For this reason, the Air Force will not take final disciplinary action against any employee who meets all four of these conditions:

"(a) Voluntarily identifies himself/herself as a user of illegal drugs prior to being identified through other means.

"(b) Obtains counseling or rehabilitation through Social Actions.

"(c) Agrees to and signs a last chance or statement of agreement.

"(d) Thereafter refrains from using illegal drugs.

"(3) Since the key to this provision's rehabilitative effectiveness is an employee's willingness to admit his or her problem, this provision will not be available to an employee who is asked to provide a urine sample when required, or who is found to have used illegal drugs pursuant to paragraph 34 and who thereafter requests protection under this provision.

"b. This self-referral option allows any employee to step forward and identify himself/herself as an illegal drug user for the purpose of entering a drug treatment program. . . ." (id.).

Paragraph 59., provided, in part, as follows:

"Opportunity to Justify a Positive Test Result.

"a. . . . The MRO must review all medical records made available by the individual when a confirmed positive test could have resulted from legally prescribed medication. . . .

. . . ." (id.).

5. On December 16, 1991, the Union and Respondent entered into the "Air Force Civilian Drug Testing Agreement Between Davis-Monthan Air Force Base and AFGE Local 2924" (Jt. Exh. 2) (hereinafter referred to as, "Local Drug Agreement). An Addendum was entered into on May 3, 1996, and a further Addendum was entered into on April 1, 1998 (id.) Section 6 of the Local Drug Agreement provides, in part, as follows:

"Notification to Employees

. . .

"d. The results of a verified positive drug test may result in a number of management decisions or options; these may include, but are not limited to, leaving the affected employees in their assigned positions, temporarily assigning such employees to other duties or positions, placing employees on appropriate leave, and taking any other actions consistent with management rights. Employees who are assigned to other position(s) or granted appropriate leave may be returned to their original position if it is determined by management that the employee can satisfactorily perform the duties of the position and the employee's return does not endanger public health, safety, or national security. (Emphasis supplied).

. . . ." (id.).

Section 9 of the Local Drug Agreement provides as follows:

"Counseling and Rehabilitation

"Employees whose tests have been verified positive will be notified in writing to report to Social Actions for evaluation and appropriate referral for counseling and/or rehabilitation. Employees will be informed of the consequences should they refuse counseling or rehabilitation.

"a. The Employer will retain employees in a duty or approved leave status while undergoing rehabilitation. If placed in a non-duty status, the employee will normally be returned to duty after successful completion of rehabilitation. At the discretion of the activity commander, an employee may return to duty in a TDP, including the TDP formerly occupied by the employee, if the employee's return would not endanger public health, safety or national security." (id.) (Emphasis supplied).

Section 12 of the Local Drug Agreement provides, in part, as follows:

"Reasonable Accommodations

"If the report is positive and employee does not wish to challenge its findings, the Employer will make reasonable accommodations for the employee's drug problem by providing him/her access to a drug treatment and rehabilitation program. If the employee chooses to participate in the program, the employee will be subject to unannounced testing following completion of such a program for a period of one (1) year.

. . . ." (id.).

Section 13 of the 1998 Addendum provides, in part, as follows:

"Verification Interview with MRO

"Replace Section 13 in current agreement as follows:

"a. . . . The MRO or licensed physician at the Base Medical Facility will contact the employee to notify of a positive test result and will take into consideration relevant medical information

pertaining to legitimate drug use by the employee concerning a positive test result.

"b. After initial notification interview of a positive test result, the employee may provide any medical evidence within ten days of the initial notification to justify the positive result. . . . The MRO will consider situations beyond the employee's control. Any medical information provided shall be included as part of the record and/or findings of the Base MRO. Copies of verified legally prescribed prescriptions will also be acceptable.

. . . ." (id.).

Section 15 of the Local Drug Agreement provides as follows:

"Safe Harbor

"The Employer agrees to issue a 30-day notice letter informing bargaining unit members of the availability of drug counseling and referral service to which the employee can voluntarily submit during this notice prior to testing without reprisal." (id.).1

Section 20 of the Local Drug Agreement provides as follows:

"Requested Information Rights

"In connection with a positive test result, the Employer agrees to provide, upon written request, to the employee or designated Union representative, the Litigation Support Package (LSP), identified in the laboratory service contract." (id.).

6. Article 27 of the parties' Collective Bargaining Agreement, signed November 5, 1998 (G.C. Exh. 1), provides, in part, as follows:

---

1 Section 11 seems a bit at odds with Section 15. Section 11 states: "The employer will not coerce or require employees to participate in voluntary programs established under Section 3(b) of E.O. 12564. Employees who volunteer for the random drug testing program will not receive preferential treatment by the Employer." Section 15, on the other hand, states that ". . . the employee can voluntarily submit during this notice prior to testing without reprisal."

"ALCOHOLISM AND DRUG ABUSE PROGRAMS"

"*Section 1*. For the purpose of this Article, alcoholism and drug abuse are defined as illnesses in which the employee's job performance is impaired as a direct consequence of the abuse of alcohol or drugs.

"*Section 2*. The Union and the Employer jointly recognize alcoholism and drug abuse as treatable illnesses; therefore, employees having these illnesses will receive the same careful consideration and offer of assistance that is extended to employees having any other illness or health problem. Employees participating in drug or alcohol abuse rehabilitation programs may request sick, annual, or leave without pay the same as they would for medical purposes. If a professional from a rehabilitation program makes a request, in writing, on behalf of the employee for leave, such leave should be granted. Failure to successfully complete a rehabilitation program which results in acceptable work performance, after a reasonable period of time, will result in disciplinary procedures. (Emphasis supplied).

"*Section 3*. The ultimate objective of the drug and alcohol abuse program will be to rehabilitate the employee through counseling, referral for medical assistance, and other such means as may be available to aid in the recovery of the employee. Referral for diagnosis and acceptance of treatment should in no way jeopardize an employee's job security or promotional opportunities. Participation in the Drug and Alcohol Abuse Prevention and Control Program, and any information resulting from such participation, including medical records, will be kept in strict confidence in accordance with applicable laws and regulations. (Emphasis supplied).

. . . ." (id.).

7. Respondent's, "Notice of Employee Requirement Employee Assigned to Testing Designated Position (TDP) (Res. Exh. 2) provides, in part, as follows:

"2. As a mandatory requirement for your continued employment in this TDP, it is required that you (a) refrain from the use of illegal drugs and (b) if requested, submit to urinalysis testing.

. . .

"5. If you refuse to furnish a urine specimen as directed, or if illegal drug use is detected through a verified positive test result, you will have failed to meet a mandatory employment requirement for this sensitive positive. If you refuse to furnish a urine specimen, you will be subject to the full range of disciplinary action, including removal. If you are found to use illegal drugs, you will be removed from the TDP and you will be separated from the Federal service unless you agree to participate in a counseling or rehabilitation program. However, if you accept counseling or rehabilitation, you still may be subject to disciplinary or adverse action and will be placed in a non testing designated position. . . . (Emphasis supplied).

"6. If you believe you may have a drug problem, you are encouraged to voluntarily seek counseling or referral services by contacting the base Drug Demand Reduction Program Manager, Bldg 4220, phone 228-5507. If you do self-identify and agree to the 'safe harbor' provisions described in the civilian drug testing program during this 30-day notice period, you will not be subject to disciplinary action for past use.

. . . ." (id.).

Each employee in a TDP was required to sign this form.

8. Ms. Southam testified that a meeting was held on November 29, 2001, with Colonel Hendricks, then the 355th Support Group Commander (Tr. 136, 296) and Mr. George Rodriguez, labor-management specialist, was also present for management and with her was the Union's Executive Board: President Barry Gatcomb, Vice-President, Leona Bull, Treasurer, Anita Lopez, Chief Steward David Shanstrom and Trustee, Willie Thomas. Ms. Southam said Mr. Vernon Holloway also attended (Tr. 39).[2] Ms. Southam stated,

---

[2] Neither Mr. Shanstrom nor Mr. Thomas placed Mr. Holloway at the meeting and I rather believe Ms. Southam was in error in saying he was present. Mr. Holloway testified and no reference was made to his having attended the meeting with Colonel Hendricks.

> "A When I talked about the violation of Article 27, he (Col. Hendricks) kind of looked at me and got a little bit of a frown on his face. And he said, 'My policy is zero tolerance.'
>
> "And looked at him and I said, 'Well, regardless of your police or your opinion, we have a collective bargaining agreement.'
>
> "And he -- you know, his face got a little twisted up and he said, 'I don't care about your contract.'
>
> "And I reminded him that the contract was between Davis-Monthan Air Force Base and AFGE Local 2924. It wasn't just the union's contract. It was an agreement that the parties sat down and signed their names to. And that meeting ended fairly shortly after that discussion." (Tr. 42).

Mr. Shanstrom fully confirmed the meeting with Colonel Hendricks, but was not certain of the date (Tr. 143). Mr. Shanstrom testified that,

> "Colonel Hendricks took the position that he appreciated the union, that he thought we were doing good work. But with the subject of Article 27, rehabilitation and drug and alcohol abuse, he had told us he had no truck with this. There would be zero tolerance in that area." (Tr. 139-140).

Mr. Shanstrom also testified that in March, 2002, in a third Step Grievance meeting with Colonel Hendricks on Mr. Clark's grievances,

> "A I had asked did he (Col. Hendricks) allow for any rehabilitation in this process, and he said, 'Military view is zero tolerance.'" (Tr. 138)

On cross-examination, Mr. Shanstrom further elaborated,

> "At the meeting I had on the Step 3 grievance I asked Colonel Hendricks how he felt about keeping personnel, and he said to the effect that if they were . . . found using, that they would be ousted. . . ." (Tr. 144).

Mr. Thomas also confirmed the meeting but said it was held in late October or early November, 2001 (Tr. 113). Mr. Thomas stated,

> "And Colonel Hendricks went on to say that the Air Force has a zero tolerance for drugs . . .
>
> "A Hew (sic) was saying that he had a zero tolerance for drugs, the Air Force policy. And the policy that Jean, Mrs. Southam, was trying to present, he didn't think it would work because of the zero policy they had." (Tr. 114).

Mr. Thomas said Ms. Southam brought up the contract, but Colonel Hendricks, ". . . didn't respond directly to that proposal that she had brought up." (id.), but he did say something in the effect, ". . . he had airmen working on multi-million dollar aircraft and he didn't want a drug user working on aircraft." (Tr. 114-115).

Colonel Hendricks at the time of the hearing had been transferred to Eglin Air Force Base and did not testify. Mr. Rodriguez had been present in the hearing room (Tr. 40) but was not called as a witness. I found Ms. Southam to be a credible witness and her testimony, in substance, was corroborated by Messes. Shanstrom and Thomas, whom I also found to be credible witnesses. Accordingly, I find that Colonel Hendricks said that he had zero tolerance for drugs and notwithstanding rehabilitation, drug users would be ousted.

9. Mr. Holloway testified that he was ordered to report to a Doctor Flowers (inasmuch as Section 13 of the 1998 Addendum to the Local Drug Agreement states, "The MRO or licensed physician at the Base Medical Facility will contact the employee to notify of a positive test result . . . ." (Jt. Exh. 2), Dr. Flowers acted as the MRO under Section 13, (See the January 18, 2002, Notice of Proposed Removal issues to Mr. Nimrichter which, in paragraph 4 identifies Dr. Flowers as the local MRO for Davis-Monthan AFB (Jt. Exh. 12)), Section 13 further provides that the MRO, ". . . will take into consideration relevant medical information pertaining to legitimate drug use by the employee concerning a positive test result" (Section 13 a.) And the MRO will consider situations beyond the employee's control. Any medical information shall be included as part of the record and/or findings of the Base MRO. Copies of verified legally prescribed prescriptions will also he acceptable." (Section 13 b.)

Nevertheless, when Mr. Holloway took a letter from his primary doctor and a letter from his dermatologist attesting to their prescription of hemp products for a skin problem, Dr. Flowers told Mr. Holloway he didn't want to see them. (Tr. 68).

10. Mr. Nimrichter was informed on October 11, 2001, that he had tested positive for marijuana. Although he entered a drug rehabilitation program, on November 29, 2001, he was given a Notice of Proposed Removal (Jt. Exh. 10), which was withdrawn on January 18, 2002 (Jt. Exh. 11) (id.) and a new Notice of Proposed Removal was issued to him on the same day, January 18, 2002 (Jt. Exh. 12) (id.). While it was stipulated that Mr. Nimrichter had completed, successfully, his rehabilitation before his removal, effective March 1, 2002 (Tr. 102; Jt. Exh. 14), he had not completed the rehabilitation program when either the first notice (November 29, 2001) or the second notice of proposed removal issued (Res. Exh. 1). Indeed, as the letter from Contact Behavioral Health, dated January 24, 2002, stated, he then had five weeks of the rehabilitation to complete.

Both his immediate supervisor, Mr. Hernandez, and the Branch Chief, Mr. Nolan, each assured Mr. Nimrichter he was doing the right thing by entering rehabilitation and neither believed he would be removed (Tr. 84, 87, 88) for, as Mr. Hernandez told him, ". . . management and the Union had an agreement that covered these circumstances" (Tr. 84), and Mr. Hernandez produced the Agreement and opened it to Article 27 (Tr. 84, 85).

Mr. Nimrichter's clearance to work in a TDP was removed and he was detailed to work at Spray Lat, a non-TDP job, where he worked until he was terminated as of March 1, 2002 (Tr. 90; Jt. Exh. 14).

11. Mr. Clark's September 26, 2001, drug test was verified as positive for marijuana on October 24, 2001, and on November 16, 2001, a Notice of Proposed Removal issued to Mr. Clark (Jt. Exh. 17). Upon notification of the positive drug test, Mr. Clark's clearance for a TDP job was withdrawn and he also was detailed to Spray Lat.

Mr. Clark had enrolled in rehabilitation with Contact Behavioral Health Sciences (Tr. 119) and had not completed the program when he was terminated on December 17, 2001 (Jt. Exh. 19; Tr. 218).

12. Mr. Warren Kossman, now Personnel Management Specialist, Headquarters, Air Force, and from 1973 through 1996 was at Davis-Monthan holding various positions in

AMARC, went to Personnel as an Employee Relations Specialist in 1987, and later was Chief of the Workforce Effectiveness Section (Tr. 161), stated that,

> "Compliance with the local agreement is mandatory." (Tr. 189, 190).

Mr. Kossman also said that the local agreement would take precedence over the Air Force Drug Testing Plan (Tr. 190).

Mr. Kossman was a member of the negotiating team that negotiated the Local Drug Agreement (Tr. 162). He stated that the provision of Section 9 (a) of the Local Drug Agreement, "At the discretion of the activity commander, an employee may return to duty in a TDP, including the TDP formerly occupied by the employee . . . " (Jt. Exh. 2) was, "As part of rehabilitation." (Tr. 192). He also stated that rehabilitation was a key provision of the Executive Order (Jt. Exh. 3) and was a key part of the Air Force Plan (Jt. Exh. 4) (Tr. 192, 194).

Ms. Kossman also testified that if an employee goes through rehabilitation successfully it would be unreasonable to remove that individual absent other circumstances (Tr. 201, 204).

13. Ms. Karen Young retired in January, 2001, (Tr. 266) and prior to her retirement worked for the Air Force for 35 years. She served three years overseas at Ramstein and Simbok, returning to Davis-Monthan in 1993 at which time she held the position of Employee Relations Specialist, then Chief of Employee Management Relations and her last three years as Civilian Personnel Officer (Tr. 250). Ms. Young was a member of the negotiating team that negotiated the Collective Bargaining Agreement (Jt. Exh. 1; Tr. 255). Ms. Young said that an employee found to have tested positive for drugs had to enter a rehabilitation program or they could be subject to immediate removal and that in negotiating Article 27 of the Collective Bargaining Agreement, they discussed whether the employee, ". . . would be on leave, would take leave, or would, you know, be excused absence . . ." (Tr. 258). Ms. Young said the policy of the Air Force is, ". . . we want to rehabilitate employees . . . and I think our record has shown that we have. But in some cases . . . there are no other positions on the base which we can place them in. . . ." (Tr. 263-264, see, also, 274).

Ms. Young stated that in her years at Davis-Monthan, to her knowledge no activity commander had ever exercised

discretion to return an employee found to have used illegal drugs to a TDP position (Tr. 271-272).

14. Ms. Vyna Lindsay, who has been employeed by the Air Force for 29½ years and has been at Davis-Monthan three years and is the current Civilian Personnel Officer, having succeeded Ms. Young in January, 2001 (Tr. 293). She testified that the Collective Bargaining Agreement takes precedence over the Air Force Instruction (Res. Exh. 5) (Discipline and Adverse Actions).

**CONCLUSIONS**

Rehabilitation is a key consideration in the Executive Order, the Air Force's Civilian Drug Testing Plan, the Local Drug Agreement and in Article 27 of the Collective Bargaining Agreement. Thus, Section 2(b)(2) of the Executive Order provides that each agency plan shall include,

> "(2) Employee Assistance Programs emphasizing high level direction, counseling, referral to rehabilitation . . . ." (Jt. Exh. 3)

and Section 5(c) of the Executive Order provides, in part,

> "(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. . . ." (Emphasis supplied) (id.)

Section 8 m. of the Air Force's Civilian Drug Testing Plan provides,

> "m. Rehabilitation, Generally, a prolonged process, either on site, or off-site (inpatient or outpatient) whose goal is to restore the employee to a well functioning non-substance abusing employee. This process includes the learning of skills to help the person to remain substance free, and should include a period of aftercare, during which the person may be allowed to return to full duties." (Emphasis supplied) (Jt. Exh. 4)

Section 12 of the Local Drug Agreement provides:

> If the report is positive . . . the Employer will make reasonable accommodations for the employee's drug problem by providing him/her access to a drug

treatment and rehabilitation program. . . ." (Jt. Exh. 2)

Article 27 of the Collective Bargaining Agreement provides, in part, as follows:

"*Section 1.* For the purpose of this Article, alcoholism and drug abuse are defined as illnesses . . . .

"*Section 2.* The Union and the Employer jointly recognize alcoholism and drug abuse as treatable illnesses . . . Employees participating in drug or alcohol abuse rehabilitation programs may request sick, annual, or leave without pay . . . . If a professional from a rehabilitation program makes a request, in writing, on behalf of the employee for leave, such leave should be granted. . . .

"*Section 3.* The ultimate objective of the drug and alcohol abuse program will be to rehabilitate the employee . . . Referral for diagnosis and acceptance of treatment should in no way jeopardize an employee's job security or promotional opportunities. . . ." (Jt. Exh. 1) (Emphasis supplied).

A. Repudiation of Section 9 (a) of the Local Drug Agreement

Section 9 (a) provides:

"a. The Employer will retain employees in a duty or approved leave status while undergoing rehabilitation. If placed in a non-duty status, the employee will normally be returned to duty after successful completion of rehabilitation. At the discretion of the activity commander, an employee may return to duty in a TDP, including the TDP formerly occupied by the employee, if the employee's return would not endanger public health, safety or notional security." Jt. Exh. 2, Section 9(a)) (Emphasis supplied).

This provision is clear and wholly unambiguous. It may well be, as Mr. Kossman stated, that the first sentence was intended to incorporate the essence of Paragraph 11 of the Air Force's Drug Testing Plan; but it does both more and less then Paragraph 11. It does less in that Paragraph 11 provides,

> ". . . Employees may be allowed up to one hour (or more as necessitated by travel time) of excused absence for each counseling session, up to a maximum of three hours during the assessment/ referral phase of rehabilitation. Absence during duty hours for rehabilitation or treatment must be charged to the appropriate leave category . . . ." (Jt. Exh. 4, Paragraph 11).

Section 9(a) makes no reference to excused absence for counseling.

But Section 9 (a) does more than Paragraph 11 by specifically directing that

> "The Employee will retain employees in a duty or approved leave status while undergoing rehabilitation."

Respondent sought to create a "red herring" by asserting that the Union claimed this Section was a "safe harbor" provision, i.e., that employees undergoing rehabilitation were immune from discipline. This is a figment of Respondent's imagination. Mr. Shanstrom made it clear that the Union did not question management's right to impose discipline under Section 9 (Tr. 148, 149), except that Respondent could not remove an employee undergoing rehabilitation (Tr. 149).

It is mandatory under the Executive Order that employees who test positive for drugs be removed from sensitive positions; but Section 5 (c) of the Executive Order (Jt. Exh. 3, Sec. 5 (c)) contains an implied imperative that an employee be restored to a sensitive job (TDP) upon the successful completion of rehabilitation. Thus, Section 5(c) provides,

> "(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistant Program. . . ." (id.) (Emphasis supplied.)

The following sentence plainly applies to employees who have not completed rehabilitation, i.e., during rehabilitation. Thus, the following sentence provides,

> "However, as part of a rehabilitation or counseling program, the head of an Executive

> agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security." (id.).

The Air Force, obviously, did not like the first sentence of Section 5 (c) of the Executive Order and in Paragraph 35 of the Air Force Drug Testimony Plan (Jt. Exh. 4, Paragraph 35) included only the substance of the second sentence. In the Local Drug Agreement, the Union was euchred out of the positive requirement of the first sentence of Section 5 (c) of the Executive Order and the language of Paragraph 35 of the Air Force Drug Testimony Plan was adopted. Thus, the last sentence of Section 9 a. of the Local Drug Agreement provides,

> "At the discretion of the activity commander, an employee may return to duty in a TDP, including the TDP formerly occupied by the employee, if the employee's return would not endanger public health, safety or national security." (Jt. Exh. 2, Section 9. a.)

Nevertheless, while it is discretionary that an employee be returned to duty in a TDP, the intent of the Executive Order, the Air Force Drug Testing Plan, the Local Drug Agreement and the Collective Bargaining Agreement was to restore employees to duty after successful rehabilitation and, certainly, it was not intended that there should be a flat refusal across the board to return any employee to a TDP position after successfully completing rehabilitation as Respondent has done. Ms. Young testified that in her years at Davis-Monthan, to her knowledge, no employee had ever been returned to a TDP position after rehabilitation and Colonel Hendricks had made it clear that, notwithstanding rehabilitation, the "Military view is zero tolerance" and if they were found using drugs they would be ousted. Indeed, Colonel Hendricks stated that he did not care about the Local Drug Agreement.

As stated above, Section 9 (a) of the Local Drug Agreement mandates that the Employee will retain employees in a duty or approval leave status while undergoing rehabilitation. Clearly, if in rehabilitation, the Employer shall not remove, or attempt to remove, the employee. His status, as in duty or approval leave, is fixed for the period of rehabilitation. Nevertheless, Respondent on November 29, 2001, gave Mr. Nimrichter notice of proposed removal, notwithstanding that Mr. Nimrichter was in a Rehabilitation Program and gave him a second notice of

proposed removal on January 24, 2002, when, even then, he had five weeks of rehabilitation to complete. Although Mr. Nimricher was not removed until after he completed rehabilitation and remained in a duty status (Spray Lat) until his removal, the issuance of notices to remove him during successful, on-going, rehabilitation violated Section 9 (a) of the Local Drug Agreement.

Mr. Clark had promptly entered rehabilitation but was removed before completing rehabilitation, although he, too, had remained on duty in Spray Lat until his removal. Beyond doubt, his removal before completing rehabilitation violated Section 9 (a) of the Local Drug Agreement.

Retention of employees during rehabilitation and without the threat of removal is critical for another reason. Employees who successfully complete rehabilitation then possess the rights of all employees and in a RIF, which Respondent was exercising, including the right to "bump" into any job for which they are qualified and for which they have longer seniority. It is not, as Respondent asserted, whether there are vacant non-TDP positions (See, for example: Jt. Exhs. 5, 7, 17, 19); but, rather, whether the employee has sufficient seniority to bump into an occupied non-TDP position. Messrs. Nimrichter and Clark were detailed to Spray Lat and an employee with 20 or more years seniority had a very high probability of having seniority to bump into an occupied position, if not in Spray Lat, then elsewhere on the Base. Employees with less seniority may have correspondingly less probability of having seniority to bump into an occupied position, but the opportunity to exercise seniority must be preserved and recognized. Moreover, as stated above, employees who successfully complete rehabilitation must genuinely and realistically be considered for return to their former, or similar, TDP positions.

B. Repudiation of Section, 13(b) and (c) of the 1998 Addendum to its Local Drug Agreement

Section 13 b. of the 1998 Addendum (Jt. Exh. 2), provides in part,

> "b. . . . The MRO will consider situations beyond the employee's control. Any medical information provided shall be included as part of the record and/or findings of the Base MRO. . . ." (Emphasis supplied).

and subsection c of Section 13, provides, in part, as follows,

"c. The Base MRO will make notes concerning the verification process on the back of the MRO's copy of the UCCF and should include reasons for rejecting any employee's documentation . . . The Base MRO will send his/her findings to the MRO of the PHS . . . ." (id.) (Emphasis supplied).

Despite the mandatory duty of the MRO to consider situations beyond an employee's control, to include any medical information provided as part of the record and the mandatory obligation to state any reasons for rejecting any employee's documentation, Dr. Flowers, the Base MRO refused to accept Mr. Holloway's proffered letters from his primary care doctor and from his dermatologist attesting to their prescription of hemp products for a skin problem. Not only did he not accept the proffered medical information, he did not include it as part of the record; did not state any reason for rejecting the proffered documentation; and his findings, including reasons for rejecting the proffered medical documentation was not sent to the MRO of the PHS. This is a vital part of the Local Drug Agreement and Dr. Flowers' complete flaunting of the provisions constitute repudiation of Section 13 of the 1998 Addendum.

C. Repudiation of Article 27 of the Collective Bargaining Agreement.

Section 1 of Article 27 of the Collective Bargaining Agreement (Jt. Exh. 1, Article 27), provides that, ". . . alcoholism and drug abuse are defined as illnesses . . .."; Section 2., provides, in part that, "The Union and the Employer jointly recognize alcoholism and drug abuse as treatable illnesses; therefore, employees having these illnesses will receive the same careful consideration and offer of assistance that is extended to employees having any other illness or health problem . . . ." (id); and Section 3. provides, in part, that, "The ultimate objective of the drug and alcohol abuse program will be to rehabilitate the employee . . . . Referral for diagnosis and acceptance of treatment should in no way jeopardize an employee's job security or promotional opportunities. . . ." (id.)

Plainly, for reasons already set forth above, Respondent has wholly rejected the concept of rehabilitation of the employee to return him, or her, to duty; has stigmatized employees found to test positive for drugs; has penalized such employees by an absolute refusal to return any employee, after successful rehabilitation, to a TDP position; has failed and refused to accord such employees

seniority rights, after rehabilitation, to bid for non-TDP jobs; has most definitely jeopardized their job security by removing them from Federal service. Moreover, Respondent through Colonel Hendricks has made it clear that he didn't care about Article 27 of the Collective Bargaining Agreement (Tr. 42); that he, "had no truck" with rehabilitation and drug and alcohol abuse and that, "there would be zero tolerance in that area" (Tr. 140), and if employees, ". . . were found using [drugs] that they would be ousted. . . ." (Tr. 144). By its words and by its actions, Respondent has repudiated Article 27 of the Collective Bargaining Agreement.

Respondent repudiated Sections 9 a. (Counseling and Rehabilitation), 12. (Reasonable Accommodation) and 13 of the 1998 Addendum. (Verification Interview with MRO) of the Local Drug Agreement, for reasons fully set forth hereinabove. These provisions go to the very heart of the Local Drug Agreement and Respondent's refusal to comply - indeed its explicit rejection of rehabilitation - negates the primary purpose of the Agreement which is to provide for the rehabilitation of employees and their return to prior positions. Respondent's actions have been continuous, and since 1986, when the Executive Order was issued (Jt. Exh. 3), no employee at Davis-Monthan found to have used drugs has ever been returned to his, or her, prior TDP or to any TDP. Three employees found to have tested positive for marijuana in 2001 were removed and in each instance, as set forth above, Respondent violated one, or more, of the Sections of the Local Agreement set forth above. Accordingly, Respondent clearly, and intentionally, repudiated Sections 9 a., 12 and 13. of the Local Drug Agreement. By the same words and actions, Respondent repudiated Article 27 of the Collective Bargaining Agreement, "Alcoholism and Drug Abuse Programs" (Jt. Exh. 1) which compliments and supplements the Local Drug Agreement. Respondent, as more fully set forth above, has wholly abrogated the provisions of Section 3 which states, in part, that, ". . . acceptance of treatment should in no way jeopardize an employee's job security or promotional opportunities. . . ." (id.). This is a critical adjunct to the Local Drug Agreement and a very important part of the Collective Bargaining Agreement. Because Respondent's words and actions have been continuous and its violations of the Agreement clear and intentional, Respondent repudiated Article 27 as well as the Local Drug Agreement. Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211, 1218-1219 (1991); Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 52 FLRA 225, 230-232 (1996).

Having found that Respondent violated §§ 16(a)(5) and (1) of the Statute, it is recommended that the Authority adopt the following:

**ORDER**

Pursuant to § 2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. § 2423.41 (c), and § 18 of the Federal Services Labor-Management Statute, 5 U.S.C. § 7118, the Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Failing to abide by Article 27 of the parties' Collective Bargaining Agreement, Section 9.a. and 12 of the parties' Local Drug Agreement and Section 13 of the 1998 Addendum to the Local Drug Agreement.

(b) Failing and refusing to honor the provisions of Section 3 of Article 27 of the Collective Bargaining Agreement which provides,

> ". . . Referral for diagnosis and acceptance of treatment should in no way jeopardize an employee's job security or promotional opportunities. . . ."

(c) Failing and refusing to honor all provisions of the parties' Local Drug Agreement and in particular:

> (i) Failing and refusing to retain employees in a duty or approved leave status while undergoing rehabilitation, as provided in Section 9.a. of the Local Drug Agreement.
>
> (ii) Failing and refusing to return employees to duty after successful completion of rehabilitation, as provided by Section 9.a. of the Local Drug Agreement.
>
> (iii) Failing and refusing to afford reasonable accommodations to employees who test positive for drugs.

(d) Failing and refusing to genuinely and realistically consider the return of employees to TDP positions after successfully completing rehabilitation.

(e) Failing and refusing to recognize and honor the seniority and grant successfully rehabilitated employees the right to bump into occupied positions.

(f) The failure and refusal of the Base MRO to consider situations beyond the employee's control; to accept any medical information; to make any medical information part of the record and/or findings of the MRO; and the statement of reasons for rejecting any employee's documentation, as provided in Section 13 of the 1998 Addendum to the Local Drug Agreement.

(g) Issuing notices of proposed removal while an employee is actively and successfully enrolled in an approved drug rehabilitation program.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Statute:

(a) Comply with Article 27 of the parties' Collective Bargaining Agreement and with the parties' Local Drug Agreement.

(b) Post at its facilities at Davis-Monthan Air Force Base, Tucson, Arizona, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, and they shall be posted at the Aerospace Maintenance and Regeneration Center, and shall be 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 insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100,

Denver, CO 80204-3581, in writing within 30 days of the date of this Order, as to what steps have been taken to comply.

IT IS FURTHER ORDERED that Paragraphs 16, 17, 18, 19, 20, 21, 22 and so much of Paragraph 24 as refers to Paragraph 22 of the Complaint be, and the same are hereby, dismissed.

_____

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 26, 2003
Washington, DC

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF THE**

**FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** fail or refuse to abide by Article 27 of the parties' Collective Bargaining Agreement, and the parties' Local Drug Agreement and in particular with Section 9.a. and 12 thereof and Section 13 of the 1998 Addendum thereto.

**WE WILL NOT** fail or refuse retain employees in a duty or approved leave status while undergoing rehabilitation.

**WE WILL NOT** fail or refuse to return employees to duty after successful completion of rehabilitation.

**WE WILL NOT** fail or refuse to genuinely and realistically consider the return of employees to TDP positions after successfully completing rehabilitation.

**WE WILL NOT** fail or refuse to recognize and honor the seniority and **WE WILL** grant successfully rehabilitated employees the right to bump into occupied positions.

**WE WILL ORDER AND DIRECT** the Base MRO to consider situations beyond the employee's control; to accept any medical information and make all medical information proffered by the employee part of the record and/or his findings; and to state the reasons for rejecting any employee's documentation.

**WE WILL NOT** issue notices of proposed removal while the employee is actively and successfully enrolled in an approved drug rehabilitation program.

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

_____
_

(Agency)

DATE: _____
BY: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: 303-844-5226.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. DE-CA-02-0172, were sent to the following parties:

_____

_

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

Matthew L. Jarvinen, Esquire **7000 1670 0000 1175 2423**
Regional Attorney
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204-3581

Major Douglas C. Huff **7000 1670 0000 1175 2430**
AFLSA/CLLO
1501 Wilson Boulevard, 7th Floor
Arlington, VA 22209

Thomas J. Burhenn, Esquire **7000 1670 0000 1175 2447**
Department of the Air Force
Davis-Monthan AFB
355 WG/JA
5275 E. Granite Street
Tucson, AZ 85707-3845

John Pennington, President **7000 1670 0000 1175 2454**
AFGE, Local 2924
P.O. Box 15039
Davis-Monthan AFB
Tucson, AZ 85708

Sue T. Kilgore, Esquire **7000 1670 0000 1175 2539**
Denver Region
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204-3581

**REGULAR MAIL:**

Bobby Harnage, President
AFGE, AFL-CIO

80 F Street, NW
Washington, DC  20001

DATED:  September 26, 2003
        Washington, DC