UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: December 13, 1996

TO: The Federal Labor Relations Authority

FROM: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

SUBJECT: U.S. ARMY ARMAMENT RESEARCH
DEVELOPMENT & ENGINEERING CENTER
PICATINNY ARSENAL, NEW JERSEY

Respondent

and Case No. BY-CA-40319

(52 FLRA 527)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1437

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 on Remand, the service sheet, and the transmittal form sent to the parties. Also enclosed is the Record sent to this office on November 14, 1996.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

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U.S. ARMY ARMAMENT RESEARCH DEVELOPMENT & ENGINEERING CENTER PICATINNY ARSENAL, NEW JERSEY Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1437 Charging Party	Case No. BY-CA-40319 (52 FLRA 527)

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been presented to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision on Remand, 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 **JANUARY 13, 1996**, and addressed to:

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

SAMUEL A. CHAITOVITZ

Chief Administrative Law Judge

Dated: December 13, 1996
Washington, DC

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

U.S. ARMY ARMAMENT RESEARCH DEVELOPMENT & ENGINEERING CENTER PICATINNY ARSENAL, NEW JERSEY Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1437 Charging Party	Case No. BY-CA-40319 (52 FLRA 527)

Joel L. Friedman, Esq.
For the Respondent

Jacob Klappholz
For the Charging Party

Allen W. Stadtmauer, Esq.
For the General Counsel

Before: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

DECISION ON REMAND

Statement of the Case

On November 14, 1996, the Authority remanded the instant unfair labor practice case to the undersigned for further action consistent with its decision in 52 FLRA (No. 50) 527
(Oct. 31, 1996). More specifically, the Authority remanded the case for a ruling on the merits of one allegation in the complaint: whether the U.S. Army Armament Research Development and Engineering Center, Picatinny Arsenal, New Jersey (the Respondent) violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to notify the National Federation of Federal Employees, Local 1437 (the Union) and arbitrator during the pendency of the arbitration that the position which was the subject of the arbitration had been made supervisory. Although the Judge dismissed the foregoing allegation as untimely without reaching the merits, a ruling that the Authority reversed for the reasons discussed below, the parties had an opportunity to address the merits in their post-hearing briefs to the Judge. Accordingly, I shall proceed to decide the merits of the remanded unfair labor practice allegation without affording the parties another opportunity to brief the issue.

Findings of Fact

The underlying facts are set forth in the Judge's initial unfair labor practice decision and the Authority's decision on exceptions thereto. *See* 52 FLRA at 528-29; 536-41. *See also* the Authority's related decision on exceptions to the arbitrator's award, reported at 48 FLRA 873. They will be repeated or augmented here only to the extent necessary to frame the issue(s) on remand.

In December 1990, the Respondent announced a position vacancy for a non-supervisory GS-13 Chemical Engineer and, on March 10, 1991, selected a GS-12 bargaining unit employee (Pastuck) for the position. The Union filed a grievance challenging the process by which Pastuck was selected. Unable to resolve the dispute during the preliminary stages of their negotiated grievance procedure, the parties submitted the matter to arbitration. An arbitration hearing was held on May 29, 1992 and September 2-3, 1992. Even before the initial arbitration hearing date in May, the duties of the disputed position had become largely supervisory. The Respondent formally converted the position to GM-13 Supervisory Chemical Engineer on April 19, 1992, and transferred Pastuck into the position. By the time that the arbitration hearing closed in September, Pastuck was performing almost exclusively supervisory duties.

It is undisputed that the Respondent failed to inform the Union or the arbitrator during the pendency of the arbitration proceeding that the disputed position had become supervisory. When questioned by the Judge on the record at the instant unfair labor practice hearing, the Respondent could assert no explanation for such failure other than the "incompetence" of its representative in the arbitration proceeding. In any event, the arbitrator's subsequent award sustained the Union's grievance; ordered Pastuck removed from the nonsupervisory position for which he had been improperly selected; and directed that the selection action be re-run without Pastuck's participation. In its exceptions to the arbitrator's award filed with the Authority, the Respondent mentioned for the first time that the position had been made supervisory during the pendency of the arbitration and that there was no longer a need for the position as it originally existed. In denying the Respondent's exceptions, the Authority construed the award to mean that "if the [Respondent] has abolished the original . . . position and does not intend to fill [it] . . . nothing
. . . specifically requires the [Respondent] to rerun the [selection] action." 48 FLRA at 882-83.

Based on the Respondent's failure either to remove Pastuck from his supervisory position or to refill the position that was originally announced, the General Counsel issued a complaint alleging that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with a final and binding arbitration award, and independently violated section 7116(a)(1) of the Statute by failing to notify the Union and the arbitrator during the pendency of the arbitration that the status of the position had changed.

The Judge (who has since retired) dismissed the first allegation of the complaint, holding that the Respondent's decisions not to remove Pastuck from the approximately 5% of the duties that were originally assigned to and remained part of the position, or to rerun the selection action when there was clearly no intent to fill the position as it originally existed, were based on a reasonable construction of the arbitration award as interpreted by the Authority. On exceptions filed by the General Counsel and the Union, the Authority concluded, in agreement with the Judge, that the Respondent did not fail to comply with a final and binding arbitration award, and therefore dismissed the section 7116(a)(1) and (8) allegation of the complaint. That matter is no longer at issue and is not before me on remand.

With regard to the second allegation, the Respondent asserted for the first time in its post-hearing brief to the Judge that the complaint was untimely under section 7118(a)(4) of the Statute. That is, the Respondent contended that the Union discovered the alleged unfair labor practice on June 11, 1993, the date that the Respondent's exceptions to the arbitrator's award were served, but that the Union did not file its charge until December 27, 1993, more than 6 months later. The Judge dismissed the second allegation of the complaint as untimely based on the section 7118(a)(4) defense raised in the Respondent's post-hearing brief.

The Authority concluded, however, that the time limit specified in section 7118(a)(4) of the Statute operates as a statute of limitations which affects only the remedy available, rather than a jurisdictional requirement which limits the right of a party to bring an action. Recognizing that Authority case law on this point was "largely undeveloped," the Authority looked for guidance to private sector case law interpreting a nearly identical provision in section 10(b) of the National Labor Relations Act. Based on that private sector precedent, the Authority concluded that section 7118(a)(4) of the Statute is an affirmative defense which must be raised prior to the close of the unfair labor practice hearing. Since the Respondent failed to do so in this case, the Authority concluded, such affirmative defense was not properly before the Judge. Accordingly, the Authority found that the second allegation of the complaint should not have been dismissed as untimely under section 7118(a)(4) and remanded this aspect of the complaint to the undersigned for a ruling on the merits. For the reasons set forth below, I find that the second allegation of the complaint in this case should be dismissed.

Discussion and Conclusions of Law

Section 7116(a)(1) of the Statute prohibits an agency from interfering with, restraining or coercing an employee in the exercise of rights guaranteed by the Statute. Section 7102 provides that an employee has the protected right to form, join or assist a labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal. As those provisions consistently have been interpreted and applied, the standard for determining whether management's statement or conduct violates section 7116(a)(1) of the Statute is an objective one which is neither dependent on the employee's subjective perceptions nor the employer's intent. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the

statement or conduct. *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020 (1994); *Department of the Air Force, Scott Air Force Base, Illinois*, 34 FLRA 956, 962 (1990). Another formulation of the same concept is whether the conduct in question would reasonably tend to discourage union activity and support. *Department of Defense Dependents Schools, Mediterranean Region, Naples American High School (Naples, Italy)*, 21 FLRA 849, 850 (1986).

As applied to the grievance and arbitration process, the Authority has determined that an agency violates section 7116(a)(1) of the Statute if it threatens an employee or the employee's exclusive representative with retaliation for filing or processing a grievance, since such conduct would tend to chill the exercise of a protected right under the Statute. *See Department of Housing and Urban Development, Region X, Seattle, Washington*, 41 FLRA 363, 372 (1991); *Scott Air Force Base,* 34 FLRA at 965; *Equal Employment Opportunity Commission*, 24 FLRA 851, 855 (1986), *affirmed sub nom. Martinez v. FLRA*, 833 F.2d 1051 (D.C. Cir. 1987). Similarly,
an agency's failure to comply with a final and binding arbitrator's award violates section 7116(a)(1) because it constitutes an unlawful interference with the protected right to pursue a grievance. *See United States Army Adjutant General Publications Center, St. Louis, Missouri*, 22 FLRA 200, 208 (1986).

However, the General Counsel has cited no case, and my independent research has not disclosed one, in which an agency was found to have violated section 7116(a)(1) of the Statute by failing to notify the union or the arbitrator--during the pendency of an arbitration proceeding--of a potentially effective affirmative defense. The General Counsel contends that the Union arbitrated the grievance needlessly, and expended its limited resources in the process, because the Respondent withheld information which might have caused the Union to drop the grievance. Clearly, the Respondent's failure to notify the Union *before* the arbitration and the arbitrator *during the pendency of* the arbitration was poor labor-management relations, but in my view it was not an unfair labor practice.

In the instant case, the Respondent accepted and processed the Union's grievance challenging Pastuck's selection for the GS-13 Chemical Engineer position through the preliminary stages of the parties' negotiated grievance procedure; participated fully in the arbitration hearings, which extended over a three-day period; and, as the Authority previously concluded, complied with the

arbitrator's final and binding award. Throughout the entire process, the Respondent neither threatened reprisals against those who invoked the grievance process nor acted in a manner that might reasonably tend to discourage union activity or support. Indeed, the Respondent's inexplicable failure to advise the Union and the arbitrator that the position at issue had become supervisory was most harmful to the Respondent. After all, the Respondent might have avoided arbitration altogether if it had notified the Union when the position became supervisory in April 1992. Similarly, the Respondent might well have prevailed before the arbitrator had the changed duties of the position been disclosed during the pendency of the arbitration proceeding. Instead, by failing to communicate such information to the arbitrator, the Respondent suffered an award sustaining the Union's grievance. Accordingly, the Respondent was placed in the position of having to file exceptions to the arbitrator's award with the Authority, and then had those exceptions denied by the Authority. In my view, even though the Authority ultimately concluded that the Respondent had not failed to comply with the arbitrator's final and binding award, the foregoing scenario would not lead a reasonable unit employee to refrain from filing grievances in the future or to withdraw support from the Union.

Additionally, a contrary ruling in this case would create an unfortunate precedent for the future administration of the Statute. That is, if the General Counsel's theory of a violation in this case were to prevail, a party's failure to raise a valid argument or defense in an arbitration proceeding could be challenged in a subsequent unfair labor practice case. This prospect, of course, would place the Authority in the position of having to review the effectiveness of the parties' representational efforts at arbitration hearings when, as here, it is alleged that the entire process was prolonged by the failure of one side to proffer evidence or argument at the appropriate time, regardless of the reason for such failure. The absence of precedent to support the General Counsel's theory suggests that it should be rejected.

Having found that the Respondent did not violate section 7116(a)(1) of the Statute by failing to notify the Union and arbitrator, during the pendency of the arbitration, of the change in the position's status, I hereby recommend that the Authority adopt the following:

ORDER

The complaint in Case No. BY-CA-40319 is dismissed.

Issued, Washington, D.C., December 13, 1996.

SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION ON REMAND issued by SAMUEL A. CHAITOVITZ, Chief Administrative Law Judge, in Case No. BY-CA-40319 (52 FLRA 527), were sent to the following parties in the manner indicated:

_____

CERTIFIED MAIL:

Jacob Klappholz, Union Representative
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Dated: December 13, 1996
Washington, DC