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

MEMORANDUM DATE:
February 1, 2007

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE

Respondent

and Case No. WA-CA-05-0515

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

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

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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 **MARCH 5, 2007**, and addressed to:

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

RICHARD A. PEARSON

Administrative Law Judge

Dated: February 1, 2007
Washington, DC

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

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES Charging Party	Case No. WA-CA-05-0515

Tresa A. Rice
For the General Counsel

Cliff Lockett
For the Respondent

Charles Stanley Painter
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On August 4, 2005, the American Federation of Government Employees (the Charging Party or AFGE) filed an unfair labor practice charge against the U.S. Department of Agriculture, Food Safety and Inspection Service (the Respondent or Agency).

After conducting an investigation, the Regional Director of the Washington Region of the Authority issued a complaint against the Respondent on July 31, 2006, alleging that the Respondent violated section 7116(a)(1) and (5) of the Statute by eliminating the practice of rotating the assignments of Consumer Safety Inspectors in the Minneapolis Circuit, prior to the completion of bargaining on the issue. The Respondent filed an answer to the complaint, admitting some of the factual allegations but denying that it committed an unfair labor practice.

A hearing was held in the matter on October 24, 2006, in Washington, D.C., at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing 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

The National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (the Joint Council or the Union) is the exclusive collective bargaining representative of a nationwide unit of employees in the Respondent's Office of Field Operations. It, as well as the AFGE of which it is a part, is a labor organization within the meaning of section 7103(a)(4) of the Statute. The Union and Respondent have, at all times relevant to this case, been parties to a collective bargaining agreement, referred to as the Labor Management Agreement (LMA) (Resp. Ex. 2).

The Respondent, an agency within the meaning of section 7103(a)(3) of the Statute, employs Consumer Safety Inspectors (inspectors) to visit and inspect the operations at food processing plants around the country; this case involves the inspectors in Circuit 2012 (also called the Minneapolis Circuit) of the Agency's Minneapolis District. Each inspector is given a patrol assignment, which consists of three to five food processing plants in geographic proximity. The inspector is required to familiarize himself with the plans that have been established at each plant for its specific manufacturing process and for sanitary operating procedures, and to visit the plants to ensure that they are conforming to these plans. Tr. 66, 80-83. Circuit 2012 consists of twelve patrol

assignments, and prior to April 2005, the inspectors in Circuit 2012 rotated from one patrol assignment to another, every eight months. Tr. 15, 81-83, 86.

The companies running each processing plant set their own hours of operation, and the inspectors must conform their work hours to the schedules of the plants in their patrol assignment. Tr. 18-20. As a result, inspectors in some patrols will be required (or have the opportunity) to work overtime, Sundays, nights or holidays frequently (and to earn premium pay for such work), while inspectors assigned to other patrols may have little or no such work. Tr. 18-19, 64-65. Consequently, when the inspectors were rotated among the different patrol assignments, they would all have an equal opportunity to work the different types of shifts and to earn overtime.

In the latter part of 2004, the Agency's Minneapolis District management decided that rotating inspectors from one patrol assignment to another was causing more problems than it solved, and they sought instead to give each inspector a permanent assignment. Tr. 82-85, Resp. Ex. 1. Subsequently, in a letter dated February 14, 2005,[1/] the Branch Chief of Respondent's Labor Relations Branch notified Charles Painter, Chairman of the Joint Council, of the Agency's intent to change the inspectors from a system of rotating patrol assignments to a system of fixed assignments. Joint Ex. 1. The Agency proposed that the assignments be determined by seniority and that the change go into effect on April 16. *Id.*

In a letter dated February 25, Painter advised the Agency that the Union wished to negotiate the proposed change in assignments for the Minneapolis District, as well as a change in a detail roster that the Agency had proposed for the Alameda District, "to the fullest extent of the law." Joint Ex. 2. On March 3, the Union sent the Respondent a set of ten bargaining proposals relating to the Minneapolis assignment change (Resp. Ex. 3), in accordance with Article 6 of the LMA, entitled "Bargaining During the Term of the Agreement". The Union's proposals included extending patrol assignment rotations to ten months, allowing employees to trade assignments under certain circumstances, continuing current policies regarding overtime and leave scheduling, assisting employees whose quality of life might be affected by the rotation change, and requiring both a pre-implementation and post-implementation meeting to discuss issues related to the

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[1/] Hereafter, all dates are 2005 unless otherwise noted.

change.

Face-to-face negotiations between the Agency and the Union began on Tuesday, March 8, and continued through March 10. Painter was the Union spokesman throughout the negotiations, and William Kent served as the Agency spokesman. At the March 8 session, there was discussion about the Union's initial proposals, and ultimately the Agency submitted a document entitled "Agency Counter 1" (Resp. Ex. 4), which responded to the Union's proposals. Tr. 117. In this document, the Agency declared nine of the Union's ten proposals nonnegotiable; the only proposal that the Agency responded substantively to was proposal number 8, regarding the holding of a meeting with employees prior to implementing any change in rotations. Resp. Ex. 4; see also Tr. 118-22, 124-25. Through the remainder of the first day of negotiations, the Union submitted two sets of counter-proposals (Resp. Ex. 5, Joint Ex. 3) and the Agency submitted a second counter-proposal of its own (Resp. Ex. 6), which again asserted that all of the Union's proposals, except for number 8 and a portion of number 9, were nonnegotiable. Tr. 124, 127-33. The Union's Second Counter proposed (among other things) that patrol assignments be rotated every twelve months, combined its proposals (number 8 and 9) regarding the pre-implementation meeting and quality of life problems, and modified its language regarding the post-implementation meeting to reflect its purpose of discussing "the fixed assignment configuration." Joint Ex. 3 at 2. After the Union explained its "Second Counter" (Joint Ex. 3), the parties adjourned for the day.

At the outset of negotiations on March 9, the parties continued discussing the Union's Second Counter, and after a recess the Agency drafted and submitted "Agency Counter 3, Last Best Offer" (Resp. Ex. 7). Tr. 136-38, 162. As with its previous offers, Agency Counter 3 contained only one substantive proposal to the Union, proposal number 8, which provided for a meeting with employees prior to implementing the rotation change. The Agency's new proposal on this issue went into slightly greater detail about the meeting, specifying that the meeting would be held at least a week before implementation and that employees would select their assignments by seniority. Discussion focused on proposal number 8, since the Agency had not changed its position that the other proposals were nonnegotiable. Tr. 136. The Union's Second Counter had proposed additional language concerning the Agency's obligation to assist employees affected by the change with "quality of life" issues through its Employee Assistance

Plan (EAP). Consequently, after a recess the Agency offered a modified version of Agency Counter 3, this one entitled "Last Best Offer (Final)" (Joint Ex. 4). This proposal listed, as examples of the types of EAP assistance available to employees, child/elderly care and financial counseling. Tr. 138. With this change, Agency Chief Negotiator Kent believed that the parties had reached agreement on this particular issue. Tr. 138-40, 167-68. There was no agreement on the other issues, however, and the parties resumed negotiations the following day, March 10, with the additional presence of a mediator. Tr. 25-26, 168.

At some point during the March 10 negotiation session, the Union submitted its Third Proposal (Joint Ex. 5), in which it modified its language concerning the trading of assignments and withdrew some of its proposals concerning leave. It continued to propose that assignments be rotated every year (proposal number 1), but its proposal for the post-implementation meeting (number 10) stated that the purpose of the meeting was "to review the stopping of the rotation and to hear any impact issues or concerns that may have arisen" (Joint Ex. 5 at 2; *see also* Tr. 37). The Union's proposal concerning the pre-implementation meeting (number 8) was similar to the Agency's Last Best Offer (Final), but there were still differences between the two proposals. The Agency did not submit a written response or counter to the Union's Third Proposal, but Kent testified that he replied verbally to the Union that all of its proposals were either unacceptable or nonnegotiable. Tr. 142-43, 169. The mediator met both jointly and separately with the parties, but no agreement was reached.

The participants disagree as to how the March 10 session ended. According to Mr. Painter, it ended with the parties agreeing to continue the negotiations at a later date, although no specific date for such a meeting was set. Tr. 37-39. He understood that the Agency was going to draft a response to the Union's 3rd Proposal and that Mr. Kent would talk to him the following week to schedule another meeting. Tr. 39. Neither the parties themselves nor the mediator declared an impasse at any time, and for this reason the Union never filed a request for consideration at the Federal Service Impasses Panel.[2/] Tr. 40-41, 45, 60. According to Painter, he spoke with Kent the following week (the week of March 14), and

[2/] However, in the separate negotiations that were held during this same time period concerning a proposed change in the Alameda District, an impasse was declared and the case was submitted to the FSIP. Tr. 40-41, 45, 60.

at least one or two other times in March, about returning to the bargaining table, but they were unable to find a mutually acceptable date. Then, Painter was surprised to receive a letter from the Chief of the Agency's Labor Relations Branch, dated March 30, stating that the Agency intended to eliminate patrol rotations as of April 16 and to implement the proposals contained in its Last Best Offer (Final). Joint Ex. 6; *see also* Tr. 45. After receiving this letter, Painter said he spoke to Kent, who said that he was also surprised. Tr. 45.

Agency witnesses, however, described the end of negotiations somewhat differently. Kent testified that he told Painter at the end of the March 10 session that the negotiations were at an impasse. Tr. 151-52, 157. Although the Agency did not make this assertion in writing, Kent noted at the hearing that Article 6, Section 2c of the LMA provides: "The parties shall be deemed to be at impasse at the conclusion of the third (3rd) day, unless the parties mutually agree otherwise." Resp. Ex. 2 at 18-19. He denied agreeing to continue the negotiations beyond March 10, or even discussing any additional negotiations with Painter on or after March 10. Tr. 143, 157-58. Randolph Wurtele, a human resource specialist assisting Kent at the negotiations, testified that although neither the mediator nor Kent explicitly declared the parties to be at impasse (Tr. 175, 178), there also was no discussion of extending the bargaining beyond March 10. Tr. 178-79. The March 10 session ended, according to Wurtele, with each side "pretty insistent on remaining" with its final proposals. Tr. 175. Thus, in accordance with the midterm bargaining procedures established in the LMA, the parties were at impasse at the end of the March 10 session. Tr. 170. Cheryl Alix, Chief of the Agency's Labor Relations Branch, who was not present at the negotiations on March 9 or 10, testified that Painter made her aware of his interest in resuming negotiations with the mediator during the week of March 14, and that she personally phoned the mediator and told him that she felt it was useless to schedule any further negotiations. She told him that "there's nothing further we can do, we're drained. . . . they're in their respective positions and we are too." Tr. 191-92. Indeed, no further negotiations were held, and on March 30, the Agency sent its letter to the Union of its intent to implement its Last Best Offer (Final) effective April 16. The rotating patrol assignments were eliminated on that date, and employees selected permanent assignments in order of seniority.

DISCUSSION AND ANALYSIS

Positions of the Parties

The General Counsel argues that the Agency's proposal to eliminate rotating patrol assignments triggered a duty to bargain with the Union, and that while the Agency began bargaining, it prematurely terminated negotiations and implemented its final proposals improperly.

With regard to the first argument, the General Counsel notes that an agency incurs an obligation to bargain with a union before implementing a change in conditions of employment that has more than a *de minimis* effect on employees. *Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina*, 59 FLRA 646 (2004). Moreover, the Authority has held that changes affecting an employee's ability to earn overtime are more than *de minimis*, as are changes in an employee's starting and quitting time. *United States Department of Veterans Affairs Medical Center, Leavenworth, Kansas*, 60 FLRA 315, 318 (2004); *Air Force Accounting and Finance Center, Denver, Colorado*, 42 FLRA 1196, 1206 (1991).

With regard to its second argument, the General Counsel argues that at least one, if not more, of the Union's bargaining proposals were negotiable: the GC focuses particularly on proposal number 8, because the Agency did in fact bargain at length on this proposal. Thus, in the GC's view, the Agency was not free to implement its change, in the absence of an impasse. The GC further argues that no impasse had been reached on March 30, when the Agency terminated the negotiations and declared its intent to implement the change. The General Counsel insists that at the end of the March 10 bargaining session, the Agency's chief negotiator had indicated a willingness to continue the negotiations, and further discussions seeking to schedule an additional date for negotiations were held between Kent and Painter between March 10 and March 30. Moreover, the Agency had never responded to the Union's last set of proposals. Kent, according to Painter, had stated on March 10 that the Agency would respond to the "Union's 3rd Proposal" at a later time; in the GC's view, this further indicated that the parties were not at impasse on March 10 and that the Agency had agreed to extend negotiations beyond March 10. The Agency's failure to respond to the Union's last proposal was in itself an act of bad faith bargaining, the General Counsel alleges, citing *U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C.*, 56 FLRA 351, 357 (2000) (*INS 2*).

The GC also stresses the fact that neither the mediator nor the Agency ever declared an impasse during the negotiations. This supports the General Counsel's contention that there was no impasse, and it was because of this fact that the Union never filed an impasse appeal to the FSIP. The GC compares the evidence in this case to the parallel negotiations on a proposed change in the Alameda District, where impasse was declared by the Agency and the Union promptly filed a request with FSIP. Finally, the General Counsel argues that the LMA language concerning an impasse in negotiations after three days is inoperative in this case, because there was testimony that this provision had not been consistently applied in the past by the parties.

The Respondent does not deny that the change it proposed on February 14 triggered an obligation to bargain. Rather, it asserts that it satisfied its legal obligations, first by notifying the Union of the change and then by bargaining to impasse. Although it argues that most of the Union's proposals were nonnegotiable,[3/] it appears to concede that at least the Union's proposal number 8 was negotiable. With regard to proposal number 8, the Respondent insists that there was give and take by both parties, but by the end of the third day of negotiations, an impasse had been reached. Although the Union wanted to continue negotiations beyond March 10, such negotiations would have been fruitless, as the parties had become fixed in their respective positions. Respondent cites the standard for determining impasse that was used by the ALJ in *U.S. Department of the Air Force, Space Systems Division, Los Angeles Air Force Base, California*, 38 FLRA 1485, 1501-04 (1991). Moreover, the Respondent urges that Article 6, Section 2c of the LMA conclusively provides that the parties are "deemed to be at impasse" if they have not reached agreement after three days of negotiations. Respondent denies that it agreed to the Union's request to extend the negotiations beyond three days; thus it was up to the Union to file a negotiability appeal or an impasse

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[3/] Inexplicably, though, the Respondent does not cite any cases or other authority for its assertion that the Union's proposals were nonnegotiable. It uses the phrase "nonnegotiable or presented no duty to bargain" frequently in its brief and in testimony, and I interpret this to mean that some of the Union's proposals were covered by the LMA and thus outside the duty to bargain. See, e.g. Tr. 77, 119-20, 164-65. But nowhere in its brief does Respondent apply Authority case law on the "covered by" doctrine, nor does it cite any negotiability decisions.

resolution request to FSIP after the Respondent notified the Union on March 30 that it would implement the change as of April 16. Absent such action on the Union's part, the Agency says it was free to implement its final offer.

As a remedy for the Agency's alleged unfair labor practice, the General Counsel does not ask for a *status quo ante* remedy, but instead it requests that the Agency be ordered to engage in retroactive bargaining over the change in patrol assignments and that the head of the Food Safety and Inspection Service sign and post a notice to employees throughout the bargaining unit. While the Respondent denies that it committed an unfair labor practice, it cites and applies the criteria of *Federal Correctional Institution*, 8 FLRA 604 (1982), and it asserts that a *status quo ante* remedy is unwarranted here.

Analysis

My resolution of this case is somewhat hindered by the fact that I don't think that counsel for either side in this case fully addressed the appropriate questions. The General Counsel focused its litigation efforts on the question of whether an impasse was reached, and its assertion that there was no impasse. As I noted in the previous section, the GC glossed over the negotiability of most of the Union's proposals, apparently because the Agency had conceded the negotiability of the Union's proposal number 8. If the parties did not reach an impasse on proposal number 8, then the GC would prevail in its contention that the implementation of the change was unlawful. But by avoiding discussion of the Union's other proposals, the GC has placed all its eggs in Basket Number 8, and that is a very flimsy basket, in my view, both on factual and legal grounds.

The General Counsel correctly cites *U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 900-02 (1999) (*INS 1*) in asserting that the GC does not need to prove that the Union submitted negotiable proposals as an essential element of its burden of proof in all refusal-to-bargain cases. But the Authority further stated that an agency may assert in some cases, as a defense to its failure to bargain, that none of the union's proposals were negotiable. *Id.* at 901. In *INS 1*, the agency had not responded at all to the union's demand to bargain or to its proposals, and it did not assert that the union's proposals were nonnegotiable until the ULP proceeding. *Id.* at 902. In our case, however, the Respondent contended throughout the

negotiations that most (but not all) of the Union's proposals were nonnegotiable. Thus, while the GC here was not obligated to establish the negotiability of the Union proposals as part of its case in chief, the Respondent was free to raise this as a defense to its actions, and it would have been prudent for the GC to devote some of its argument to the negotiability of the Union's proposals other than number 8.

For its part, the Respondent adequately supports its contention that the negotiations had reached an impasse, and I tend to agree with this argument, at least with respect to Union proposal number 8 (the only proposal on which actual bargaining occurred). If proposal number 8 were the only issue on the table on March 10, I would agree with the Agency that it was free to implement its final proposal. But the Union still was pursuing several other issues at the close of bargaining, and the Agency had not budged from its insistence that those proposals were all nonnegotiable. If even one of those other proposals was negotiable, then the Agency's refusal to negotiate was unlawful, and its implementation was premature. As the Authority stated in *United States Department of Housing and Urban Development*, 58 FLRA 33, 34 (2002) (*HUD*):

> When an agency responds to a union's request to negotiate by refusing to bargain because it contends that the proposals are nonnegotiable, the agency acts at its peril if it then implements the proposed change in conditions of employment. *See, e.g., United States Dep't of Health and Human Servs., SSA, Balt., Md.*, 39 FLRA 258, 262-63 (1991) [*SSA 1*]. If all pending proposals are nonnegotiable, the agency will not be found to have violated the Statute by implementing the change without bargaining over them. However, if any pending proposals are negotiable, the agency will be found to have violated the Statute by implementing the change without bargaining over the negotiable proposals and either reaching agreement or declaring impasse.

Citing the *SSA 1* decision, the Respondent argues that it was entitled to implement the change in patrol assignments because the Union's proposals were nonnegotiable. Resp. Brief at 8. But Respondent's counsel offers not a single word, and not a single case, to explain how or why the Union's proposals were nonnegotiable. This was a fatal error.

While I agree with the Respondent that the negotiations

had reached an impasse on March 30, the impasse was largely the result of the Agency's refusal to bargain on nearly all of the Union's proposals. Because some of those proposals were negotiable, I conclude that the Agency's implementation of the change violated section 7116(a)(1) and (5) of the Statute. In light of this conclusion, it is not necessary for me to decide whether the parties had reached impasse on proposal number 8.

First, it is clear that the change implemented by the Respondent significantly affected the conditions of employment of bargaining unit employees, and thus a duty to bargain arose. In the past, inspectors in the Minneapolis Circuit had rotated from one patrol assignment to another every eight months. As a result, inspectors developed expertise at a variety of processing plants, and both the beneficial and adverse effects of working overtime and earning premium pay were spread relatively equally among them. With the elimination of rotating assignments and the change to fixed assignments, the most senior inspectors now get to pick the patrols they consider most desirable, and the least senior inspectors will likely be "stuck" with the least attractive assignments. This adversely affects the working hours and ability to earn premium pay for many employees, and it also limits the breadth of experience they will obtain, which could in turn limit their opportunities for career advancement. This change was clearly more than *de minimis*, and the Respondent was required to bargain with the Union over at least the impact and implementation of the change.[4/]

In our case, the Agency did, of course, negotiate, but it

[4/] The complaint does not specify whether the General Counsel considers the change to be negotiable as to its substance or only as to its impact and implementation, but in its opening argument the General Counsel limited its allegation to "the procedures and appropriate arrangements of the change" (Tr. 12). Therefore I will not address the substantive negotiability of the change. Cf. HUD, 58 FLRA at 35, and American Federation of Government Employees, Local 3509 and U.S. Department of Health and Human Services, Social Security Administration, Greenwood, South Carolina District, 46 FLRA 1590, 1598-99 (1993), regarding the negotiability of proposals for rotation of assignments.

declared nine of the ten Union proposals nonnegotiable,[5/] and it is those proposals that I will now examine. Although the Respondent did not explain in its post-hearing brief the rationale for asserting the nonnegotiability of the Union's proposals, its negotiators did offer some explanations in their hearing testimony. Proposal number 1 from the Union's initial proposals (Resp. Ex. 3) was considered to be an infringement on management's right to assign work; proposals number 2 through 7 were considered to be covered by specific articles in the LMA; the first sentence of proposal number 9 was considered to be overly broad; the first sentence of proposal number 10 was considered as requiring a specific management official to perform specific work; and the second sentence of that proposal was considered to be covered by the LMA. *See* Kent's testimony at Tr. 118-22, 128-33, 154-55; Wurtele's testimony at Tr. 162-67. I will particularly focus on those proposals which the Agency alleged to be "covered by" the LMA, because I believe that the Respondent has taken a wholly untenable and internally inconsistent view of the concept.

In *Internal Revenue Service*, 29 FLRA 162, 166 (1987), the Authority held that a union has a right to engage in mid-term bargaining "on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved." It further noted that such waivers, which could be demonstrated by express agreement or bargaining history, must be clear and unmistakable. *Id.* In *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993) (*SSA 2*), the Authority sought to articulate a test for determining when a matter is "contained in or covered by" a collective bargaining agreement. It sought to balance "the need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement" with Congress' intent to encourage agencies and unions to resolve disputes through bargaining during the term of an agreement. 47 FLRA at 1016-17. The test articulated in *SSA 2* involves two parts: first, is the matter in dispute "expressly contained in" the agreement? If so, then there is no duty to negotiate over it again. If not, the Authority then asks whether the subject is

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/ See Resp. Ex. 4. As negotiations progressed, the Union combined proposals 8 and 9, and the Agency addressed the Union's combined proposal in its own combined proposal. See Resp. Ex. 5, 6, Joint Ex. 4, 5.

"inseparably bound up with" or "so commonly considered to be an aspect of the matter" in dispute; and if so, then further bargaining over the issue is considered to have been foreclosed. *Id.* at 1018. When it is unclear whether the matter sought to be bargained is an aspect of matters already negotiated, the Authority examines "whether, based on the circumstances of the case, the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." *Id.* at 1019.

The key in this analysis is defining "the matter sought to be bargained." The approach seemingly taken by the Respondent's witnesses was a highly simplistic and literalistic one: if an article in the LMA covers the general subject addressed in a Union proposal, further negotiations are foreclosed. This approach is apparent when the witnesses' testimony is compared to the Union's proposals and to the LMA.
The second of the Union's initial proposals (Resp. Ex. 3) was that "Trades will be allowed at the time rotation [sic]." Its third proposal was that "Trades will be allowed within the 10 months duration [of patrol assignments] for the purpose of child and elderly care, or other personal needs." *Id.* In its final set of counter-proposals, submitted on March 10 (Joint Ex. 5), the Union combined those two proposals regarding trades into proposal number 3: "Trades will be allowed in Accordance the current LMA and will be explained at the meeting as described in number 8."

Article 22 of the LMA is entitled "Assignments and Rotation of Assignments." In Section 1, it recognizes the "merit in having a fair and equitable system rotating employees through a series of structured assignments on a regular basis where it is feasible for such a system to be used." If the Agency seeks to change the rotation system in effect, Section 1 requires it to do so in accordance with Article 6, the mid-term bargaining provisions. Section 3 of Article 22 permits the "[t]rading of assignments within the same rotation pattern" if the two employees and the supervisors agree, but is silent as to whether a supervisor must explain a denial. It also requires inspectors to submit their trade requests to their supervisors four weeks in advance of the rotation.
Thus, the Union's final proposal on trading assignments (Proposal number 3 of Joint Exhibit 5) sought to continue the existing contractual procedure for trades while adding a requirement that the Agency provide an explanation of the denial of a trade at the pre-implementation meeting created under proposal number 8.

In order to properly understand the Union's proposals, not only regarding trades but also other matters, the context of the March 8-10 negotiations must be understood. As noted above, the LMA expressly recognizes the rotation of patrol assignments as the norm, as the "fair and equitable" way of assigning inspectors. It was the Agency which proposed, mid-contract, to impose a different assignment system, but only for its Minneapolis employees. Section 3 of Article 22 speaks to how employees can trade assignments within the existing rotation system. The situation facing the parties in March of 2005 was considerably different from the situation described in Article 22, because the employees now were being asked to take fixed assignments. Once the assignments were made in April 2005, there would be no further rotation; thus the ability of inspectors to trade assignments at that time took on added significance. Also, because the new, permanent assignments would be made in April 2005, a few days before they would go into effect, it would be impossible for inspectors to request trades four weeks in advance, as the contract anticipated.

In this context, it would be unreasonable to interpret Article 22 as contemplating the situation faced by the parties in March 2005, or as foreclosing the proposal made by the Union concerning trades. Union proposal number 8, which the Agency had already accepted in principle, contemplated the employees and managers holding a meeting in April to discuss issues relating to how the transition to the new system would affect employees;[6/] in proposal number 3 the Union sought to require supervisors to explain at that meeting why a proposed trade was being denied. As Agency negotiator Wurtele himself noted, Article 22, Section 3 of the LMA "deals with trading of assignments within rotation patterns. And again, the Agency's proposal was to discontinue the rotations." Tr. 164. If the Union had been proposing to require supervisors to explain their denials of trades at the time of the normal eight-month rotation, I would agree with Respondent that such a proposal is inseparably bound up in the language of Article 22, Section 3. But in the actual context of the 2005 mid-term negotiations, initiated by the Agency to deviate from the

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[6/] Some of the Union's proposals appear to reflect conflicting purposes. Thus while the Union continued to seek to maintain a system of rotating assignments, modifying its offer from eight months to ten months and then to a year (compare proposal number 1 in Resp. Ex. 3 and 5), some of its other proposals reflect a recognition that the assignments would become permanent (see proposals number 8 and 10 in Joint Ex. 3 and 5).

normal assignment rotation system endorsed by the LMA, the Union's proposal was not inextricably bound up with the contractual provision, and the parties who negotiated that provision in 2002 could not reasonably have intended to foreclose it. In April 2005, the rotation of assignments was being eliminated, and the pre-implementation meeting proposed by the Union might be the inspectors' last chance to have a role in the selection of their patrols. If they could arrange a mutually acceptable trade at that time, they might obtain a patrol that was more acceptable to them than their seniority might allow them to select. None of this could have been foreseen by the parties in 2002, when they negotiated Article 22; but the negotiators in 2002 did foresee that the Agency might seek to change the rotation system, and they expressly required such changes to be negotiated through midterm bargaining. I interpret this requirement as expressly enabling the Union to propose appropriate arrangements and procedures related to a change in the rotation system. The Union's proposal regarding trades was just such a procedure or arrangement. It was not covered by the LMA and was negotiable.

The Respondent's refusal to negotiate Union proposals number 4-7 extended its "covered by" rationale to its absurd extreme. Proposal number 4 concerned overtime, number 5 concerned annual leave that employees had already scheduled, number 6 concerned annual leave that had not yet been scheduled, and number 7 concerned sick leave.[7/] In each proposal, the Union simply stated that "current policies . . . will remain in effect." Resp. Ex. 3 and 5, Joint Ex. 3 and 5. Despite the fact that the Union's proposals did not seek to change anything, but merely sought to emphasize that existing practices would continue under the new assignment system, the Agency insisted that the entire subject was "covered by" the LMA and could not be negotiated further. Tr. 129-33. For instance, after noting that overtime is addressed in Article 23 of the LMA, Mr. Kent testified (Tr. 131):

> The Union had the right to include language that pertained to overtime will remain the same during negotiations of the contract, through proposed

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7/ In its later proposals (Joint Ex. 3 and 5), the Union combined its sick leave and annual leave proposals and then withdrew them, and its other proposals were modified slightly, but at all times and in all forms, the Agency held that they were nonnegotiable.

> changes. The proposed changes were being made by the Agency. The Union had the right to include language that overtime would remain the same. They chose not to do that.

When I asked Kent to explain how the existing language of Article 23 covered the language proposed by the Union, he replied (*Id.*):

> That's my point. They didn't get it covered. They had the right to negotiate Article 23 and did not have the language that's in the proposal included or language such as.

When I observed that the Union seemed to be proposing no change whatever in the existing LMA, that there seemed to be no difference between the Union's proposal and the Agency's, I asked Kent why he didn't simply agree to the Union's proposal. His response first was that the Union was "presenting . . . a permissive subject" and then by agreeing with the Union, the Agency would have been "negotiating over a covered by doctrine." Tr. 133.

The Agency's position here makes no sense to me and reflects the underlying absurdity of its interpretation of the "covered by" doctrine. The Union's initial proposal regarding overtime, as well as its first two counter-proposals, simply stated that "current overtime practices will remain in effect." These proposals did not alter anything with regard to overtime procedures, but simply made it clear to employees that overtime practices would remain the same. Normally, when an agency argues that a proposal is covered by a contract, it is insisting that the rules and practices remain the same; in this case, however, when the Union asked for precisely such a provision, it was told that even that was nonnegotiable. Given the Union's proposals on this point, it would have been a simple and logical thing for the Agency to simply agree to the proposal; the *status quo* would have been maintained and the Agency would have conceded nothing. If the "covered by" doctrine precludes the type of proposals that the Union made here on the subjects of overtime and leave scheduling, then it is so broad as to preclude everything.

As I noted earlier regarding the Union's proposals concerning trades, the circumstances affecting inspectors working overtime in March 2005 were totally different from the circumstances in 2002, when the LMA was negotiated. Article 23, Section 1 of the LMA states that if overtime is

required, "it is the responsibility of the employee covering the assignment", but that rule does not apply in certain types of situations. Resp. Ex. 2 at 74. Article 23, Section 3 provides that "[d]istribution of overtime shall be fairly and equitably assigned by the supervisor among eligible and qualified employees." *Id.* at 75. The situation in March 2005 for inspectors, who would soon be given a permanent assignment, was not specifically addressed by the LMA, and the inspectors could reasonably have been uncertain as to how, or whether, overtime would be equalized. The Union's overtime proposals sought to address this uncertainty, albeit modestly, by at least stating that the existing policies would apply under the new system of assignments. Thus I cannot agree with the Agency's assertion that the language of Article 23 expressly encompassed how overtime would be distributed after assignments were no longer rotated, or that the parties should have contemplated that further bargaining would be foreclosed on this issue.

In its initial and first two counter-proposals, the Union sought to address the problem simply by specifying that "current overtime practices will remain the same." The mere fact that the LMA already contained an article entitled "overtime" didn't mean that all mid-term proposals relating to overtime were foreclosed, especially when the mid-term bargaining was triggered by an Agency-proposed change that would directly affect inspectors' overtime opportunities. Moreover, the Union's proposals expressly sought to assure employees and supervisors alike that even after the rotation system was eliminated, the basic rules relating to overtime would continue. It is just this sort of "stability and repose" that the "covered by" doctrine is meant to foster. *See SSA 2*, 47 FLRA at 1017. Even the Union's final counter-proposal (Joint Ex. 5), which added a provision that "the Agency will keep overtime within the Minneapolis Circuit fair and equitable", simply echoes the language of Article 23, Section 3 of the LMA ("Distribution of overtime shall be fairly and equitably assigned by the supervisor among eligible and qualified employees."). As I have noted several times already, it was the Agency here which sought to substitute an entirely new assignment system in place of the one described in Article 22; the Union's proposals here simply sought to make it clear that specific provisions of the LMA would continue to apply under the changed assignment system. These proposals were fully negotiable, and the Agency's refusal to do so was unlawful.

For the same reasons, the Union's proposals concerning the scheduling of leave (proposals number 5-7 in its first three

sets of proposals and proposal number 5 in its final proposals) were negotiable. Indeed, the unreasonableness of the Agency's position is illustrated most clearly here. Article 14 of the LMA covers all types of leave, and Section 4 of that article provides that "current annual leave scheduling policies and practices remain in effect". Resp. Ex. 2 at 44. Painter explained in his testimony that employees must schedule their annual leave for the coming year by December. Tr. 35. With the change in the assignment system being implemented in April 2005, the LMA did not specifically address whether the inspectors who had already scheduled vacations for 2005 would be able to rely on the leave they had scheduled, and the Union's proposal number 5 was intended to clarify this question. Thus the Union's proposal did not change anything in the LMA, but simply clarified that the newly implemented system of assignments would not change the inspectors' entitlement to leave that they had already scheduled in accordance with the LMA. It could reasonably be argued that even without the acceptance of the Union's proposal, inspectors would be entitled under the LMA to rely on the leave they had previously scheduled. However, the Union's proposal simply sought to eliminate any ambiguity, and it certainly was not foreclosed by the vague language of Article 14.[8/]

The final proposal that I will discuss is number 10, in which the Union sought to have what I call a post-implementation meeting between inspectors and Agency management. The wording of this proposal evolved during the negotiations, but in each of its forms, proposal number 10 provided for an employee-management discussion of the impact of the change in the assignment system, and it stipulated that a Union official would be entitled to official time and reasonable expenses to attend the meeting. The Agency objected to the initial wording of the first sentence, in that it specifically named the Agency officials who would attend the meeting, and the Union accordingly modified its proposal to allow the Agency to designate anyone to attend. Tr. 121-22, 134, 154-56, 166-67; *see also* Resp. Ex. 3 and 5 and Joint Ex. 3 and 5. Thus, in its final form, the Agency's objection to Union proposal

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[8/] Proposals number 6 and 7, providing that current policies for scheduling annual and sick leave would remain the same, were withdrawn in the Union's final proposals (Joint Ex. 5), but they were flatly rejected by the Agency as nonnegotiable throughout the early stage of negotiations. The Agency's position on these proposals was unreasonable, for the same reasons as I explained in regard to the Union's overtime proposal.

number 10 was that it was covered by Articles 7 and 8 of the LMA (Official Time and Labor Management Meetings, respectively).

Article 7 is indeed a detailed provision, entitling Union officials to official time and expenses to conduct a wide range of representational activities. Among the activities that are expressly recognized for "reasonable amounts of official time" is "[a]ttendance at labor management meetings as defined in Article 8." Resp. Ex. 2 at 22. In turn, Article 8 establishes a structure for holding periodic labor management meetings at both the national and district levels, and it further permits the scheduling of "common interest meetings on a more frequent basis with other management officials." Resp. Ex. 2 at 26, 27. The question then is, by negotiating the above-cited provisions in the 2002 LMA, did the parties intend to foreclose either party from proposing an additional meeting for a specific purpose, at which Union officials would be entitled to official time? *See SSA 2*, 47 FLRA at 1018-19. I think not, at least in the circumstances of this case.

First, there is nothing in the language of either article which suggests that they intend to cover all types of labor management meetings or all situations in which Union officials may be entitled to official time or expenses; indeed, the wording of both articles conveys precisely the contrary intent. Article 7 is open-ended in defining when official time is appropriate, and Section 3c merely offers examples of such situations. Similarly, Article 8, Section 2d leaves open the possibility of scheduling meetings that are not expressly mentioned in the rest of the article. Additionally, the meeting being proposed by the Union in proposal number 10 was not exactly a "labor management meeting" but a meeting with employees as well as management and the Union, for a specific purpose that was addressed neither in Article 7 nor 8. Thus the open-ended language of the existing LMA left open the possibility of a meeting of precisely the type the Union proposed in March 2005.

Further, the context of the events in this case supports a conclusion that the proposal number 10 was not foreclosed by the LMA. The Agency triggered the negotiations by proposing an entirely new system of assignments, and proposal number 10 was sought by the Union in order to allow the inspectors to discuss with management the impact of the change a year later. The Agency did not object to the meeting itself, but to any requirement that a Union official would be entitled to

official time or expenses. While the Union could certainly argue that the existing language of Articles 7 and 8 entitled them to official time and expenses, the proposal was a reasonable and logical attempt to clarify the issue in advance. The meeting was neither expressly nor implicitly covered by the LMA, and the Union's proposal was an appropriate arrangement for the specific group of employees adversely affected by the Agency's elimination of the rotation system. Thus the Respondent violated the Statute by refusing to bargain on this proposal.

For all the reasons set forth above, I find that proposals number 3 through 7 and 10 were negotiable. Because the Respondent refused at all times to negotiate on those proposals, it caused the breakdown in negotiations and declared an impasse before bargaining had been completed. The implementation of its proposed change in conditions of employment was therefore premature and unlawful, in violation of section 7116(a)(1) and (5) of the Statute.
The General Counsel has not asked for a *status quo ante* remedy, but instead seeks an order that the Respondent cease and desist its unlawful activity and that it promptly engage in retroactive bargaining concerning the elimination of the rotation system. In the circumstances of this case, I agree that a return to the *status quo ante*, or an immediate resumption of rotating assignments, is unnecessary. The Minneapolis inspectors have been working in their new assignments for approximately nine months, and a prompt resumption of bargaining, with retroactive application of any terms on which the parties reach agreement, can adequately remedy the Agency's premature implementation. Additionally, the Respondent should post the traditional notice to employees of its violation, signed by the head of the activity responsible, the Food Safety and Inspection Service. *See U.S. Department of Veterans Affairs, Washington, D.C.*, 48 FLRA 1400, 1402 (1994).

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Rules and Regulations of the Authority and section 7118 of the Federal

Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Department of Agriculture, Food Safety and Inspection Service (the Respondent) shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in the system of patrol assignments for consumer safety inspectors in the Minneapolis Circuit without bargaining over those changes with the National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (the Union), to the extent required by the Statute.

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

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

(a) Upon demand, bargain with the Union to the extent required by the Statute over the procedures and appropriate arrangements related to changes in the system of patrol assignments for consumer safety inspectors in the Minneapolis Circuit.

(b) Post, at all of its facilities where inspectors in the Minneapolis Circuit are assigned, 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 Director of the Food Safety and Inspection Service and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable care shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Washington Regional Office of the Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, February 1, 2007.

Richard A. Pearson
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority (Authority) has found that the U.S. Department of Agriculture, Food Safety and Inspection Service, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes in the system of patrol assignments for consumer safety inspectors in the Minneapolis Circuit without bargaining over those changes with the National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (the Union), to the extent required by the Statute.

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

WE WILL, upon demand, bargain with the Union to the extent required by the Statute over the procedures and appropriate arrangements related to changes in the system of patrol assignments for consumer safety inspectors in the Minneapolis Circuit.

_____
(Agency)

Dated:_____ By:_____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Washington Regional Office, whose address is: Federal Labor Relations Authority, 1400 K Street,

NW, 2nd Floor, Washington, DC 20424-0001, and whose telephone number is: 202-357-6029.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. WA-CA-05-0515, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

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Dated: February 1, 2007
Washington, DC