DAVIS-MONTHAN AIR FORCE BASE TUCSON, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2924 Charging Party	Case No. DE-CA-50248

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 22, 1996**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: March 21, 1996
Washington, DC

MEMORANDUM DATE: March 21, 1996

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: DAVIS-MONTHAN AIR FORCE BASE
TUCSON, ARIZONA

Respondent

and Case No. DE-CA-50248

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924

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

DAVIS-MONTHAN AIR FORCE BASE TUCSON, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2924 Charging Party	Case No. DE-CA-50248

Michael Farley
For the General Counsel

Phillip G. Tidmore, Esquire
Sue Ellen Schuerman, Esquire
Lt. Colonel W. Kirk Underwood, Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

An unfair labor practice complaint alleges that the Respondent (Air Force Base) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing a request of the Charging Party (the Union) to resume negotiations for a new collective bargaining agreement. The Air Force Base denied a number of the key factual allegations in the complaint. At the hearing, however, it became apparent that the material evidentiary facts were virtually undisputed. The Air Force Base defended the case essentially on the dual

basis that it was not obligated to resume bargaining at the time the request was made and that the request was more properly characterized as an untimely request to **initiate** bargaining than a request to resume. As explained below, I conclude that the alleged violation has been established.

Findings of Fact

The Union is the exclusive representative of certain Wage Grade, General Schedule, and professional employees at the Air Force Base. The parties have entered into a series of successive collective bargaining agreements at least since 1973. Their most recent collective bargaining agreement, entitled "Memorandum of Agreement" (MOA), took effect in June 1988.

Article 34 of the 1988 MOA provides, in pertinent part:

> The agreement shall remain in effect for three years from the date it is signed by the parties. Unless either party gives written notice to the [other] between 120 and 90 calendar days prior to the end of the three year period of the party's desire to negotiate a new agreement, this agreement will automatically be renewed for a period of three years.

By letter dated March 8, 1991, the Air Force Base notified the Union that management wanted to negotiate a new collective bargaining agreement, pursuant to Article 34 of the existing MOA. Following that letter, the parties initiated the bargaining process and, after seeking the assistance of the Federal Service Impasses Panel (FSIP) in establishing ground rules, agreed on ground rules and withdrew their request for FSIP assistance. These ground rules included procedures that were to "apply throughout the entire course of negotiating sessions[.]"

The parties continued to negotiate, but reached an impasse over 15 articles of the contract. By letter dated July 23, 1992, the Union requested FSIP assistance in resolving the impasse over these articles. On August 21, 1992, the Union requested the FSIP to direct that the impasse be resolved through mediation/arbitration. By letter dated September 3, 1992, the FSIP directed the parties to resume negotiations, with assistance from the Federal Mediation and Conciliation Service as needed, for a 30-day period and on a concentrated schedule.

Meanwhile, a petition had been filed with the Authority in April 1992 to decertify the Union as the exclusive

representative of the bargaining unit covered by the expired agreement. In October 1992 the FSIP informed the Union that it was putting the request for assistance on hold until the issues raised by the decertification petition were resolved. On November 12, 1992, a second decertification petition was filed, purporting to relate to the Union's status as exclusive representative of a unit of "GS employees serviced by CBPO" at the Air Force Base.[1] A hiatus in negotiations followed.

By letter to the FSIP dated June 22, 1993, the Union inquired whether the FSIP's previous position that resolution of the parties' impasse was to be placed on hold remained in effect. The FSIP advised the parties that it would continue to hold resolution of the parties' impasse in abeyance pending the outcome of the two decertification petitions. Following this confirmation of the FSIP's position, the negotiations between the parties remained "on hold" (Tr. 34).

Cheryl Faulkner became the president of the Union in February 1994. The parties remained at impasse before the FSIP. On July 12, 1994, Faulkner received a telephone call from FSIP Assistant Executive Director Joseph Schimansky. Prompted by their conversation, the Union sought to withdraw its request for assistance, without prejudice. By letter to the parties dated July 22, 1994, the FSIP confirmed the Union's request to withdraw. The FSIP letter to the parties included the following:

> The withdrawal request is granted without prejudice to the right of either party to file another request for assistance at such time as the questions con-cerning the Union's representational status have been resolved, and an impasse has been reached following renewed negotiations for a successor agreement.

On September 28, 1994, elections were held in connection with the two decertification petitions. The Union prevailed in both elections. The results of those elections were certified on October 6. By letter to management dated November 29, 1994, Union President Faulkner wrote:

> In July of this year, the Federal Service Impasse Panel, notified the parties that the request for Panel assistance has approved the withdrawal

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[1] The record does not reveal what connection, if any, this bargaining unit has with the unit involved in this case.

without prejudice (*sic*). Copy of letter is attached.

It has been over two years since the parties have met to negotiate a Collective Bargaining Agreement, which subsequently was referred to the Impasse Panel on fifteen or so Articles.

Due to the passage of time, and the issues being

> vague in both parties minds, the Union hereby requests that the parties meet to bargain over ground rules and submit new contract proposals, depending on the stipulations set forth in the ground rules.
>
> Accordingly, attached are AFGE Local 2924 Ground Rule proposals. Your counter proposals and/or response is required no later than close of business on 9 December 1994.
>
> Your cooperation will be greatly appreciated in this matter. If you should have any questions, please do not hesitate to contact this office.

By letter to the Union dated December 12, 1994, Warren G. Kossmann, Chief, Work Force Effectiveness Section of the Air Force Base, sent Faulkner the following response:

> 1. Your request to negotiate a new collective bargaining agreement is premature, considering that the parties are currently under a new three-year term of the Memorandum of Agreement (MOA). Pursuant to Article 34 of the MOA, a new agreement may be negotiated by either party giving written notice to the other between 120 and 90 calendar days prior to the end of the three-year period. The current three-year period expires on or about 16 June 1997.
>
> 2. If you have any questions concerning this matter, please call me at ext. 3711.

Either before Kossmann's written response (according to Faulkner) or afterward, during an informal attempt to resolve the unfair labor practice charge filed in this case (according to Kossmann), Faulkner and Kossmann met and discussed this matter. Faulkner left their discussion with the impression that Kossmann's position was that the contract "rolled over" once the Union prevailed in the decertification elections (Tr. 51). Kossmann left the only discussion he could remember with the impression that, consistent with his understanding of Faulkner's November 29 request, Faulkner wanted to negotiate "from square one," not

to resume from "where the parties left off" (Tr. 108).[2] In any event, there were no further discussions or negotiations.

Discussion and Conclusions

The primary issue in this case is whether the 1988 collective bargaining agreement, or MOA, was renewed for an additional three-year period following its original (June 1991) expiration date. If it was renewed, the Air Force Base may at least argue (whether successfully or not) that the agreement was automatically renewed again in June 1994, pursuant to its Article 34, when neither party gave notice of a desire to negotiate a new agreement. However, the issue of a subsequent renewal in 1994 may not be reached unless there was an initial renewal in 1991, for if there was none, there was no agreement in 1994 to renew.[3] In that case, there was no "rollover" and the Union's November 1994 request to bargain was timely.

The 1988 agreement was not renewed. The Air Force Base gave timely notice in 1991 that it desired to negotiate a new agreement, the Union did not contest that notice as a proper invocation of the procedure prescribed in Article 34 to preclude or forestall renewal, and the parties proceeded to negotiate. None of the parties' actions are consistent with a belief that the 1988 agreement was renewed. Rather, their conduct manifested a mutual understanding that it had expired.

Given this state of affairs, the Air Force Base can point to no subsequent events that resurrected the 1988

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[2] Kossmann's testimony concerning this conversation entered the record without objection, although the fact that it was in the nature of a settlement discussion did not become apparent until Kossmann answered a general question propounded from the bench. Counsel for the General Counsel would now have that testimony excluded because it was part of a settlement discussion. I do not see Kossmann's characterization of Faulkner's explanation of her bargaining request in the same light as testimony about a position taken by a party for settlement purposes. I shall therefore not exclude it.

[3] Following the expiration of a collective bargaining agreement, the terms and conditions of employment that concern mandatory subjects of bargaining and that are embodied in the agreement continue in effect. *Department of Health and Human Services, Social Security Administration*, 44 FLRA 870, 878, (1992). This does not mean, however, that the agreement itself has been renewed or extended.

agreement, either in its entirety or with respect to Article 34 itself. Thus, the interrupted course of negotiations, and the issue of whether the Union's request is more accurately characterized as one to initiate or to resume bargaining is beside the point.

The Air Force Base argues, however, that it was entitled to reject the Union's request to negotiate new ground rules and, as the Air Force Base construed the request, to bargain "from square one," because certain matters, including the ground rules, had already been agreed upon. That argument is unpersuasive because the Air Force Base did not merely refuse to negotiate over new ground rules and over other matters previously agreed upon. It refused to negotiate at all. Nor did it communicate to the Union any objections to the negotia-tion of ground rules or what it supposed to be the scope of the bargaining request. Therefore, while Kossmann's testimony that he **would have bargained** if the request had specified that it was a request to resume bargaining from where the parties had left off is interesting, it is also irrelevant. His actual refusal, explaining to the Union only that a second renewal of the 1988 agreement made its bargaining request premature, was unlawful.

The Remedy

A. Remedial Issues Raised by the Parties

Counsel for the General Counsel contends that a "traditional" bargaining order would be insufficient to remedy adequately the violation that occurred here. He requests, therefore, in addition to the usual remedial provisions, that the Air Force Base be ordered to resume negotiations, "includ-ing necessary ground-rules negotiations," within 30 days of the date of the Decision and Order, and, upon the Union's request, to make any contract provisions retroactive to a date that would permit employees to receive any new benefits that may be negotiated in the same manner they would have been received if the Air Force Base had properly initiated bargaining following the Union's request on November 29, 1994.

The Air Force Base, on the other hand, argues that any bargaining order should be limited to negotiations over the 15 proposals that were pending before the FSIP. Such a limita-tion, it argues, conforms to the Union's present position as to its intention when it requested negotiations.

Counsel for the General Counsel also requests two remedial provisions that appear to be novel, at least under

the Authority's published decisions. The first is that the Air Force Base make the Union whole for any additional costs or expenses incurred in resuming and completing negotiations which the Union would not have incurred if the Air Force Base had properly begun negotiations when requested. The second is that an annotation be placed in Warren Kossmann's "AF-971" file and his official personnel file to the effect that his decision not to negotiate was found to be unlawful. Such a formal, nondisciplinary action, it is argued, would discourage similar actions in the future.

B. The Appropriate Bargaining Order

First, with regard to the scope of bargaining to be ordered, I conclude that it would be inappropriate to limit the mandated negotiations to the items that had been presented to the FSIP. I infer from the record that the parties reached **tentative** agreement on all those items that were not presented to the FSIP. However, the parties' existing ground rules, which I find to be still in effect, provide in pertinent part that "[a]ll articles or sections for which tentative agreement has been reached shall be binding only upon acceptance of the final agreement." Moreover, the passage of time since these tentative agreements were reached might give the Union legitimate reasons to seek to revisit one or more provisions previously negotiated. An attempt to reopen any subject without sufficient reason, however, could be considered evidence of bad faith bargaining. *See Department of Defense, Department of the Air Force, Armament Division, AFSC, Eglin Air Force Base*, 13 FLRA 492, 505 (1983).

The question of mandating negotiations on ground rules, if the Union continues to request them, is more difficult. The existing ground rules provide expressly that, at least with respect to the six items (paragraph 3., a.-f.) labeled "procedures," they will apply "throughout the entire course of negotiating sessions." Aside from this express provision, it is usually presumed that ground rules are applicable for the duration of negotiations. However, events have rendered some of the ground rules ineffective. For example, there are provisions calling for the beginning of negotiations, and for the exchange of initial proposals, on specified dates in 1991. Thus, paragraph 3.a., specifying June 18, 1991 for the beginning of negotiations "unless mutually agreed to start at a later date," can no longer be applied. I conclude that the Union is bound, however, by paragraphs 3.b.-f, by virtue of the specific provision for their applicability throughout the "entire course" and because the Union's proposed November 1994 ground rules did not seek substantial changes from those

items. With respect to the remaining ground rules agreed upon in 1991, I believe that the passage of time and the interven-ing events in the bargaining process make it inappropriate to restrict the normal scope of mandatory ground rules negotia-tions. In recommending an order to reopen negotiations, therefore, *see Department of the Air Force, Griffiss Air Force Base, Rome, New York*, 25 FLRA 579 (1987), I shall make no specific provision concerning ground rules.[4]

The General Counsel's requested specification in the bargaining order that negotiations resume within 30 days of the Decision and Order in this case appears also to be a novel remedy. The necessity of such a departure from the usual form of mandate has not been demonstrated. I shall not recommend it.

Similar considerations govern the request for retroactive application of any collective bargaining agreement reached after negotiations resume. While a retroactive bargaining order is not a novel remedy, the Authority has imposed such orders only in certain defined situations, none of which is present here. *See Federal Deposit Insurance Corporation*, 40 FLRA 775, 784-85 (1991) (*FDIC*).

The Authority advised in *FDIC* that the situations in which it had imposed retroactive bargaining orders in the past "do not exhaust the type of cases in which retroactive bargaining orders would be appropriate[.]" *Id.* at 785. However, the Authority has not articulated any specific criteria for determining when such an order would be appropriate to effectuate the purposes and policies of the Statute. Rather, it has employed a policy that places at least some value in affording the parties the flexibility to determine whether retroactivity will best serve their needs, thus finding **prospective** bargaining orders to be more appropriate in various situations. *See, for example, FDIC*; *U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts*, 38 FLRA 989, 992-93 (1990) (*Customs Service*). *See also Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220,

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[4] To mandate "necessary ground-rules negotiations," as Counsel for the General Counsel requests, would only inject, without resolving, the additional issue of what is "necessary."

231 (1995) (Judge's Decision).5 Counsel for the General Counsel has not provided a reason, sufficient to outweigh the value of affording flexibility to the parties, to expand the circumstances in which mandatory retroactivity is appropriate so as to cover the instant case.

C. General Counsel's Request for Novel Remedies

Although not labeled as such, the requested remedies of reimbursement of the Union for negotiating expenses and an annotation in Kossmann's employee files would ordinarily be considered to be extraordinary. *Cf. Internal Revenue Service (District, Region, National Office Units)*, 16 FLRA 904, 924 (1984) (award of costs and attorney's fees to union considered an extraordinary remedy). The Authority has had little to say about extraordinary remedies, but in *Social Security Adminis-tration, Baltimore, Maryland*, 14 FLRA 499, 500 n.1 (*SSA*), it expressly affirmed the Judge's recommendation, at 533-34, that the issuance of an (unspecified) extraordinary remedy was not warranted absent the recurrence of the unlawful conduct found. The National Labor Relations Board also considers the reimbursement of a union for expenses caused by an employer's unfair labor practices to be an extraordinary remedy, and will make such an award only in exceptional circumstances. The Board has identified such circumstances as those where the defenses to the alleged unfair labor practice are frivolous or where the respondent has shown a proclivity to violate the National Labor Relations Act once its actions have been adjudicated unlawful. *Three Sisters Sportswear Co.*, 312 NLRB 853, 879 (1993); *Eastern Maine Medical Center*, 253 NLRB 224, 228 (1980); *Wellman Industries*, 248 NLRB 325 (1980). *But cf. The Sacramento Union*, 291 NLRB 540 (1988) (respondent ordered to make union whole for any expenses it may have incurred as a result of unlawful unilateral changes regarding where the parties met to process grievances).

Although I have found no merit in the Air Force Base's defenses to its alleged violation, I conclude that, while misdirected and unpersuasive, they are not necessarily frivolous. At least I am not certain that no labor relations professional or reviewing body would find these defenses worthy of serious consideration. Nor has the Air Force Base been the kind of recidivous violator whose repeated actions warrant the presumption that such conduct

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This is not to say that the Authority has, as a general matter, found retroactive orders to be undesirable. *See Customs Service* at 993.

will continue absent extraordinary remedies. *See SSA.*[6] Concerning the annotation for Kossmann's file, I find nothing so exceptional in his conduct here or in his history to warrant that extraordinary measure.[7]

For all of these reasons, I recommend that the Authority issue the following order, which is intended to conforms to the current Authority standard for cases of this type.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, Davis-Monthan Air Force Base, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Failing and refusing to reopen contract negotiations and negotiate in good faith with the American Federation of Government Employees, Local 2924, the exclusive representative of its employees, with respect to

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[6] Although the Air Force Base was found to have committed a generically similar unfair labor practice in 1990, *Davis-Monthan Air Force Base, Tucson, Arizona*, 42 FLRA 1267 (1991), its only other previous unfair labor practice found by the Authority was a 1987 refusal to furnish names and home addresses of bargaining unit employees. *Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona*, 32 FLRA 73 (1988), *rev'd*, No. 88-1441 (D.C. Cir August 9, 1990). In addition, an Administrative Law Judge found that in 1992 it engaged in surveillance of two union meetings. *Davis-Monthan Air Force Base, Tucson, Arizona*, Case No. SA-CA-20608 (1993), Administrative Law Judge Decision Reports, No. 111 (December 3, 1993). (I have not attempted a complete search of older Administrative Law Judge decisions.)

[7] I had occasion to reject a request for an analogous remedial provision -- to name the offending official in the Notice to employees -- in *United States Department of Justice, Immigration and Naturalization Service*, 51 FLRA 914, 914-15, 930-31 (1996). The General Counsel filed an exception to the Notice I recommended, but the Authority did not find that the exception raised the issue of naming the offending official. However, the Authority took the opportunity to modify its traditional Notice to include a statement that the Authority had found the respondent to have violated the Statute. *Id.* at 915-16.

conditions of employment relating to negotiations for a new collective bargaining agreement.

(b) In any like or related manner, interfering with, restraining, or coercing 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 Statute:

(a) Upon request of the American Federation of Government Employees, Local 2924, reopen contract negotiations and bargain with respect to conditions of employment relating to a new collective bargaining agreement.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Davis-Monthan Air Force Base, Tucson, Arizona, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, D.C., March 21, 1996

_____
JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

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

We hereby notify our employees that:

WE WILL NOT fail and refuse to reopen contract negotiations and negotiate in good faith with the American Federation of Government Employees, Local 2924, the exclusive representative of our employees, with respect to conditions of employment relating to negotiations for a new collective bargaining agreement.

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

WE WILL, upon request of the American Federation of Government
Employees, Local 2924, reopen contract negotiations and bargain with respect to conditions of employment relating to a new collective bargaining agreement.

_____
(Activity)

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

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Region, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, and whose telephone number is: (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. DE-CA-50248 were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Phillip G. Tidmore, Esq.
Sue Ellen Schuerman, Esq.
Lt. Colonel W. Kirk, Esq.
Air Force Legal Services Agency/CLLO
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Arlington, VA 22209-2403

Mr. Kent Bradley
National Representative
American Federation of Government
Employees, 13th District
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Lakewood, CO 80226

Marjorie K. Thompson, Regional Director
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
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Cheryl Faulkner, President
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Employees, Local 2924
P.O. Box 13168
Tucson, AZ 85732

Warren Kossmann, Chief
Work Force Effectiveness Section
HQ, 355th Support Group (ACC)
Davis-Monthan AFB
Tucson, AZ 85707

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: March 21, 1996
Washington, DC