ARMY AND AIR FORCE EXCHANGE SERVICE, WACO DISTRIBUTION CENTER, WACO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4042 Charging Party	Case No. DA-CA-30990

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 **OCTOBER 16, 1995**, and addressed to:

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

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: September 14, 1995
Washington, DC

MEMORANDUM DATE: September 14, 1995

TO: The Federal Labor Relations Authority

FROM: SALVATORE J. ARRIGO
Administrative Law Judge

SUBJECT: ARMY AND AIR FORCE EXCHANGE SERVICE, WACO DISTRIBUTION CENTER, WACO, TEXAS

Respondent

and Case No. DA-CA-30990

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4042

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

ARMY AND AIR FORCE EXCHANGE SERVICE, WACO DISTRIBUTION CENTER, WACO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4042 Charging Party	Case No. DA-CA-30990

Peter A. Campagna, Esq.
For the Respondent

Jeffrey L. Hinkle
For the Charging Party

John M. Bates, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
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 U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Dallas Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by issuing final notices and implementing a reduction in force (RIF) involving unit employees prior to

completing bargaining with the Union over the impact and implementation of the action and refusing to furnish the Union with a copy of the RIF roster and a copy of all Personnel Actions from February 1, 1993 to March 25, 1993.

A hearing on the Complaint was conducted in Waco, Texas at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE) is the certified exclusive collective bargaining representative of a nationwide consolidated unit of employees of the Army and Air Force Exchange Service and AFGE Local 4042 is an agent of AFGE for the purpose of representing employees assigned to the Waco Distribution Service, Waco, Texas. Respondent notified the Union by letter on February 1, 1993 that it intended to conduct a RIF at the Waco facility. The notification did not set the effective date of the RIF nor did it identify specific employees that would be affected. The notice did designate job titles, grades and locations which would be affected by the RIF of 30 employees. The notification further stated:

> RIF Rosters and a RIF Plan will be developed consistent with the Master Agreement and AAFES regulations. Affected employees will be provided at least 30 days advance written notice of any RIF impact, and your office will be furnished a list of these personnel actions before employees are notified.

On February 3, 1993, after Distribution Center Manager John Hash had announced the proposed RIF to employees at a meeting, Union President Alice Long contacted Human Resources Manager, Mary Geary, and voiced a complaint concerning the RIF. At this time Long made a statement to the effect that, with regard to the RIF, since a prior chief steward, apparently knowledgeable in such matters was no longer available to assist her, Long would not "fool around"

with anything she didn't understand and would go to the Federal Service Impasses Panel (FSIP) for resolution.[1]

Union President Long notified Manager Hash on February 9, 1993, in writing, that the Union wished to negotiate on the impact and implementation of the proposed RIF. Long's request stated:

> Please be advise[d] that AFGE Local 4042[']s demand to bargain the impact and implementation of the proposed RIF of some 20 plus bargaining unit employees.
>
> I will be glad to meet at a date and time mutually agreed upon to discuss what actions we can take to mitigate the effect of this RIF on the bargaining unit employees.
>
> Proposal on ground rules will be forthcoming. Please direct any question concerning your schedule to the undersigned to see if agreeable.

Early in the morning of February 10, as Long began her workday around 7:30 a.m., she was given a letter from Hash dated February 9 which referred to Long's February 9 request to bargain on the RIF as well as two other February 9 letters Long sent to Respondent requesting to bargain on two other matters. Hash's letter concluded with advising Long that he would meet with her to bargain all three issues at 10:00 a.m. on that same day, February 10. Long testified that when she first received the letter she did not have time to read it and not long thereafter Hash came to her work station and asked her if she was ready to meet at 10:00 a.m. Long said she was not aware that a meeting had been scheduled and Hash referred her to the letter given to her that morning. Long stated it was impossible for her to meet that day since the Union had not prepared for a meeting and further stated that the steward she wished to assist her was unavailable. Long asked Hash if they could meet on the following day and Hash replied that Long had given him a letter demanding to bargain and if she was not at the

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[1] I was impressed with Geary's straight forward testimony and I have credited Geary's version of this exchange over that of Long.

meeting at 10 o'clock, then he would not bargain on the matter.2

Union President Long received the following letter on February 18, 1993 from Center Manager Hash:

> In my letter to you of 1 February 1993, I announced a Reduction in Force (RIF) of bargaining unit people within the Waco Distribution Center. A demand to bargain was submitted by the Union on 9 February 1993; however, you declined my requests to meet and negotiate.
>
> Therefore, notice is hereby given that advance notices will be given affected employees on 1 March 1993, and that the RIF will be effective 3 April 1993. Should the Union have any suggestions or comments regarding the RIF, they should be submitted without delay.

Apparently Long then called Hash and again requested to bargain on ground rules. Hash's reply indicated he did not want dealing with the RIF to be between only Long and himself and he was forwarding the matter to Agency Headquarters representative Richard Maples and the matter was now out of his hands.

On February 19, 1993 Long requested assistance from the FSIP and sent Hash the following letter:

> Be advised that AFGE Local 4042 has this day, requested the assistance of the Federal Service Impasse[s] Panel regarding the proposed reduction-in-force at the Waco Center. Our position to management and before the Panel is as follows.
>
> I was notified of a proposed reduction-in-force and associated changes in conditions of employment on February 1, with a proposed effective date of March 1. I provided you with a timely demand to

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2 Hash denied the comments attributed to him by Long or having any conversation whatever with Long concerning the meeting he scheduled for 10:00 a.m. February 10. I find it unlikely that in such circumstances nothing would be said by the parties concerning one's failure to attend a scheduled negotiation session and I do not credit Hash's testimony in this regard.

bargain on February 9, to which you failed to respond. I provided you with another request to negotiate on February 18.

Our proposal is, no implementation of the proposed reduction until resolution by the FSIP.

I have contacted Commission[er] Guy, of the Federal Mediation and Conciliation Service who indicates that he will be available on February 22 and 23, should you need his assistance.

Shortly thereafter Long received a telephone call from Labor Relations Specialist Richard Maples and the parties discussed meeting. Union President Long wanted to proceed with negotiations on ground rules before entering substantive negotiations on the RIF and Maples was of the opinion that ground rules negotiations were not necessary. In any event, on February 23, 1993 Long sent Center Manager Hash a copy of the Union's proposed ground rules consisting of two and one-half typewritten pages, and requested management's proposals after review of which, Long suggested, the parties could then meet to negotiate on the RIF.

On March 1, 1993 each of the 30 affected employees received from Respondent an "Advance Notice" of proposed RIF actions.[3] The notices set forth the anticipated action, e.g., removal, transfer, downgrading, as well as various procedures and employee reply rights in connection with the proposed RIF and, inter alia, stated that the employee was identified for the RIF action "solely on the basis of . . . retention score on a RIF roster" prepared in accordance with specified Agency regulations. On March 2 Long delivered to Respondent a letter advising that the Union was ready to meet and negotiate on ground rules concerning the RIF and

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[3] During this time there were approximately 500 employees in the collective bargaining unit.

would be willing to meet on March 8. Labor Relations Specialist Maples agreed to the meeting that same day.[4]

Representatives of the parties met on March 8, 1993 and discussed ground rules to negotiate matters concerning the RIF. Ground rules negotiations concluded with an agreement on March 11.[5]

Maples sent Union President Long the following letter on March 11, 1993:

> This letter is in response to our telephone conversation this morning during which we discussed the status of the reduction in force (RIF) at the Waco Distribution Center.
>
> You expressed concern over Management's plan to issue final RIF notices on March 16, and our unwillingness to agree that the RIF will not be implemented until all negotiations are completed. It is unreasonable for the Union to expect Management to agree to a substantive proposal before negotiations begin, especially in view of the difficulty we've experienced in getting the Union to the table. We have been available for negotiations and, since early February, have encouraged the Union to submit proposals for consideration. To date, the only response we've had is a demand to negotiate ground rules and a demand that the RIF not be implemented until all negotiations were completed. These, and other

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On March 2 the Union also sent a letter to Respondent claiming that various employment changes had been made while the RIF was pending and urging that the situation be restored to the "status quo." The Union also contended that RIF notices were given to employees in violation of Article 23, Section 4 of the collective bargaining agreement dealing with negotiating on procedures to afford the Union the opportunity to review and comment on the final retention roster prior to issuance of advance notices to employees. Maples responded that same day declining to return to the status quo on the RIF, essentially taking the position that the Union had engaged in dilatory tactics in proceeding with negotiating the RIF while management had been available and that it would "continue with the RIF process as outlined in the Master Agreement."

5
Management signed its copy on March 18 and the Union signed its copy on March 23. The record does not disclose why there was a delay in signing the documents.

> facts, have led us to the conclusion that the Union's goal is to indefinitely delay implementation of the RIF.
>
> It is our position that the Master Agreement allows us to proceed with implementation of the RIF procedures contained in Article 23 while bargaining other impact and implementation issues. Management has made a determination that a RIF is required, and the Union has been advised of the nature and the effective date of the RIF as required by the contract. Furthermore, Management has continuously expressed a willingness to negotiate with the Union in accordance with law and the Master Agreement. To hold that Management is then precluded from implementing the RIF on the date established in accordance with the contract simply because it can't get the Union to the negotiating table would be a misinterpretation and misapplication of the Master Agreement and would excessively interfere with Management's right to determine staffing require-ments.
>
> I trust that the foregoing has fully explained our position on this matter. As previously discussed, final notices will be issued to affected employees on March 16, and the RIF will be effective April 3, 1993. I am available to negotiate substantive issues now, before the final notices are issued, after the final notices are issued, before the effective date of the RIF, and after the effective date.

The Union challenged the assertions made by Maples in a letter of March 16. On that same day Respondent sent each affected employee a "Final Notice" of the action the employee would be subject to in the RIF and the specific date in April 1993 that the action would take effect for that employee.

On March 25, 1993 the Union gave Respondent a written request for various data including RIF Retention Rosters,[6] all Personnel Actions from February 1, 1993 to March 25 and the Organization Master File as of January 1993. The request gave no explanation or comment as to why the data was being requested nor gave any indication of how it would be used. That same day Respondent provided some of the data requested, indicated some of the information was not available and refused to furnish other requested data. With regard to the request the RIF Retention Rosters, Respondent replied:

> Procedures to afford the Union the opportunity to review the RIF retention rosters is a subject appropriate for bargaining as outline in Article 23, Section 4c of the Master Agreement. Your request should be addressed at the bargaining table.

As to the request for the Personnel Actions, the Agency responded:

> Copies of Personnel Actions are maintained in the Official Personnel Folders of individual employees, and contain sensitive, private information. It would require approximately 15 (days) to review all Official Personnel Folders and make sanitized copies of all Personnel Actions from 1 February 1993 to the present. If you could narrow your request to specific employees or specific departments rather than the entire WADC workforce, the information could be provided more promptly.

Respondent informed the Union that the Agency only maintained current copies of the Organization Master File, which was created weekly. Also on March 25 Respondent suggested the Union supply it with bargaining proposals so that negotiations on the impact and implementation of the RIF could begin on March 30.

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[6] The RIF Retention Roster is prepared by Respondent to determine the identity and ranking of those employees who will be subject to RIF. It contains the names of all employees, identifies certain categories such as length of service, Performance Evaluation Review (PER) ratings, awards, education and special training, all of which receive scores totaling a final score. Placement on the RIF Retention Roster is made based upon each employee's total score.

The Union supplied bargaining proposals and parties met in a negotiation session on March 30, 1993. Union President Long began by insisting the Union needed to have the RIF Ranking Roster and the Organization Master File before they could proceed. Management took the position that furnishing the Union with those documents was a bargainable matter and when the Union then presented a written request for the documents, management argued that if the RIF Ranking Roster was given to the Union, management suspected the Union would use it only to assist particular individuals. Various matters were at issue during this meeting including the question of official time, ratification by bargaining unit members before the agreement could be final and lack of finality to any portion of negotiations on the agreement until the entire document had been agreed to.

During the meeting of March 30 Long explained that the Union needed the RIF Retention Roster essentially to determine whether Respondent was following contractual requirements in calculating employees' RIF scores to ascertain that the right people were being RIFed. Respondent refusal to yield, maintaining its position that the matter was negotiable under the agreement.[7] Little progress was made and management indicated the RIF would be implemented on April 3, Long concluded the parties were at impasse.

Thereafter the RIF action affecting approximately 30 employees took place as scheduled. However, the parties continued to meet and discuss proposals.[8] By letter of September 23, 1993 Union President Long indicated that a

[7] Long also testified, in response to a leading question by Counsel for the General Counsel, that during this meeting they "talked about" the list of Personnel Actions. From my observation and review of her testimony I find and conclude that the list of Personnel Actions was not sought by the Union at this meeting or thereafter. Indeed, I conclude based upon the foregoing and subsequent conduct, infra, that as of March 30 and thereafter the Union abandoned attempting to obtain the list of Personnel Actions and only sought the Organization Master List and the complete RIF Retention Roster.

[8] The record reveals that after the Union contacted the FSIP for assistance on February 19, 1993, both parties thereafter supplied the Panel with information in March and April and subsequently, in May, the Union requested withdrawal of its request for Panel assistance. That request was granted on May 13.

return to the bargaining table was contingent on the Union receiving "all the requested data". Labor Relations Specialist Maples, in his reply, stated that he presumed that Long's request referred to the January 1993 Organization Master File and the RIF Retention Roster.[9] Maples again informed the Union that the Organization Master File no longer existed but this time agreed to provide a RIF Retention Roster. However, the Roster furnished on October 1, 1993 contained a listing of employees by job, grade and total retention points but did not reveal the underlying data upon which the scores were based, such as, each employee's Performance Evaluation Review ratings, length of service, awards, educational information and special training and the like with the scoring for such matter.

By November 1993 the parties were still unable to reach agreement and negotiations ceased.

The Collective Bargaining Agreement

Article 23, of the parties' collective bargaining agreement captioned "Reduction In Force", provides, as relevant herein:

> Section 1. Reduction in force (RIF) is defined as an action resulting from decreased personnel requirements of the Employer. It may result in a change in category, reassignment, downgrade or separation. It is an operational determination relating to a position or positions and will not be used in lieu of separation for cause or for unsatisfactory performance.
>
> Section 2. A RIF action will not be taken until the affected positions have been identified by job title and a formal determination has been made that the work force be reduced due to one or more of the following . . .
>
> Section 3. As early as possible, but at least 60 calendar days before the effective date of a RIF, the Employer will provide the Union with preliminary written notice which includes the

[9] The Union did not claim that Respondent was mischaracterizing its request which lends support to the conclusion that the Roster and the Organization Master File were the items the Union was seeking to obtain from March 30 on and that the Union had abandoned its request for copies of the February and March 1993 Personnel Actions.

purpose and nature of the RIF, the location and types of positions to be affected and the number of positions at each location. The Employer will consider any suggestions made by the Union to lessen the adverse effects of the RIF. Management further agrees, if requested by the Local Union, to undertake bargaining in accordance with law and this Master Agreement.

Section 4. As a minimum Management commits itself to impact and implementation bargaining in the following areas:

a. Explanation concerning whether the following alternatives have been considered and, if rejected, why they cannot be adopted in whole or in part:

(1) Hiring freeze on new employees;

(2) Curtailing conversion of temporary employees to regular employees;

(3) Separating employees during probation; and

(4) Honoring requests for retirement separations for those eligible.

(5) Pursuing placement in other Federal agencies state and local government, and in private sector positions.

(6) Implementing training and management sponsored programs in order to help employees adversely affected by the reduction to assist them in becoming competitive and finding suitable employment.

b. Procedures for employees who receive RIF notices to review retention rosters, with their Union Representative.

c. Procedures to afford the Union the opportunity to review and comment on the final retention rosters prior to issuance of advance notices, with the understanding that the Union in the case of a subsequent complaint has a right to review the data upon which the RIF ranking roster was generated, i.e., PER scores, credible training

course points, work experience and length of NAFI service.

Section 5. Reductions in force will be conducted in accordance with the procedures set forth in AR 60-21/AFR 147-15 and EOP 15-10.

a. For the purpose of this Master Agreement, any reference ro the term "job title" in the RIF process refers to jobs having the same first four digits in the job code;

b. By highest to lowest grade, when two or more grades are involved, employee with the highest retention score will be considered for the following, in the order listed, to the extent available;

(1) Continuance in same position.

(2) Lateral local transfer to a vacant position.

(3) Lateral local transfer to a position filled by an employee in a probationary status.

(4) Downgrade local transfer to a vacant position.

(5) Downgrade local transfer to a position filled by a probationary employee, or an employee with a lower retention score.

(6) Lateral local transfer to a vacant part-time position.

(7) Downgrade local transfer to a vacant part-time position.

(8) Separation.

c. For purposes of application of the Article, retention scores on RIF rosters will be computed in accordance with procedures established in EOP 15-10, except that DOD NAFI length of service will be computed on the basis of 1 point for each year of regular-full-time, regular-part-time and intermittent service.

Additional Findings, Discussion and Conclusions

The General Counsel alleges Respondent violated section 7116(a)(1) and (5) of the Statute by issuing the final RIF notices to affected employees on March 16, 1993 without having completed negotiations with the Union regarding the impact and implementation of the RIF. The General Counsel also alleges Respondent violated section 7116(a)(1), (5) and (8) of the Statute in that since March 25, 1993 it has refused to furnish the Union with a copy of the RIF Retention Roster and a copy of all Personnel Actions from February 1, 1993 to March 25, 1993. Respondent essentially takes the position that its implementation of the RIF did not violate the Statute, contending it acted in good faith in its dealings with the Union at a time when the Union was engaging in dilatory tactics to delay the implementation of the RIF. With regard to the information request, Respondent contends some of the information did not exist, some had been furnished and, in any event, the information sought was not necessary for the Union to bargain on any of its proposals. Respondent also takes the position that, pursuant to the terms of the parties' collective bargaining agreement, the Union was not entitled to the data sought unless achieved through the bargaining process.

I find that on March 16, 1993 Respondent issued final RIF notices to unit employees before negotiations with the Union on the impact and implementation of the contemplated action were completed. In Department of the Air Force, Scott Air Force Base, Illinois, 35 FLRA 844 (1990) (Scott), the Authority, Member Armendariz dissenting, held that an agency's issuance of specific RIF notices to bargaining unit employees which identified the particular employees who would be affected by the RIF before completing impact and implementation bargaining with the employees' collective bargaining representative violated section 7116(a)(1) and (5) of the Statute. In Scott the Authority, at 855, noted that various aspects of the RIF process which occur before the issuance of specific notices to employees are negotiable, including the determination of the competitive area, employees' assignment rights in some cases, and indeed the content of the RIF notice itself. The Authority stated in Scott, at 855, ". . . it would be anomalous, at best, for the Authority to find that although an agency is obligated to bargain over the content of the RIF notice, the agency is not obligated to bargain until after the RIF notice has been issued." Accordingly, I conclude Respondent's issuance of the specific RIF notices to affected employees on March 16

in the circumstances herein violated section 7116(a)(1) and (5) of the Statute.[10]

Respondent argues that the Union never desired or intended to reach an agreement on the RIF but rather embarked on a course of conduct designed to delay the RIF. To support its position Respondent points to the following: Union President Long's comment to Human Resources Manager Geary when first hearing of the RIF indicating she was going to take the matter to impasse; Long's premature invocation of the Impasses Panel prior to any negotiations having occurred; Long's refusal to engage in negotiations on February 10; and Long's insistence on engaging in ground rules negotiations when Respondent's other unions faced with a RIF did not do so.

To begin, even if the Union engaged in conduct designed to delay implementation and entering bona fide negotiations on the RIF, in my view such conduct would not privilege Respondent to fail to honor the bargaining obligations imposed by the Statute on it, absent a showing which was not made in this case that the Union's conduct prevented Respondent from fulfilling its Statutory obligations. See United States Information Agency, Voice of America, 37 FLRA 849, 870-871 (1990). In any event I conclude the actions of the Union, taken independently or in their totality, do not unquestion-ably establish that the Union never desired to reach agreement regarding the impact and implementation of the RIF. Clearly the Union was not eager to see the RIF implemented.[11] While I find Union President Long, when first notified of the RIF told Human Resources Manager Geary that due to her lack of know-ledge over such matters as a RIF she would seek resolution from the Impasses Panel, such does not manifest an intent to violate the Union's Statutory obligation to bargain in good faith on the RIF. Nor does the Union's prematurely invoking the services of the Impasses Panel. As to Union President Long's refusal to enter negotiations on February 10 after being given only two and a half hour's notice, the refusal on such notice is quite understandable and, indeed, requesting bargaining under such circumstances brings into question Respondent's good faith by such conduct. Lastly, I do not view insisting on ground rules negotiations as proposed herein, a right

[10] I am unpersuaded by Respondent's claim that the principles annunciated in Scott are inapplicable to or distinguishable from the case herein.

[11] In correspondence to the FSIP on April 1, 1993 Long acknowledged the Union was "not in a great rush to bargain" on implementing the RIF.

under the Statute, to constitute convincing of evidence of bad faith on the part of the Union or to be evidence of a desire to delay or not to reach agreement. Cf. U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 36 FLRA 524, 533 (1990).

Respondent suggests in its brief that RIFs were largely "covered by the Contract", apparently therefore extinguishing Respondent's obligation to negotiate further on the subject before implementing the RIF. Article 23 of the agreement, upon which Respondent relies, specifically treats the subject of reductions in force. However, in Section 4 of Article 23 Respondent recognizes it has an obligation to bargain, at a "minimum", the impact and implementation of specific matters including procedural matters. Thus, while the contract addresses the subject of RIF's, by using the words "(a)s a minimum" the contract acknowledges more areas are open to impact implementation negotiations than those listed. In these circumstances RIFs are "covered by" the agreement only in so far as acknowledging that Respondent has a bargaining obligation. Accordingly Respondent's contention is rejected.

Essentially the record reveals the Union received notice of the RIF on February 1, 1993; requested on February 9 to negotiate the impact and implementation of the RIF; refused to negotiate on abbreviated notice on February 10; requested to negotiate ground rules on February 18 after receiving notice from Respondent that affected employees would be given, on March 1, advance notices of being RIFed on April 3; gave Respondent ground rules proposals on February 23; notified Respondent on March 2 of its availability to negotiate on March 8 and met to negotiate ground rules on that day and concluded those negotiations on March 11; and met with Respondent on March 30, at Respondent's suggestion, to proceed with negotiations on the impact and implementation of the RIF.[12] Such conduct does not demonstrate to me a desire by the Union to prevent Respondent from effecting the RIF. Rather, on the facts contained in the record herein I conclude that Respondent, by issuing final notices of the RIF to employees on March 16, 1993 without meeting with the Union and providing it an opportunity to bargain over matters concerning the impact and implementation of the RIF, failed to fulfill its Statutory bargaining obligation. See Scott at 855-859.

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Other than the February 10 incident, this was the only time Respondent actually suggested a meeting date.

Turning now to the allegation that Respondent violated the Statute by its failure to provide the Union with the information it requested, the General Counsel contends the Union requested a copy of all Personnel Actions from February 1, 1993 to March 25, 1993. The record reveals that while on March 25 the Union requested the Personnel Actions, Respondent did not refuse to supply the data but on March 25 replied that the documents contained private information and it would take approximately 15 days to obtain the information in sanitized form and asked if the request could be narrowed so that the information could be provided more promptly. The Union never responded to Respondent's suggestion and five days later on March 30 made a request for information which did not include the Personnel Actions but included a request for the Organization Master File. The Union never again raised a request for the Personnel Actions. In these circumstances I find and conclude the Union abandoned its March 25 request for Personnel Actions and substituted instead a request for the Organization Master File, a document which, Respondent informed the Union, did not exist. Accordingly I conclude the General Counsel has not established that Respondent violated the Statute by refusing to furnish the Union the Personnel Actions as alleged. See U.S. Department of Justice, Office of Justice Programs, 45 FLRA 1022, 1023, n.2 (1992) and Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 43 FLRA 549, 570 (1991).

The General Counsel also alleges Respondent failed to furnish the Union with the complete RIF Retention Roster. That document which the Union and the General Counsel allege Respondent was obligated to furnish is a list of affected employees, their total RIF ranking scores, and the data upon which the RIF ranking score is based such as the employee's Performance Evaluation Review, length of service, experience, education, training and awards. Respondent takes the position that the Retention Roster was furnished and, in any event, it was not necessary for negotiations, and further suggests the matter of reviewing the RIF Retention Roster was covered by the contract.[13]

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[13] Because Respondent does not assert any Privacy Act constraints the issue of whether disclosure of the RIF Retention Roster is prohibited by the Privacy Act is not presented in this case and will not be addressed. See Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA No. 86, n.7 (1995).

I reject Respondent's contention that the RIF Retention Roster was furnished to the Union. While a Roster was provided to the Union on October 1, 1993, it was requested on March 25 and the Roster that was provided did not contain the underlying data upon which the Roster scores were based, which data the Union had requested.

I also reject Respondent's contention that the Roster was not necessary for negotiations. Respondent attempts to support this contention by arguing that Union President Long acknowledged in her testimony that the Retention Roster, and supporting data, was not necessary to bargain any of the 19 substantive proposals made by the Union on March 25. However, Long's testimony makes it abundantly clear that the Union needed the data in order to assure that the correct employees were being RIFed, i.e., that the individual's RIF scores were correctly computed. It is quite obvious that it was for this purpose the Union submitted, along with the 19 substantive RIF proposals, six procedural post-RIF proposals and 13 proposals under the heading "Staffing Freeze/ Reinstatement/Employment Preference". The Union's actions clearly conveyed its position that after it ascertained that the individual employees were properly scored on the RIF Retention Roster, it would then be prepared to negotiate on the 19 substantive proposals as they would apply to the correctly selected employees.

As to counsel for Respondent's contention that matters concerning obtaining the RIF Retention Roster were covered by the parties' collective bargaining agreement, Respondent argues that Article 23, Section 4c. grants it the right to insist that the Union's request for the Roster was a bargainable matter and accordingly Respondent had no Statutory obligation to furnish the Roster to the Union upon demand. Counsel for the General Counsel takes the position that in order to escape the Statutory obligation to provide the requested documents the contract must contain a clear and unmistakable waiver of this obligation and, counsel argues, Article 23, Section 4c. of the contract does not contain a "clear and unmistakable" waiver of the Union's Statutory right to obtain the information, citing various cases in support of that position. However, in Internal Revenue Service, Washington, D.C., 47 FLRA 1091 (1993) (IRS), which issued subsequent to the cases cited by counsel for the General Counsel, the Authority, held, at 1103:

> This case provides us with an opportunity to reexamine the Authority's approach to resolving defenses, based on a collective bargaining agreement, to alleged interference with statutory

> rights. On reexamination, we conclude that in unfair labor practices cases, such as this one, where the underlying dispute is governed by the interpretation and application of specific provisions of the parties' collective bargaining agreement, we will no longer apply the "clear and unmistakable waiver" analysis . . . We have formulated a new approach to these cases that will carry out the purposes and policies of the Statute. We now hold that when a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including it administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly.

In the case herein the Union seeks various data under section 7114(b)(4) of the Statute and Respondent defends its refusal to furnish this data based upon its interpretation of Article 23, Section 4c. of the parties' negotiated agreement. That provision states:

> Section 4: As a minimum Management commits itself to impact and implementation bargaining in the following areas:
>
> . . .
>
> b. Procedures for employees who receive RIF notices to review retention rosters, with their Union Representative.
>
> c. Procedures to afford the Union the opportunity to review and comment on the final retention rosters prior to issuance of advance notices, with the understanding that the Union in the case of a subsequent complaint has a right to review the data upon which the RIF ranking roster was generated, i.e., PER scores, credible training course points, work experience and length of NAFI service.

I interpret Article 23, Section 4 as requiring the Agency, after it formulates a RIF Retention Roster which scores affected employees, to notify the Union to provide it with the opportunity to negotiate procedures to "review and comment" on the final Retention Roster i.e., make proposals

on matters concerning the Roster, prior to issuing the advance notice of potential RIF to affected employees. Thus procedures to "review" or see the RIF Retention Roster at this stage are contractually considered by the parties to be negotiable. The Union would then have whatever rights it could negotiate concerning matters affecting the Roster, but no Statutory right to obtain, without negotiation, access to the RIF Retention Roster. Further, "to afford the Union the opportunity" means to me that the Union must first make a timely demand to view the Roster scoring. The contract clauses indicate no additional Union bargaining rights prior to issuance of advance notices.

However, as I interpret the remainder of Article 23, Section 4c., after the advance notices have been issued, if a complaint is raised, then the Union has the absolute right under Article 23, Section 4c. to review the Roster and all data upon which the RIF Ranking Roster was formulated, including an individual employee's Performance Evaluation Review score and other applicable experience or background considerations for which the employee received points which went into the employee's final RIF retention score. The contract does not specify or limit who may raise the "complaint". Thus in such circumstances the clause could be interpreted to cover a complaint made by either an employee or by the Union on its own behalf.

On February 1, 1993 Respondent gave the Union notice in compliance with Article 23, Section 3 of the contract that it was contemplating a RIF. On February 9 the Union notified Respondent that it wished to bargain on the impact and implementation of the proposed RIF "to mitigate the affect of this RIF on the bargaining unit employees". The Union made no request to negotiate procedures for employees to review the Roster. On February 18 Respondent gave the Union notice that on March 1 advance notices would be sent to employees affected by the RIF. The Union still made no request that it be given an opportunity to review and comment on the final Retention Roster. On March 1 advance notice of the RIF was given to affected employees. On March 11 Respondent notified the Union that final RIF notices would be issued to employees on
March 16 which was done and, up until that date, the Union made no request to review the RIF Ranking Roster or view the data supporting the final RIF retention scores. On March 25 the Union requested the RIF Retention Roster but was not provided it.

As stated above, I interpret the agreement to provide the Union with an absolute right to a copy of the RIF Retention Roster and supporting data after issuance of the

advance notices "in the case of a subsequent complaint." In my view the term "complaint", although undefined in Article 23, should be given broad meaning sufficient to encompass any complaint, not necessarily a "grievance" under the agreement, by either an employee or the Union, concerning any matter affecting a condition of employment. Indeed, it appears to me that the term "complaint" should be given a broader meaning than "grievance", and "grievance", under the Statute is defined sufficiently broad to encompass the matter at issue when the Union made its request for the RIF Retention Roster on March 25, 1993. Thus, section 7103(a)(9) of the Statute states:

> (9) "grievance" means any complaint-
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee labor organization, or agency concerning-
>
> (I) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
>
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

In the case herein the record reveals that when the parties met on March 30, 1993 and Respondent refused to furnish the requested materials, the Union explained that the RIF Retention Roster, with supporting data, was needed in order to ascertain that the correct employees were being selected for RIF. The Union also told Respondent that a few of the affected employees raised some concern regarding their RIF scores as opposed to other employees.[14] I find this concern by the Union, as expressed to Respondent on March 30, to constitute a "complaint" within the meaning of

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[14] Union President Long testified that the scoring was troubling to her especially since one employee, Ms. Buhl, received a RIF letter which indicated she had been "bumped out of her slot" by another employee, Ms. Russell, and Distribution Center Manager Hash early-on expressed his concern to Long that Russell would be difficult to place in a RIF.

Article 23, Section 4c. of the parties collective bargaining agreement.[15]

As it would be impossible for the Union to allay its suspicions and ascertain whether Respondent's scoring of employees affected by the RIF was proper and accurate, I further conclude the information sought was "necessary" within the meaning of section 7114(b)(4) of the Statute. Thus the Union established it had a particularized need for the RIF Retention Roster and supporting data when it explained to Respondent during the negotiations of March 30, 1993 that it needed the information to determine whether Respondent was following contractual requirements so that correct employees were correctly scored and therefore they were properly ranked for the RIF. The record herein also supports a finding that the RIF Retention Roster and underlying data was "normally maintained" and "reasonably available" within the meaning of section 7114(b)(4) of the Statute and I so find even though the RIF Retention Roster is created for each separate RIF.[16]

In sum, on March 25, 1993 the Union made a demand for the RIF data and on that same day Respondent refused to furnish the information, relying on its interpretation of Article 23, Section 4c. of the parties' agreement. On March 30 the Union perfected its demand by communicating why the data was "necessary", thus fulfilling the requirements of section 7114(b)(4) of the Statute and demonstrating it had a "complaint" under Article 23, Section 4c. of the parties' agreement which gave the Union a contractual right to the RIF Ranking Roster and ". . . to review the data upon which the RIF Ranking Roster was generated, i.e. PER scores, credible training course points, work experience and length of NAFI service." Therefore I conclude in their circumstances Respondent's failure to furnish the Union with the RIF Retention Roster and supporting data on March 30 and thereafter violated section 7116(a)(1), (5) and (8) of the Statute. See IRS.

Remedy

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[15] Labor Relations Specialist Richard Maples acknowledged, when being cross-examined on Article 23, Section 4c., that Respondent had received "allegations" but no "complaint concerning the RIF." However, Article 23, Section 4c., does not limit a "complaint" to one received only by Respondent.

[16] Respondent admits in its Answer to the Complaint that the data was not "guidance, advice, etc. under section 7114(b)(4)(c) of the Statute.

The RIF action ultimately affected 29 employees: 7 separations, 16 downgrade transfers, and 6 lateral transfers. Since the RIF occurred some employees have been reinstated, some transferred back to their original jobs or promoted, and a number of employees have resigned. The General Counsel request, inter alia, a status quo ante remedy and a make whole remedy for employees adversely affected by the RIF.

In Federal Correctional Institution, 8 FLRA 604 (1982) (Federal Correctional) the Authority held, at 606, that in order to justify a return to the status quo ante to remedy a failure to bargain over the impact and implementation of a change in conditions of employment, the Authority will, on a case-by-case basis, carefully balance the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy. In Federal Correctional the Authority set forth criteria it would consider in making such a determination, which included among other relevant things: (1) whether, and when, notice was given to the union by the agency; (2) whether, and when, the union requested bargaining; (3) the willfulness of the activity's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. Id. at 606.

In the case herein, notice of the RIF was given to the Union on February 1, 1993, substantially before the effective date the RIF was announced. The Union's original request for bargaining was not made until eight days after it first received notice of the RIF. After that the Union was told, on February 18, that employees would receive advance notice on March 1 that the RIF would occur on April 3. The parties then met to negotiate ground rules on March 8 and 9. Negotiations on the actual impact and implementation of the RIF did not begin until March 30. Neither party refused to meet the other at any time, with the exception of the February 10 incident, supra. Thus bargaining did not move along very quickly. Indeed the Union acknowledged it was in no rush to bargain on the RIF.

As to the matter of willfulness, Respondent was willing to negotiate on the impact and implementation but not to withhold issuance of advance notices to employees or withhold implementation of its RIF until negotiations were complete. No exigency has been shown to exist whereby

implementation of the RIF on the announced date was imperative.

The impact experienced by adversely affected employees was substantial, at least to the seven employees who lost their employment and the 16 employees who were downgraded when being transferred. No evidence was presented regarding the degree of disruption, if any, that a status quo ante remedy would produce but I note that some employees have since been reinstated and others have returned to prior jobs. It is obvious therefore that rescinding the RIF, recalling all affected employees and then commencing negotiations again would produce significant disruption and confusion. Further, it is indeed possible that Respondent's selection of employees to be RIFed was fully justified.

Having weighed the above factors set forth in Federal Correctional as applicable to the situation herein I conclude that a status quo ante remedy should not be ordered. It seems to me that a bargaining order whereby the results of the bargaining are applied retroactively would adequately effectuate the purposes and policies of the Statute. See Federal Deposit Insurance Corporation, Washington, D.C. and Federal Deposit Insurance Corporation, Oklahoma City, Oklahoma, 48 FLRA 313, 329-322 (1933). Then if it is disclosed that the employees selected for the RIF would not or should not have been selected, satisfactory remedial action can be effectuated, infra.

With regard to the General Counsel's request for a make whole remedy, in Federal Aviation Administration, Washington, D.C., 27 FLRA 230 (1987) (FAA), the Authority established criteria for determining whether back pay remedies are appropriate in cases involving agency refusals to bargain. The Authority held, at 234-235:

> In sum, a backpay award under the Back Pay Act requires a determination (1) that an employee was affected by an unjustified or unwarranted personnel action, (2) that the unjustified or unwarranted personnel action resulted in a withdrawal or reduction in the pay, allowances, or differentials of the employee, and (3) that the withdrawal or reduction would not have occurred but for the unjustified action.
>
> The first requirement is met when it is established that employees were affected by an agency unfair labor practice, including a refusal-to-bargain violation. The second requirement is met when it has been shown that the agency action

which gave rise to the violation resulted in a withdrawal or reduction in the pay, allowances, or differentials or employees. If these requirements are met in a refusal-to-bargain case, we will conclude that the violation warrants a remedy of backpay. This remedy will require an award of backpay which is consistent with the results of the ordered bargaining, subject to the parties agreeing otherwise. Any disputes over whether the ordered bargaining resulted in any agreement which eliminated or reduced the withdrawal or reduction in pay, allowances, or differentials can be raised as a compliance matter.

Applying the above criteria set forth in FAA to this case I find and conclude that a make whole remedy, including backpay, is appropriate to remedy the violation found herein. See Scott, at 859-860.

Accordingly, in view of the foregoing and the entire record herein I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas, shall:

1. Cease and desist from:

(a) Implementing a reduction-in-force (RIF) concerning bargaining unit employees without first notifying the American Federation of Government Employees, Local 4042, the agent of the exclusive representative of its employees, and fulfilling its obligation to bargain regarding the procedures for implementing the RIF and appropriate arrangements for employees adversely affected by the RIF.

(b) Failing and refusing to furnish the American Federation of Government Employees, Local 4042, a copy of the RIF Retention Roster with supporting data which was used in the RIF conducted on April 3, 1993.

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

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

(a) Bargain with the American Federation of Government Employees, Local 4042, the agent of the exclusive representative of its employees, concerning the procedures for implementing the RIF conducted on April 3, 1993 and appropri-ate arrangements for employees adversely affected by the RIF, and apply retroactively the results of such bargaining.

(b) Make whole any bargaining unit employee who was adversely affected by the unlawful implementation of the RIF conducted on April 3, 1993, including backpay for any bargaining unit employees who suffered a withdrawal or reduction in pay, allowances, or differentials as a result of the RIF, to the extent that bargaining in compliance with this Order results in an agreement which would have had the effect of reducing, eliminating, or delaying the adverse effects of the RIF on affected bargaining unit employees.

(c) Furnish to the American Federation of Government Employees, Local 4042, a copy of the RIF Retention Roster with supporting data which was used in the RIF conducted on April 3, 1993.

(d) Post at all places at the Waco Distribution Center, where bargaining unit employees are located, 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 Waco Distribution Center Manager and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places were notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 14, 1995

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SALVATORE J. ARRIGO

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement a reduction-in-force (RIF) concerning bargaining unit employees without first notifying the American Federation of Government Employees, Local 4042, the agent of the exclusive representative of our employees, and fulfilling our obligation to bargain regarding the procedures for implementing the RIF and appropriate arrangements for employees adversely affected by the RIF.

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, Local 4042, a copy of the RIF Retention Roster with supporting data which was used in the RIF conducted on April 3, 1993.

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 Federal Service Labor-Management Relations Statute.

WE WILL bargain with the American Federation of Government Employees, Local 4042, the agent of the exclusive representative of our employees, concerning the procedures for implementing the RIF conducted on April 3, 1993 and appropriate arrangements for employees adversely affected by the RIF, and apply retroactively the results of such bargaining.

WE WILL make whole any bargaining unit employee who was adversely affected by the unlawful implementation of the RIF conducted on April 3, 1993, including backpay for any bargaining unit employee who suffered a withdrawal or reduction in pay, allowances, or differentials as a result of the RIF, to the extent that bargaining in compliance with this Order results in an agreement which would have had the effect of reducing, eliminating, or delaying the adverse effects of the RIF on affected bargaining unit employees.

WE WILL furnish to the American Federation of Government Employees, Local 4042, a copy of the RIF Retention Roster with supporting data which was used in the RIF conducted on April 3, 1993.

(Activity)

Date: By:
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Region, 525 Griffin Street, Suite 926, LB 107, Dallas, TX 75202-1906, and whose telephone number is: (214) 767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SALVATORE J. ARRIGO, Administrative Law Judge, in Case No. DA-CA-30990, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Peter A. Campagna
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Mr. John A. Hash
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American Federation of Government
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Washington, DC 20001

Dated: September 14, 1995
Washington, DC