UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF AGRICULTURE, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, PLANT PROTECTION AND QUARANTINE, HONOLULU, HAWAII Respondent	
and NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES Charging Party	Case No. SF-CA-50933

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 **DECEMBER 16, 1996**, and addressed to:

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

GARVIN LEE OLIVER
Administrative Law Judge

Dated: November 12, 1996
Washington, DC

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

MEMORANDUM DATE: November 12, 1996

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF AGRICULTURE ANIMAL AND PLANT HEALTH INSPECTION SERVICE PLANT PROTECTION AND QUARANTINE, HONOLULU, HAWAII
Respondent

and Case No. SF-CA-50933

NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES

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

U.S. DEPARTMENT OF AGRICULTURE, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, PLANT PROTECTION AND QUARANTINE, HONOLULU, HAWAII Respondent	
and NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES Charging Party	Case No. SF-CA-50933

Stanley E. Kensky
Representative of the Respondent

Yolanda Shepherd Eckford
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (5), by altering and repudiating an agreement with the Charging Party (Union,) concerning provisions 3A and 3B of the transit flight policy, and thereby engaged in bad faith bargaining in violation of the Statute.

Respondent's answer denied any agreement or alteration with respect to the 3A or 3B proposals and any violation of the Statute.

A hearing was held in Honolulu, Hawaii. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file

post-hearing briefs. The Respondent and General Counsel filed helpful briefs.

For the reasons set out below, I find that a preponderance of the evidence does not support a violation of the Statute.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The National Association of Agriculture Employees is the exclusive representative of a nationwide unit of U.S. Depart-ment of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine (PPQ) employees, including employees at the Respondent's Honolulu, Hawaii facility. The mission of the Respondent is to prevent agriculture pests from foreign sources from entering the United States. This is achieved through the inspection of passengers, vessels, baggage and cargo prior to entry into the United States. The Respondent's Honolulu office enforces a domestic quarantine to ensure that Hawaii pests do not enter the mainland United States.

By letter dated April 4, 1994, the Officer in Charge of the Honolulu Office of the Respondent notified the Union of management's intention to implement a change in its Transit Flight Policy by discontinuing its practice of "preclearing" passengers and crews boarding in Honolulu on "progressively cleared flights." In essence, the Officer-in-Charge's memo meant that the Respondent's inspectors would no longer conduct inspections of passengers who had stayed in Hawaii for a brief period of time on route via a foreign flag airline carrier to the mainland United States. Such inspections were normally conducted on overtime by the Respondent's inspectors because the flights would often arrive outside of regular shift hours. The expense of conducting the inspections on overtime pay was borne by the airlines.

The Union submitted ground rule proposals for negotia-tions concerning the proposed change in working conditions. An impasse on the ground rules was declared by the Respondent.[1] The parties were at impasse over two proposals submitted by the Union. One of the proposals stated that, "Implementation may not occur until all proposals including

[1] The parties were already at impasse over almost identical ground rules submitted by the Union in connection with another matter then pending negotiation.

impact and implementation proposals have been negotiated to conclusion."[2]

By letter dated September 13, 1994, the Regional Director of the Western Region of the Respondent submitted notice of the same change to Union representative Mike Randall. By letter dated September 22, 1994, Randall submitted proposals in response to the Respondent's September 13, 1994 notice. However, no negotiations occurred because the parties were still at impasse over the ground rules for negotiations. In mid-December 1994, the ground rules impasse was resolved by the Federal Service Impasses Panel (FSIP). The FSIP imposed upon the parties the Union's proposed ground rule that imple-mentation not occur until the completion of negotiations.[3] The parties completed negotiations on the remaining ground rules in February 1995.

On February 28, 1995, the parties commenced negotiations on the proposed change in the Transit Flight Policy. The Union was represented in the negotiations by Randall and two bargaining unit employees who were not Union representatives, Wendell Wong and Roger Yamane. Management was represented in the negotiations by Glenn Hinsdale, the Hawaii State Health Director, Mike Wafer, a Regional Employee Relations Specialist, and James Eddy, the Officer-in-Charge at the Respondent's Los Angeles facility.

On the first three days of negotiations, the parties discussed the Union's proposals, coming to agreement on some of the proposals. The parties did not, at that point, reduce their agreement to writing. By the third day of negotiations, March 2, 1995, the parties had reached agreement on all proposals, with the exception of two proposals which the parties agreed would be addressed during local negotiations on the subject, and proposal number 3. The Union's proposal number 3 stated:

> Union and Management agree that no matter where inspections conducted pursuant to 7 CFR 318.13 occur, qualified bargaining unit personnel shall be utilized to do the inspection clearance work to the extent possible, consistent with port personnel requirements. The method and means of work accomplishment shall be, to the greatest

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[2] Record evidence establishes that "negotiated to conclusion" meant "through impasse procedures, negotiability appeal (and) any arbitration...."

[3] The other ground rule over which the parties were at impasse was resolved without FSIP assistance.

extent possible, have qualified Honolulu bargaining unit personnel, if available, inspect and clear Honolulu domestic outbound passengers, crew and baggage joining progressively-Custom-cleared-foreign flag carrier flights to the mainland, prior to aircraft departure from Honolulu, as is the current policy and practice.

On March 2, 1995, at the end of the day, management representatives informed the Union representatives that they could not agree to proposal 3 as written. Hinsdale asked the Union negotiators to revise the proposal.

Randall conferred with the Union's attorney the following morning and devised proposals 3A and 3B which stated:

3A. Union and Management agree that no matter where inspections conducted pursuant to 7 CFR 318.13 occur, ratios of L/A and technician employees to PPQ Officers shall remain the same as the ratios used on January 1, 1995 to do the inspection clearance work to the maximum extent possible, consistent with port personnel requirements.

3B. The method and means of work accomplishment shall be, to the greatest extent possible, to have qualified Honolulu bargaining unit personnel, if available, inspect and clear Honolulu domestic outbound passengers, crew and baggage joining progressively-Custom-cleared-foreign flag carrier flights to the mainland, prior to aircraft departure from Honolulu.

On March 3, 1995, Management prepared a document reflecting all proposals agreed to by the parties, and Hinsdale and Randall initialed each proposal.[4] With respect to proposal 3, the document stated: "Note: This proposal on HOLD requiring further negotiations per discussion concerning NAAE Proposals 3A. and 3B."

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[4] The initialing process adhered to Paragraph #14 of the "Ground Rules for Transit Flight Negotiation", which states:

14. When both parties reach agreement on the language of a provision or item, that provision or item shall be reduced to writing and initialed by each chief negotiator. Both sides shall be provided with copies of the initialed agreement.

Following the submission of Union proposals 3A and 3B, the parties discussed them, then the management representatives asked for time to caucus. During this period of time, the management negotiation team caucused and contacted the Agency for advice. After being advised by the Agency that the two proposals were considered non-negotiable, Mr. Hinsdale retyped Union proposals 3A and 3B on his computer with a preamble at the top which read as follows:

> It is Managements position that the union proposals submitted on March 3, 1995 at Regional Negotiations are non negotiable as written:

The parties met again approximately ninety minutes later. Mr. Hinsdale and Mr. Randall signed one document and another marked "copy." A document with the original signatures of Mr. Hinsdale and Mr. Randall was offered by Respondent at the hearing and a copy was received in evidence.

All three of the Union negotiators, Michael Randall, Wendell Wong, and Roget T. Yamane, testified that when the management representatives came back into the room, Mr. Hinsdale said he was ready to sign the Union's proposal. The Union negotiators testified that, before Mr. Randall signed the document, they each carefully examined the management document to compare the typed 3A and 3B proposals with the Union's version, and the above preamble was not on the document which they viewed and Mr. Randall signed.

Two of the management negotiators, Glenn Hinsdale and Michael Wafer, testified that the documents were signed merely to acknowledge the non-negotiability determination; that they did not indicate agreement with the proposals in any way, which would have been entirely inconsistent with their previous positions; and that the signed documents contained the above preamble, as demonstrated by one of the originals, and were not altered in any way.

The original document in evidence gave no appearance of alteration. Mr. Randall speculated that the document with the original signatures could have been altered later by simply typing the preamble on the same computer and printing it on the executed document. No evidence supporting this theory was offered.

Based on the physical evidence, an original document, which is supported by the testimony of the management negotiators, which I credit, and find more consistent and plausible given the history of the negotiations than that of the Union negotiators, I find that the above preamble

declaring provisions 3A and 3B to be non-negotiable was on the documents when they were signed by Mr. Wafer and Mr. Randall and, consequently, that there was no agreement between the Respondent and the Union which included provisions 3A and 3B concerning the transit flight policy.

Mr. Randall was not furnished a copy of the document. In Mr. Wafer's haste to catch a plane to Los Angeles, he placed the original documents in his briefcase and took them to his office in Sacramento. When Mr. Randall learned several weeks later that Mr. Wafer had the documents, Mr. Randall requested a copy, and Mr. Wafer faxed him a copy on or about April 17, 1995. The Union's petition for review of negotiability, filed with the Authority on August 18, 1995 (dismissed without prejudice, October 11, 1995, O-NG-2262), and its unfair labor practice charge in the instant case, filed September 25, 1995, followed.

The Respondent implemented its proposed transit flight policy in September 1995. The Policy did not include Union proposals 3A and 3B.

Discussion and Conclusions

Section 2423.18 of the Rules and Regulations, 5 C.F.R. § 2423.18, based on section 7118(a)(7) and (8) of the Statute, provides that the General Counsel "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Based on the credibility resolutions made above, it is concluded that a preponderance of the evidence does not establish that Respondent violated section 7116(a)(1) and (5), as alleged, by altering and repudiating an agreement on provisions 3A and 3B concerning the transit flight policy.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, November 12, 1996

GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. SF-CA-50933, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Stanley E. Kensky
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REGULAR MAIL:

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Dated: November 12, 1996
Washington, DC