EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3614 Charging Party	Case No. BP-CA-30873

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **APRIL 17, 1995**, and addressed to:

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

ELI NASH, JR.
Administrative Law Judge

Dated: March 17, 1995

Washington, DC

MEMORANDUM DATE: March 17, 1995

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, D.C.

Respondent

and Case No. BP-CA-30873

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3614

Charging Party

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

Enclosures

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3614 Charging Party	Case No. BP-CA-30873

Mary Chlopecki, Esq.
For the Respondent

Barbara S. Liggett, Esq.
For the General Counsel

Ms. Brenda Hester
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Pursuant to an unfair labor practice charge filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority, by the Regional Director for the Boston Regional Office, issued a Complaint and Notice of Hearing alleging that the Respondent violated section 7116 (a)(1), (5) and (6) of the Statute by issuing a revised intake rotation schedule prior to completion of negotiations with the Union over the impact and implementation of that change, and after the Union had timely invoked the services of the Federal Service Impasses Panel (herein FSIP or the Panel).

A hearing in this matter was conducted before the undersigned in Philadelphia, Pennsylvania. Respondent and the General Counsel of the FLRA were represented by counsel and afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

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

Findings of Fact

A. Background

The National Council of EEOC Locals No. 216, American Federation of Government Employees, AFL-CIO (AFGE), is the exclusive representative of a nationwide consolidated unit of the Respondent's employees, including employees located at the Respondent's Philadelphia District Office and Pittsburgh Area Office. The Union, AFGE Local 3614, is an agent of AFGE for purposes of representing unit employees at the Philadelphia and Pittsburgh offices. At all times material herein, Marie Tomasso was the Deputy District Director of the Respondent's Philadelphia District Office, and Brenda Hester was the Union's President.

In 1987, well before the events giving rise to this case occurred, the Equal Employment Opportunity Commission (EEOC) decided to reorganize its Office of Program Operations. As a result of that reorganization, the EEOC and AFGE negotiated at the national level of exclusive recognition a Memorandum of Understanding (MOU) which covered a number of subjects, including "Charge Receipt Duties." In 7 paragraphs, the parties agreed that the "[f]ield charge receipt functions of the district and area offices . . . shall be accomplished by the rotation of State and Local Coordinators, enforcement units and systemic units on a one to two week basis;" covered various contingencies; and provided certain protections for affected employees, including (1) sufficient advance notice of rotation changes to allow employees to plan their work and leave schedules, (2) the intake duties not counting against the employee's average case processing time, and (3) the right of employees on Flexitime work schedules to continue on them unless other accommodations to cover the field charge intake volume in their absence could not be made. The parties further provided for local level bargaining, if requested

by a local union within 45 days of implementation of the reorganization, concerning impact and implementation matters not covered in the MOU.[1]

Several terms contained in the MOU which are not in dispute between the parties nevertheless require some explanation. "Field charge receipts" or "intake" describes the process of accepting charges or complaints from individuals who walk into a district office such as the Respondent claiming to be the victims of unlawful employment discrimination. As the EEOC's district offices operate, investigators are assigned the function of assisting such individuals in the process of filing complaints. Such assistance includes an inquiry to determine whether the EEOC has jurisdiction over a particular claim; if so, a discussion with the complainant of the circumstances which give rise to his or her claim and the identity of other individuals who may have relevant information to substantiate the claim; and finally, the preparation of an affidavit setting forth those circumstances which support the complainant's claim.[2] Investigators who perform intake duties may be assigned to "enforcement" units; "systemic" units; or "State and Local Coordinator" units. Enforcement investigators do the field investigations of complaints received through the intake process; systemic investigators are assigned to work on large "pattern and practice" investigations rather than complaints of individualized employment discrimination; and State and Local Coordinators review investigations of alleged employment discrimination performed by various agencies at the state and local level. All investigators are assigned to perform the intake function for a week or two at a time on a rotating basis, according to a schedule established in advance by the Respondent.

William Cook, the Respondent's Enforcement Manager since 1981, is responsible for establishing the intake rotation schedules. According to Cook's undisputed testimony, he revises an intake rotation schedule when circumstances dictate--such as where there has been an increase or decrease of staff, a dramatic change in workload, or the current schedule has expired. In establishing a revised rotation schedule, Cook considers how

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[1] There is no record evidence that the Union requested local impact and implementation bargaining in 1987, as authorized by the MOU.

[2] The subsequent field investigation of such claims is not part of the "intake" or "field charge receipt" process. Field investigations are accomplished by investigators assigned to "enforcement units."

many investigators are available to perform the intake function; the amount of intake volume; and the competing priorities within the District Office.[3] He has revised the intake rotation schedule on a number of occasions through the years, usually because of a change in the number of investigators available or a dramatic increase in the intake volume.

Marie Tomasso, the Respondent's Deputy Director, testified that the Union is always notified in advance and provided with a copy of a revised intake rotation schedule before it is issued. She further testified that, in the past, the Union never responded to the notice of a schedule change with a written request for formal "impact and implementation" negotiations.[4]

B. The Revised Intake Rotation Schedule of 1993

By memorandum dated March 16, 1993, Enforcement Manager Cook revised the existing intake rotation schedule, such revised schedule to become effective at the beginning of April. Deputy Director Tomasso promptly sent a copy of the revised intake rotation to Union President Hester for her comments. Hester responded in writing on March 19, 1993,

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[3] For example, since the Respondent views enforcement investigations as the office's most important function, the assignment of systemic unit investigators and State and Local Coordinators to the intake rotation is deemed advisable because it frees the enforcement investigators to do more field investigations. Conversely, since systemic investi-gations must be completed within a certain deadline, a systemic unit investigator whose deadline is near will be removed from the intake schedule if necessary to meet the deadline on a "pattern and practice" investigation. Similarly, where systemic unit investigators or State and Local Coordinators are deemed to have too many other func-tions to perform at any given time, they may be assigned to intake duties only as backups during periods of very heavy workflow, or they may be regularly assigned to intake duties but only on a part-time basis. Finally, when Union President Brenda Hester is assigned to the intake rotation, she receives a reduced workload so that half of each day is available for her to perform Union representational functions if necessary.

[4] According to Tomasso, the Union called her once or twice in the past with a specific concern about a revised intake schedule and an adjustment was made if possible, but no negotiations ever occurred. The record contains no evidence to the contrary. Therefore, I credit Tomasso's recollections on this point.

requesting impact and implementation negotiations concerning the revised intake rotation schedule; setting forth a series of questions for Tomasso to answer; and requesting all documents considered by the Respondent in revising the intake rotation schedule to aid the Union in preparing its bargaining proposals. Tomasso replied to the Union's request in a memorandum dated April 1, 1993. In that memorandum, Tomasso agreed to negotiate the impact and implementation of the revised intake rotation schedule with the Union and set
April 8 as the date for such negotiations.[5] She also answered all of the specific questions raised in Hester's March 19 letter, and advised her that the documents she had requested did not exist. Hester thereafter prepared and submitted to Tomasso a series of 14 proposals for discussion at the April 8 meeting.

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[5] Tomasso testified that she agreed to negotiate with Hester for two reasons, even though the Union had never asked to negotiate over revised intake rotations in the past. First, she wanted to improve the poor labor-management relationship in the Philadelphia District Office; second, the revised intake rotation schedule dated March 16 included some employees from the Affirmative Employment unit who had never been assigned to intake work before, and she thought this might be a change in their conditions of employment which would require bargaining.

The parties met on April 8 as scheduled, and agreed upon all but sections 1, 2 and 9.[6] As to these proposals, Tomasso stated in part that the Investigative Support Assistants, who would be included in the revised intake rotation schedule under the Union's proposals, were incapable of performing the intake function, and that the personnel who would be assigned to perform intake duties involved an exercise of management's reserved right under

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Those Union proposals read as follows:

> Section 1. The Charge Receipt duties shall be accomplished by the rotation of the Investigative Support Assistants and Investigators (including State and Local Coordinator) in the CR/TIU, Enforcement, State and Local and Systemic Units on a one to two week basis.
>
> Section 2. Systemic Investigators, Investigative Support Assistants, State and Local Coordinators and Investigators assigned to the State and Local Unit may be combined with each other or attached to another Enforcement Unit for the purpose of charge receipt rotation.
>
> Section 9. For each and every eight-hour day that the Union official performs charge receipt duties (Intake), eight-hours credit shall be given to perform official representational duties.

section 7106 of the Statute to assign work.[7] The parties met again on May 4, this time with a mediator from the Federal Mediation and Conciliation Service. While the Union agreed to withdraw section 9 from further consideration, the parties were unable to make any progress on sections 1 and 2. Tomasso continued to express her position that those proposals involved management's right to assign work.[8]

At the conclusion of the mediation session on May 4, Hester decided that the parties were at an impasse and submitted a "Request for Assistance" to the Federal Service Impasses Panel. She gave a copy of the Union's request to Tomasso that same day. On May 7, the Respondent implemented the revised intake rotation schedule, to be effective as of May 10. As reflected in a memorandum from Tomasso to Hester dated May 7 concerning the Respondent's implementation of the revised intake schedule, the only difference between the proposed schedule of March 16 and the schedule effective May 10 was that the Affirmative Employment unit members who had been included in the March 16 rotation for the first time were removed from the final schedule. Tomasso's memorandum again notified Hester that the Union's "concerns regarding the assignment of ISA [Investigative Support Assistant] staff and the S&L [State and Local] Coordinator to the intake function are non-negotiable since they deal with assignment of work to employees which remain a management right." Hester's response dated May 11 advised Tomasso of the Union's position that the Respondent had

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[7] Tomasso further testified that she also advised Hester at the April 8 session that the Union's proposed sections 1, 2 and 9 were therefore nonnegotiable. Hester conceded that Tomasso refused to bargain over those sections because they involved management's right to assign work, but disputed that Tomasso ever declared them nonnegotiable. I find it unnecessary to decide whether Tomasso actually uttered the word "nonnegotiable" because I conclude that her refusal to bargain over specific proposals on the basis that they involve management's right under section 7106 of the Statute to assign work was the equivalent of declaring those proposals nonnegotiable. An experienced Union representative such as Hester--President of the Union since 1988--certainly should have understood the consequences of Tomasso's position.

[8] Tomasso testified that the mediator agreed with her in private that the Union's proposed sections 1 and 2 were non-negotiable. Hester testified that the mediator never said the same thing to her. I find it immaterial to the disposition of this case to decide whether the mediator would tell one side but not the other that the proposals in dispute were nonnegotiable.

committed an unfair labor practice by implemen-ting the revised intake rotation schedule while the Union's timely-filed request for assistance in resolving a bargaining impasse was pending with the Panel. Hester's memorandum also attached a copy of the Union's unfair labor practice charge dated May 11, which led to the instant proceeding.

Discussion and Conclusions of Law

The complaint in this case alleges that the Respondent violated section 7116(a)(1),(5) and (6) of the Statute by implementing its revised intake rotation schedule prior to completing impact and implementation negotiations and after the Union had timely sought assistance from the Federal Service Impasses Panel. In the particular circumstances set forth above, I conclude that the Respondent did not violate the Statute as alleged, and shall therefore recommend that the complaint be dismissed in its entirety.

In the typical case, if an agency's decision to exercise a reserved management right under section 7106 of the Statute would give rise to a change in conditions of employment, the agency has an obligation to notify the exclusive represen-tative of the unit employees to be adversely affected by the change, and to bargain upon request concerning the impact and implementation of its decision. 5 U.S.C. § 7106(b)(2) and (3); see also Department of Defense, Army-Air Force Exchange Service v. FLRA, 659 F.2d 1140, 1146 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982). If this were the typical case, the Respondent's notice to the Union and its agreement on all but 3 of the Union's 14 impact and implementation proposals--that is, all but the 3 proposals which the Respondent declared to be inconsistent with its reserved right under section 7106 of the Statute to assign work--would have satisfied its duty to bargain in good faith. In these circumstances, the Union would have had the right to seek a negotiability determination from the Authority under section 7117(c) of the Statute either directly or, if deemed necessary, after clarifying that the Respondent was in fact raising negotiability issues and obtaining a written declaration of nonnegotiability from the Respondent. Alternatively, the Union could have sought the Panel's assistance under section 7119 of the Statute to resolve a bargaining impasse. Even though the Respondent was asserting that the disputed Union proposals were non-negotiable, the Panel could have accepted jurisdiction over the dispute and resolved the impasse if it determined that the proposals were negotiable under existing Authority precedent. Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364, 31 FLRA 620, 623-25 (1988).

Again, if this were the typical case, the Union's timely invocation of the Panel's processes on May 4, 1993--the same day that the parties met with an FMCS mediator but failed to resolve their differences with respect to the Union's proposed sections 1, 2 and 9--would have precluded the Respondent from implementing its revised intake rotation schedule while the matter was pending before the Panel unless the Respondent could establish that such implementation was consistent with the necessary functioning of the agency. That is, under well established Authority precedent carried over from the policy under Executive Order 11491, as amended,[9] once parties reach an impasse in their negotiations and one party timely invokes the services of the Panel, the status quo must be maintained to the maximum extent possible, i.e., to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action is deemed appropriate. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA 466, 468-69 (1985)(BATF); Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, Region II, 35 FLRA 940, 950 (1990)(DHHS).[10] A failure or refusal to maintain the status quo during such time would, except as indicated above, constitute a violation of section 7116(a)(1), (5) and (6) of the Statute. BATF, 18 FLRA at 469.[11] Accordingly, since the Respondent knew that the Union had timely invoked the services of the Panel on May 4, 1993, and neither alleged nor established that its May 7

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[9] See Internal Revenue Service, 6 FLRC 311, 320 and n.18 (1978); Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 6 FLRC 414, 417-18 (1978).

[10] See also U.S. Department of Housing and Urban Development and U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri, 23 FLRA 435 (1986); Department of Veterans Affairs, Veterans Administration Medical Center, Decatur, Georgia, 46 FLRA 339 (1992); Department of Health and Human Services, Health Care Financing Administration, 39 FLRA 120, 131-32 (1991)(HCFA), enforced, No. 91-1068 (4th Cir. 1991).

[11] The same conduct not only violates section 7116(a)(6) of the Statute because it constitutes a failure or refusal to cooperate in the Panel's impasse resolution procedures, but it also violates section 7116(a)(5) because "the impasse resolution procedures of the Panel comprise one aspect of the collective bargaining process." Department of Health and Human Services, Social Security Administration, 44 FLRA 870, 883 (1992); HCFA, 39 FLRA at 131-32.

implementation of the revised intake rotation schedule (to be effective
May 10) was consistent with the necessary functioning of the agency, ordinarily the Respondent would have violated section 7116(a)(1),(5) and (6) of the Statute by such action, as alleged. It would have made no difference that the Panel ultimately declined to accept jurisdiction over the dispute in October 1993 on the basis that the Respondent had raised a threshold question concerning its obligation to bargain over the Union's proposals, which question had to be resolved in an appropriate forum before a determination could be made as to whether the parties had, in fact, reached a negotiation impasse. Thus, as the Authority has found in these circum-stances, allowing an agency to speculate as to what action the Panel will take after implementation would undermine the important role played by the Panel in collective bargaining under the Statute. DHHS, 35 FLRA at 950.12

In my view, the reason why the Respondent did not violate the Statute in the circumstances of this case, as alleged, is that the parties were mutually bound by the terms of a Memoran-dum of Understanding--negotiated in 1987 and still in effect when the events in this case arose in 1993--which covers the subject of revised intake rotation schedules in some detail. Thus, as noted in the background discussion above, the parties mutually agreed upon a number of matters related to charge receipt (i.e., intake) duties, including the types of employees who would perform such duties ("State and Local Coordinators, enforcement units and systemic units," but not Investigative Support Assistants, as proposed by the Union); how the duties would be performed (by "rotation . . . on a one to two week basis"); how certain contingencies would be handled (such as an unusually

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I reject the Respondent's assertion that it was free to implement the revised intake rotation schedule because the Fifth Circuit has ruled that an agency may never be prevented from exercising its reserved management rights under section 7106 of the Statute, even when a dispute is pending before the Panel. While it is true that the court has so ruled, U.S. Department of Justice, Immigration and Naturalization Service, 995 F.2d 46, 48 (5th Cir. 1993), the Authority has not adopted the Fifth Circuit's reasoning or result. Accordingly, I am constrained to follow existing Authority precedent on the issue. Department of Health and Human Services, Region V, Chicago, Illinois, 26 FLRA 460, 467 n.3 (1987), rev'd as to other matters sub nom. FLRA v. Department of Health and Human Services, Region V, Chicago, Illinois, No. 87-1147 (D.C. Cir. Aug. 9, 1990); U.S. Department of the Army, Fort Stewart Schools, Fort Stewart, Georgia, 37 FLRA 409, 416 (1990).

heavy intake of cases which requires backup capabi-lity); and how the rights of employees assigned to intake duties would be protected (such as sufficient advance notice of revised intake schedules to allow assigned employees to schedule their other work duties and leave plans, intake duties not counting against an employee's average case processing time, and employees on Flexitime being able to maintain their pre-existing work schedules unless no other accommodation can be made to cover the intake function).

There is no dispute that the 1987 MOU deals with the same subject matter that the Union sought to bargain in 1993. Under these circumstances, I conclude that the Union sought to negotiate over a subject which was "covered by" the parties' 1987 MOU. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004, 1016-19 (1993)(SSA); Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. FLRA, 962 F.2d 48, 61-62 (D.C. Cir. 1992)(Marine Corps). That is, I conclude that the express language of the 1987 MOU reasonably encompasses the subject matter of revised intake rotation schedules and settles the matter in dispute. SSA, 47 FLRA at 1018-19.[13] Accord-ingly, the Respondent had no duty to bargain with the Union over the decision to revise the intake rotation schedule in 1993, and could have declined to do so when requested by the Union. Marine Corps, 962 F.2d at 53; U.S. Department of the Air Force, 375th Combat Support Group, Scott Air Force Base, Illinois, 49 FLRA 1444, 1452-54 (1994)(Scott Air Force Base) (agency did not violate section 7116(a)(1), (5) and (6) by reassigning employees after union invoked Panel's processes to resolve impact and implementation bargaining impasse where subject matter of dispute was covered by parties' agreement); Sacramento Air Logistics Center, McClellan Air Force Base, California, 47 FLRA 1242, 1244-45 (1993).[14]

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[13] I reject the General Counsel's assertion that the terms of the 1987 MOU were not followed in the Philadelphia District Office. All of the investigators mentioned in the MOU have been assigned to intake duties on a rotating basis from time to time, as adjusted periodically in recognition of competing priorities in the office, and changing workloads or employees' availability. This is precisely what happened again in 1993.

[14] In so concluding, I find it unnecessary to rely on the absence of Union requests to bargain over the impact and implementation of revised intake rotation schedules in the past. Scott Air Force Base, 49 FLRA at 1454 n.5.

The General Counsel contends, however, that the Respondent should be precluded from relying upon the 1987 MOU in this case because it never raised such defense to the Union's request to bargain over the impact and implementation of the 1993 revised intake rotation schedule, but instead freely negotiated with respect to the Union's proposals. I reject this contention as inconsistent with the purposes and policies of the Statute. Thus, the General Counsel's approach would discourage agencies from seeking to improve labor-management relations, as Tomasso did here, by agreeing to discuss unions' concerns (and reach an accord where possible) even though they had no legal obligation to do so, lest they be viewed as having waived the right to rely upon the terms of an existing agreement concerning the same subject matter. As the court stated in the Marine Corps case: "Implicit in this statutory purpose [to promote collective bargaining as the means of arriving at a collective bargaining agreement] is the need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement." 962 F.2d at 59. Where the parties choose to resolve problems bilaterally even though they have no mutual obligation to do so, as they did here by agreeing to 11 of the Union's 14 impact and implementation proposals, stability and repose are unaffected and even may be enhanced. If, however, an agency were to forfeit the right to rely on the terms of its preexisting bargain with the exclusive representative of its employees simply by agreeing to explore current union concerns, stability and repose would be seriously affected.

The foregoing conclusion is not inconsistent with the notion that an agency must maintain the status quo to the maximum extent possible while the Panel decides what action to take with respect to a matter referred to it for considera-tion. While that doctrine promotes stability in Federal labor-management relations by permitting the collective bargaining process to be completed before the status quo is disrupted, its underlying assumption is that the parties in question had a mutual obligation to bargain collectively concerning the matter(s) referred to the Panel. Where the parties have no such statutory duty to bargain in good faith, the status quo doctrine has no applicability.

The Authority recognized this fundamental distinction in its lead BATF decision. In BATF, the parties negotiated over the union's proposals submitted in response to the agency's proposed explosives safety policy; reached impasse on a number of issues; and the union invoked the services of the Panel before the agency implemented its announced policy. In defense of its actions, the agency contended that the union's proposals concerning training and safety

inspections were covered by provisions of the parties' negotiated agreement or other agency directives, and therefore the explosives safety policy it implemented did not change existing policy in those respects so as to give rise to a duty to bargain in the first instance. The Authority agreed, and therefore found that the agency "was not obligated to bargain over such matters and its implementation of these provisions of the [explosives safety policy] while a dispute concerning the proposals related thereto was pending before the Panel can not be held to have violated the Statute." BATF, 18 FLRA at 469-70.[15]

Accordingly, having found that the Respondent had no obligation to bargain with the Union concerning the impact and implementation of its decision to revise the intake rotation schedule in the circumstances of this case,[16] I conclude that the Respondent did not violate section 7116(a)(1),(5) and (6) of the Statute by implementing the revised schedule while the matter was pending before the Panel. Therefore, it is recommended that the Authority adopt the following:

ORDER

IT IS ORDERED that the Complaint in Case No. BP-CA-30873 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 17, 1995.

ELI NASH, JR.
Administrative Law Judge

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[15] Of course, where the agency had a duty to bargain over other aspects of the explosives safety policy, its implemen-tation while the matter was pending before the Panel was found to violate section 7116(a)(1),(5) and (6) of the Statute in the absence of the agency's demonstration that implementation was required consistent with the necessary functioning of the agency. Id. at 471-72.

[16] In so concluding, I note that even though Tomasso thought there might be a duty to bargain due to the inclusion of employees from the Affirmative Employment unit in the intake rotation schedule for the first time in March 1993, the final rotation schedule which became effective on May 10, 1993, eliminated those employees from the assignment of intake duties altogether.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, Jr., Administrative Law Judge, in Case No. BP-CA-30873, were sent to the following parties in the manner indicated:

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Dated: March 17, 1995
        Washington, DC