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

SOCIAL SECURITY ADMINISTRATION REGION IX SAN FRANCISCO, CALIFORNIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 147, AFL-CIO Charging Party	Case No. SF-CA-70506

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 pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 29, 1998**, and addressed to:

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

_____
ELI NASH, JR.
Administrative Law Judge

Dated: May 28, 1998
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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MEMORANDUM DATE: May 28, 1998

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION, REGION IX
SAN FRANCISCO, CALIFORNIA
Respondent

and Case No. SF-CA-70506

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
COUNCIL 147, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(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

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION REGION IX SAN FRANCISCO, CALIFORNIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 147, AFL-CIO Charging Party	Case No. SF-CA-70506

Stefanie Arthur, Esq.
For the General Counsel

Ralph Patinella, Esq.
Wilson Schuerholz, L.R.S.
For the Respondent

Craig Campbell, Union President
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to an unfair labor practice charge filed on June 19, 1997, by the American Federation of Government Employees, Council 147 (herein called charging party/union) the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (herein called the Authority) issued a Complaint and Notice of Hearing, on November 26, 1997.

The complaint alleges that the Social Security Administration, Region IX, San Francisco, California (herein called the respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (herein called the Statute) by unilaterally implementing an early consultative examination project in the Chula Vista field office without bargaining as required by the Statute; by repudiating

the November 8, 1995, national Memorandum of Understanding on Early Decision List (herein called EDL), Teaming and Sequential Interviewing which requires regional negotiations over baseline teaming of SSA Claims Representa-tives with State Disability Examiners; and, in the alternative, by engaging in bad faith bargaining in connection with regional level teaming negotiations that commenced on April 14, 1997.

A hearing was held in San Francisco, California at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. The parties filed timely post-hearing briefs which have been carefully considered.

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

Findings of Fact

At all times material herein, the American Federation of Government Employees (AFGE), has been the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining with the Social Security Administration. Charging Party, AFGE Council 147, is an agent of AFGE for representing unit employees at field installations and teleservice centers in the area covered by SSA's Region IX, the Respondent herein. Craig Campbell is the President of Council 147. Linda McMahon is the Respondent's Regional Commissioner.

The Agency's Disability Process Redesign Plan

The basic facts are undisputed. Where there is a dispute concerning a matter the undersigned has relied on the consistent and credible testimony of Campbell.

Around September 1994, the Social Security Administration (herein called the agency) finalized a disability redesign plan. The plan sought to fundamentally change the way the agency performs its disability mission. The plan was included in a national agreement, negotiated between the Agency and AFGE, in November 1995, in order to commence implementation of the aforementioned disability redesign plan.

In 1994, the agency published its plan to redesign its disability claims process, entitled Plan for A New Disability Claim Process, followed in November 1994, by a plan for implementing the disability process redesign. Implementation of disability redesign is coordinated by a disability process

redesign team (DPRT), headed until recently, by the Director of Implementation Charles A. (Chuck) Jones.

Devised with the goal of improving the quality of service in the disability claim process, one of the cornerstones of the disability redesign is the establishment of a disability claim manager position. Under the current procedure, applications for SSA disability, whether filed under Title 2 or Title 16 of the Social Security Act, are taken by the agency's field offices, where field office personnel, particularly claims representatives (CRs) through personal interviews, obtain a detailed medical and vocational history for the claimant and then screen for nonmedical eligibility factors. The claim is then forwarded to one of the State Disability Determination Services (DDS) offices, where a disability examiner (DE), sometimes referred to also as disability analyst (DA), develops the medical evidence, which would include scheduling the claimant for a consultative examination (CE) if needed, and a final decision made regarding the existence of a medically determinable impairment which meets the definition of disability. The new Disability Claims Manager (DCM) will have responsibility for the complete processing of an initial disability claim, combining the DE's knowledge of the medical aspects of the disability program with the CR's interviewing skills and knowledge of nonmedical aspects of agency programs.

In November 1995, teams of representatives from AFGE and the agency met in Baltimore and negotiated five separate MOUs covering various aspects relating to implementation of the redesign plan. One of those MOUs, the only one at issue in this case, was the EDL, Teaming and SI MOU.

Among the ideas embraced by the disability redesign team as means of providing cross-training for the agency and DDS employees, in order to move to the disability claims manager model, were the EDL and the Teaming and SI. The EDL is an expanded list of conditions which could be presumptively determined to constitute disabilities. The SI, is a procedure by which the DE follows up the CR's regular interview of the disability applicant with a telephonic or personal interview to obtain medical information. The Teaming MOU, in fact, specifically states that "the Agency has decided to implement the concept of CR/DE baseline teaming, the Early Decision Process (EDP) and Sequential Interviewing as the preliminary steps in the transition to the DCM. These steps are viewed by the Agency as the building blocks toward this objective."

Primarily concerned with establishing procedures for implementing EDL nationwide, the MOU specifically required negotiations over CR/DE teaming and SI to take place at the regional level:

> The Agency plans to implement CR/DE teaming and SI as quickly as possible. Management agrees to bargain these issues at the regional level (level 3) in accordance with the Operations Partnership Agreement MOU dated 9/6/95. Management will provide AFGE with notice in accordance with Article 4 of the National Agreement, 5 USC 71, and Executive Order 12871. The parties encourage the regional bargaining process to commence within 10 calendar days from the date the notice is given to the union.

Although the MOU contains no definition of teaming at the time of its negotiation, representatives of both sides were working from identical materials prepared by the redesign team which described different teaming scenarios and set out a number of teaming pilot programs which had been tried with more or less success. Among other things, the negotiation team members had before them the material which appears, in slightly modified form. This document makes clear that CR/DE teaming is a broad concept: "Team structure and function can occur in many ways depending upon the desired objective." "While teaming implies that a literal pairing of CRs and DEs will be established, actual team composition is likely to vary due to operational needs of the FO and DDS." Thus, teaming can occur person-to-person, group-to-group, unit-to-unit or case-by-case, or in any other structure or combination of structures, depending on local FO and DDS operational needs. "Teaming neither presumes nor prohibits team members being physically collocated. The use of collocation and/or communications technology depends upon the structure, resources and needs of the teams."

In the summer of 1996, representatives from AFGE, the agency and State DDS participated in a series of conference calls to discuss their experiences with teaming arrangements under the agency's disability redesign plan. A document summarizing those various teaming arrangements was prepared and is part of respondent's evidence in Resp. Exh. 2.

Regional Implementation of the Redesign Plan

By letter dated December 22, 1995, Regional Commissioner McMahon notified Campbell of the Region's desire to commence implementation of aspects of the Disability Redesign Plan covered in the Early Decision Listing, Sequential Interviewing and Teaming MOU, and invited the union's participation in the process:

> We envision a number of local projects

> which may result from the implementation of this MOU. Toward that end, we would like to explore establishing regional parameters for enabling the parties to make local arrangements and decisions.

Acknowledging that EDL, SI and Teaming "comprise a phased approach to creating the Disability Claims Manager position," McMahon describes Respondent's intentions with respect to teaming arrangement as follows:

> **Teaming** is the bringing together of Field Office (FO) and Disability Determination Services (DDS) staff to facilitate the development and adjudication of disability claims. There are some suggested models for pairing these resources . . . [but] the model used in any given field office will vary with local conditions and service area needs.
>
> Acceptable alternative FO/DDS pairing arrangements may already exist in some locations. In those locations where such is the case, FO and DDS staff will be encouraged to explore further explanations as long as they are consistent with the goal of CR/DE teaming.

Campbell thereafter requested negotiations, and after some dispute, it was agreed to conduct negotiations in person using interest-based bargaining (IBB). The negotiations were scheduled in April 1996. Martin Almanzan, Respondent's Northern Area Director, was designated to be Respondent's chief negotiator. Prior to the scheduled negotiations, the union and management exchanged their "proposals," more accurately identified as interests and criteria, but in April 1996 the negotiations were postponed in view of the fact that none of the States in the Region was willing to participate in EDL. As Campbell explained, under EDL, the CRs would perform some of the DDS functions while under SI or teaming, the CE would begin to perform some of the CR's functions. The union did not think it was fair to agree to procedures for state employees to begin performing the agency work in the absence of the *quid pro quo*.

The 1997 Negotiations

The negotiations that took place at the Regional level in April 1997 are the center of interest here, as they were allegedly unilaterally terminated by respondent. The MOU at issue, entitled EDL, Teaming and SI (herein Teaming MOU), was one of several MOUs negotiated at the time as a prelude to implementation of the nationwide plan. The Teaming MOU specifically provides that "the agency plans to implement CR/DE

teaming and SI as quickly as possible" and requires negotiations "over these issues" at the regional level.

The union heard nothing more from respondent concerning its plans to negotiate as required by the MOU until February 1997, when Campbell received a letter from Kim Mollenauer, respondent's Labor Relations Team Leader, advising that as a result of pressure from the national disability redesign team, the Region desired to complete regional negotiations on the teaming and sequential interviewing aspects of the national MOU "as soon as possible." Claudia Carlson, the Fresno Field Office Manager, was designated as the agency's chief negotiator, and Bill Otto, the Disability Program Administrator, was the co-negotiator. Campbell designated Elena Stonebraker, a disability CR in the Fairfield office as his co-negotiator.

Negotiations were set to begin on April 14 and continue through April 17, 1997, at the San Francisco Regional Office. It was agreed to conduct the negotiations using IBB so the services of a facilitator were obtained by the agency.

IBB is a method of negotiations using problem solving techniques, rather than traditional, positional bargaining, which has been adopted by the agency and AFGE as a cornerstone to their partnership agreement. Under the IBB procedures which have been utilized by the agency and AFGE, facilitators are trained to moderate the sessions and provide some structure to the meeting. Flip charts are used to record various areas explored and discussed by the parties. As part of the process, the parties share their interests, develop joint criteria by which to measure an agreement, generate options, discuss what they can or cannot accept and, in the last step, develop a plan which reflects all of those matters with which the parties are in agreement. As part of the process, agreements are reached by consensus decision making whereby all of the negotiators indicate either that they support or can "live with" the idea.

Under the parties' national ground rules, negotiations at the regional level "will not exceed four (4) working days . . . These time frames will include necessary travel, preparation, actual bargaining, and mediation." Anxious to insure that the negotiations would be completed within this contractual time frame, a mediator was contacted and her services reserved for April 17, 1997.

In correspondence scheduling the negotiations, and later at the table, Carlson made it clear that the purpose of the negotiations was to establish a framework for future regional teaming activities. "What we want to accomplish in these negotiations is to establish a Regional process whereby Teaming projects can occur in field offices . . . Specific workload

proposals and field office sites are not part of this proposal." To that end, in her correspondence, Ms. Carlson enclosed "MOU's from other Regions that establish frameworks for Teaming."

> As you know, the national level Memorandum of Understanding (MOU) on EDL, Teaming and Sequential Interviewing calls for regional level negotiations . . . Reaching an agreement on this matter and resuming teaming activities is important because Region IX FO's and DDS's have a long history of cooperative ventures designed to improve public service. Evolution of these agreements and the ability to respond to changing public demands, resources, and legislation have been delayed pending resolution of this bargaining. Also, teaming activities help build the structure to support further reengineering activities such as DCM.

Bargaining commenced, as scheduled, on the afternoon of April 14, 1997. Carlson and Otto represented respondent; Campbell and Stonebraker represented the union; and a facilitator, Mike Lemon was presented. After the facilitator reviewed the IBB process, the parties proceeded to establish their ground rules. The agreed-to ground rules included the time they would meet (8:00 a.m. to 4:00 p.m.), that there would be no interruptions, that they would follow the procedures in Article 4 of the national agreement regarding mediation and impasse if no agreement were reached, and that they would chart all consensus decisions. The parties also agreed that either party could caucus. The parties next discussed the problem statement, which was tentatively identified as "how do we implement teaming and sequential interviewing in the San Francisco Region," and then moved on to listing their respective interests relative to this problem statement. After a preliminary discussion concerning a definition of teaming, the parties adjourned for the day.

When the bargaining resumed at 8:00 a.m. on April 15th, the parties started right in working on a definition of teaming, using the baseline teaming informational document and description of pilots in evidence. After much discussion, the facilitator put a tentative definition on a flip chart: that teaming was a process that improved the relationship between state agency and field offices with the goal of improving job skills for our employees and improving public service; and that it could be done in a variety of ways. The parties then listed the ways, such as group-to-group, unit-to-unit, case-to-case and person-to-person, using terminology from the Baseline

Informational document which the parties were using to define teaming.

No final agreement was reached on the definition of teaming but with this working definition, the parties began brainstorming options--the different types of teaming arrangements that could be used in the Region.

At some point, the facilitator directed the parties back into the sequential steps of the IBB process, discussing criteria by which they would measure their agreement, e.g., that it would be manageable, workable, legal and ratifiable, fair and equitable, and then the parties began brainstorming what the actual framework for their regional teaming process would look like. Using the same process they had previously, each of the negotiators included items they thought were necessary elements to this framework. A number of ideas were put up by the parties under the topic of a framework, including a process for approval of local projects, and the element most important to the union, regional level notice of all teaming arrangements. This topic had been the source of contention since the management negotiators, particularly Otto, had expressed a significant interest in local flexibility, but after Campbell explained why the union wanted to be involved regionally, Otto indicated that he could accept that explanation.

> . . . I explained what the Union had to have and needed, was that we needed to be involved regionally and wanted to know what was going on in these projects because it had such a serious impact on our employees. We didn't know if disability reengineering was going to mean improved jobs for employees or loss of jobs, and we wanted to know what these teaming jobs involved, and we had to have a regional control on the projects . . . .

According to Campbell, this was a "major breakthrough . . . in the IBB process for us and so then Mike [Lemon] saw that as an opportunity to find out if we had a consensus on that item, so he identified whether we all had a consensus on the item, which we did." Carlson acknowledged that Respondent's negotiators agreed with the union's arguments and that consensus was reached on the matter of regional level notification. According to Carlson, she agreed because regional level notification was consistent with the type of framework which had been negotiated in regional teaming and sequential interviewing MOUs in other regions.

Shortly after this important breakthrough, having worked for several intensive hours of negotiations, the parties broke for lunch, but when they returned, before they could resume any

substantive discussions, management requested a caucus, which lasted for the remainder of the day.

Negotiations were to resume the following morning, April 16, at 8:00 a.m. in accordance with the parties' ground rules, but management initially requested to delay the opening. At 8:30 a.m., the management negotiators returned to the table, explaining that they were having discussions with Regional management concerning the framework that had been agreed to and that Regional management wanted to conduct a conference call later that morning with the area directors who were then in Baltimore for a meeting.

To avoid wasting time, the parties decided to move to another subject while waiting for the conference call to occur. They turned to the subject of sequential interviewing, which had been placed in the "parking lot" the previous day, when it became apparent that it was going to be a difficult issue to address, and began brainstorming their different interests relative to sequential interviewing.

After about an hour, LRS John Hernandez called Otto out of the negotiations, and then, Otto and Carlson requested a caucus to meet with regional management for a conference with the area directors. When they returned in about an hour, Otto told the union negotiators that they had to withdraw from their agreement to regional notice; and that they had authority to continue negotiations only if the union would agree to local notice.

The union negotiators were shocked by management's action. Campbell and the facilitator, Lemon, both attempted to convince Otto that management could not withdraw from their agreement but management insisted that they could not proceed with negotiations unless the union agreed to local level bargaining.

Unwilling to surrender their agreement to regional notice and unsure how to proceed, the union negotiators requested a caucus in order to regroup. Concerned that the negotiations were now heading for third party proceedings, and that all they had was the material on flip charts, Campbell and Stonebraker decided they needed to put something in writing and they proceeded to prepare a document. Although entitled Union Proposal, the document was an attempt to capture on paper all of the material on the flip charts, i.e., summarize the parties' discussions during the prior two days of negotiations. The union specifically sought to include all of the interests and options which respondent's negotiators had surfaced during the negotiations. According to Campbell, the parties decided "to proceed with how we thought the IBB process would proceed . . . ."

So we proceeded to write up -- we decided just to proceed with how we thought the IBB process would proceed, which is, you come up with your written plan to address everybody's interests, so we developed the Union's plan and tried to take all the interests that were up on the board and write a plan, and it actually took us about four hours. I had a laptop and a portable printer in the room, and we actually typed it up and printed it out, made copies, and got management back to the table at, I believe about 3:30.

* * *

Q Now, you indicated that this document took into account the interests? Can you point to some of-- give us some examples here?

A Yes. The first section's an overview, so this kind of probably follows our framework that was up on the flip chart, where it tried to provide a structure to process, so item one was our attempt to write an overview of how the process would work, which is, you know, that the administration would identify the test sites, which would address their flexibility of they would pick the sites. They would take care of getting state agencies participation agreement, they would develop the written proposal, and then the regional framework, item four, would be where it -- we came up with this coordinator idea, that would be the regional notice, and then the step five under the overview is where the coordinators would review it, modify it, or approve it, and that addressed Bill Otto's interest of letting the local parties know whether their plan had been approved or not. And then, item six was an effort to put employees, the people who do the work, into the process, so we thought, you know, having a group of employees who could develop a plan or review the plans to get their input as to whether they thought it was workable. That was kind of an overview, and then the rest of it is just trying to provide more substance and detail to those individual components.

We -- there was an interest in the framework of having a format, and so item three was listing a structure for a written format, so any proposed project would be typed up using this format, stating the length of the project, what number of people participating, giving a work flow, giving some

> structure to the plan so that the coordinators who evaluated would know what the actual proposal was.

The union completed its caucus and the parties returned to the table around 3:00 or 3:30 that afternoon, April 16, at which time the union presented its "proposal" to management. Campbell reviewed the plan with the negotiators, explaining how the union had tried to address as many of management's interests as they could. After about a half an hour of explanation, management requested a brief caucus. When they returned, they modified their prior position regarding local negotiations slightly, stating that "they saw only regional bargaining taking place if there was a regional roll out of a teaming project, or if a teaming project involved more than one area, but everything else had to be bargained locally." Campbell rejected this idea, reminding them that they had agreed to regional notice under the framework. At that point, Carlson told Campbell that the agency was "withdrawing their proposal."

> Q What did you understand that to mean?
>
> A That they were withdrawing their proposal to start teaming, and that they expected not to proceed. I responded that, "You can't withdraw your proposal." I said, "The National MOU says that you must bargain regionally and it has time frames that kick in, and you've already agreed to a regional notice," and I pointed to it again up on the flip chart. At this point, Mike Lemon was frustrated as the Facilitator and he said he felt like his services were no longer needed, that the parties had moved into a more traditional process, but we were going into mediation, because I had made reference to the mediator being there the next [day], and that we were going to proceed to mediation, and at that point the discussions terminated, and we left the room with me saying, "I'll see you tomorrow."

Carlson and Otto did not advise the union negotiators that management intended to cancel the services of the mediator, who was scheduled to meet with the parties the following day at 10:00 a.m., or that management did not intend to return to the table for any further negotiations.[1]

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[1] Although Carlson testified that she told Campbell that they were "withdrawing our request to bargain," she never told the union that they were terminating further negotiations or that they were canceling the mediator scheduled for the following day.

Moreover, notwithstanding respondent's contention that it terminated the negotiations because of differences over the definition of teaming, at the point the negotiations ended on April 16, there was no discussion whatsoever about the definition of teaming and management never advised the union that it considered there to be great disparity in their respective definitions of teaming or that it was terminating negotiations on that basis. That the parties did not discuss their alleged differences over the definition of teaming is not surprising, in view of the fact that, as discussed above, they had no significant differences. Respondent's claim that the decision was made to terminate negotiations because of the wide difference in their respective definitions--a decision assertedly made only after the union "moved from IBB to traditional bargaining" by submitting a "proposal"--is negated by the lack of any definition of teaming in the document itself.

On April 16, 1997, the union negotiators left for the day planning to return for the session with the mediator scheduled for the following morning. When they returned on April 17, 1997, however, neither the mediator nor the management negotiators showed up and only then did they learn that, unbeknownst to them and without their agreement, Hernandez had contacted the mediator the prior afternoon, and canceled the session. Moreover, only then did the union learn that management had decided to "withdraw" from the negotiations.

Upset by what he regarded as respondent's cavalier treatment, Campbell prepared a letter to the Regional Commissioner protesting the negotiators' actions and sought to discuss the matter directly with the Regional Commissioner or someone on her staff. Later in the morning, respondent's Executive Officer, Dennis Wilkin, contacted Campbell and they discussed what had occurred with the teaming negotiations. Wilkin informed Campbell that respondent intended to proceed with the Sacramento project, but assured him that they had no intention of implementing teaming in any other office.

Directly upon his return to Arizona, Campbell submitted the union's request for assistance to the Federal Service Impasses Panel (FSIP), but later withdrew his request in view of respondent's opposition that there was no continuing duty to bargain because it had withdrawn its "proposal."[2] Campbell was appalled by respondent's contention that the union had ended the IBB process by taking a caucus and preparing a traditional proposal, when, in fact, it was respondent's withdrawal from its

[2] In this FSIP submission, respondent essentially denies that IBB constitutes negotiations, implying that collective bargaining takes places only in the context of traditional proposals and counter proposals.

consensus agreement and its ultimatum concerning local level notice that had forced the union into this action. "If the Agency had not tried to terminate their regional agreement for a regional framework, we wouldn't have developed that plan, we would have been still at the table jointly developing a joint plan."

The Sacramento Early CE Project

In late 1995, the Sacramento field office (FO) of the agency, and the State of California DDS, jointly devised a plan for an early CE project, whereby State disability analysts (DEAs) would "spend 18-20 hours per week at the FO in identifying what type of exam is needed, recording the necessary data . . . to ensure provider payments will occur as appropriate, and arranging transportation issues as needed and notifying the CE provider. When the DEAs are not at the FO, a dedicated telephone line and cellular phone will keep DEAs in communication with the CRs [claims representatives] re exam types, next available appointment, etc." As proposed, the plan provided for the DEAs to work at the FO, scheduling CEs, work which the DEA had previously performed at the DDS office, without face to face contact with the claimant. The plan also specifically provided that when the DEAs were not in the office, the CRs, in telephonic consultation with the DEAs, would determine the type of consultative exam needed and to schedule the exam for the claimant, work previously performed solely by the DEA.

Taking the position that the Sacramento CE project constituted a teaming arrangement within the meaning of the November 1995 Teaming MOU, the union sought to bargain at the regional level. On April 22, 1996, the Sacramento District Manager Bob Clevenger refused to bargain at the regional level because the Sacramento CE project was not "teaming" but constituted "an expansion and improvement of the current process for obtaining CE's."

As proposed, this early CE project was not implemented in the spring of 1996. However, at about the same time, a new Drug Addiction and Alcoholism (DA&A) initiative became law. This law required termination of benefits to all claimants receiving benefits based solely on drug addiction or alcoholism by the end of 1997, unless it were determined that the claimant had another qualifying disability. The Agency established a time frame for notifying claimants of the impending termination of benefits and of procedures for appeal, and for reevaluating those cases where an appeal was filed. In such cases, a complete medical reevaluation was necessary. In the San Francisco Region, the parties entered negotiations over the DA&A procedures. Although no final agreement was reached and management implemented its

"last, best offer," during the negotiations, the union did agree that FO employees could be involved in scheduling consultative exams on a limited basis during the DA&A initiative. This agreement was limited to the DA&A case load and was in no way intended to evidence the union's agreement to such activity in any other context.

From May through July 1996, a DA&A project was in effect whereby state DEAs were "out stationed" in the Sacramento FO, where they would meet with DA&A claimants following their interview with the FO employee and schedule necessary consultative exams. This DA&A project, which was virtually identical to the early CE project proposed in December 1995, and later implemented in April 1997, was described in the Oasis, an official publication of the Social Security Administration, as a teaming arrangement and touted as a program which "helps strengthen the work relationship" between the DDS staff and the Sacramento FO. It was also identified in the summary of teaming projects implemented throughout the nation prepared by the agency's DPRT.

In January 1997, the Sacramento FO again proposed to implement an early CE project. Like the original December 1995 plan, under this project, jointly established between the Sacramento FO and the State DDS, DEAs would work in the Sacramento FO in the morning or afternoon, during which time they would interview the claimant (after he or she was interviewed by the Agency CR), determine whether a CE was needed and, if so, schedule the examination. The union again requested bargaining at the regional level on grounds that the project constituted a teaming arrangement under the November 1995 MOU, and respondent, by its Sacramento District Manager, again refused to bargain and the early CE project was implemented effective April 28, 1997.

On April 23, 1997, Campbell filed a union grievance concerning "the Agency's refusal to negotiate with AFGE over the implementation of the CE Project in Sacramento." The grievance was denied on May 30, 1997, and the matter is now pending arbitration.

The San Diego Prearranged CE Project

Sometime in May 1997, the San Diego FO proposed to implement a Prearranged CE project whereby at the time of their interview of the claimant, the CR would schedule consultative examinations for disabled clientele meeting certain identified criteria. Under this plan, the CR would determine the type of CE to set up, based on a "Desk Guide for Exam Selections" or by contacting one of the La Jolla DDS employees designated to provide assistance, and provide the claimant with the relevant

examination information. The determination as to the type of CE exam and the scheduling of the examination is work normally performed by the DDS employees.

On May 1, 1997, Campbell requested bargaining at the regional level over this new plan on grounds that it involved CR/DE teaming covered by the national MOU. The proposed plan was withdrawn.

The Chula Vista Prearranged CE Project

Although withdrawn in San Diego, a similar early CE project, identified as a La Jolla DDS, Chula Vista Field Office Prearranged CE Pilot, surfaced about a month later in Chula Vista. This project also provides for the CR to schedule a CE for claimants meeting certain eligibility criteria. The CR is to use the "Desk Guide for Exam Selection" for assistance in selecting the appropriate examination(s) or "if assistance is needed in determining whether a CE is appropriate," contact a DDS representative for assistance. The CR also provides the claimant with information about the consultative examination, including preparation of an Exam Information Sheet which the claimant must read and sign, makes transportation arrangements under certain circumstances, or arranges for an interpreter during the CE if necessary.

This prearranged CE project was developed jointly by the agency and the State DDS, and requires the CR to perform work normally handled by the DEA.

On June 17, 1997, Pam Smith, FO Manager, notified local union representative Jenny Salvez of her plan to implement the prearranged CE project. Based on the union's view that the Chula Vista prearranged CE Project was a teaming arrangement, Salvez responded, advising Smith that regional level notification was required, but that if management insisted on local level bargaining, the union's negotiators for the local level negotiations would be Campbell and Stonebraker. Smith responded that as the pilot was to be implemented only in Chula Vista, only local notice was required but that in any event, since the pilot had *de minimis* impact on the bargaining unit employees, no bargaining was necessary. Campbell was never contacted and the program was implemented without negotiations.

The union requested bargaining at the regional level on grounds that the Chula Vista pilot was a CR/DE teaming arrangement and that all such bargaining is required to take place at the regional level (absent agreement otherwise) as a result of the November 1995 MOU regardless of impact. Furthermore, at the time the union requested bargaining, it

anticipated that the program would have significant impact on the bargaining unit employees.

The foreseeable impact concerned the extra work (anywhere from 5 to 20 minutes on a disability interview) as most of the employees in Chula Vista work by appointment with a fixed period between appointments. When they take on extra work and the issue of expanding the time between appointments can create numerous problems from running late on appointments or even not being able to meet all appointments on a given day.

Respondent presented evidence concerning the post implementation effects of the pilot program. During the six-month period after implementation, about 30 prearranged CEs were scheduled by the CRs. Respondent's witness estimated that it took the CR about 10 minutes to complete the transaction.

Analysis and Conclusions

A. Positions of the Parties

The General Counsel argues that respondent's actions relative to Chula Vista evidence its repudiation of the national teaming MOU requirement for regional negotiations. In the alternative, General Counsel contends that respondent's entire course of conduct, including its withdrawing from an agreement reached on regional level notice of teaming projects within the region, cancellation of the scheduled mediator and unilateral termination of the negotiations, established bad faith bargaining.[3] Lastly, the General Counsel asserts that implementation in the Chula Vista office, which was done without negotiations at either the regional or local level, as requested by the union, constituted a separate violation of the Statute.

Respondent maintains that the Sacramento, San Diego and Chula Vista projects do not constitute teaming arrangements and, therefore, it was under no obligation to bargain at the regional level prior to implementation. Respondent also asserts that any consideration of the Sacramento CE project in this particular case is barred by section 7116(d) of the Statute because of an earlier filed union grievance. In addition, respondent asserts that there was no obligation to bargain here since the change had only a *de minimis* impact on bargaining unit employees.

[3] Recognizing that a grievance related to respondent's unilateral implementation of the CE project had been filed in Sacramento, the General Counsel is not urging, in this case, that a separate unilateral change occurred relative to Sacramento. According to the General Counsel, evidence tendered with regard to the Sacramento project was offered solely to support the alternative theory of respondent's course of bad faith conduct.

Finally, respondent argues that it did not engage in bad faith bargaining because it was free to withdraw its proposal to bargain at the regional level, notwithstanding that its negotiators had reached agreement with the union concerning an essential element of the matter under negotiation, and was free to unilaterally terminate the April 1997 negotiations, despite the national teaming MOU.

B. The Sacramento Early CE Project, the San Diego and Chula Vista Prearranged CE Projects are Teaming Arrangements Within the Meaning of the November 1995 Teaming MOU

A basic issue here is whether the projects which were implemented in respondent's field offices subsequent to the failed regional teaming negotiations were "teaming" arrangements within the meaning of the November 1995 MOU. Respondent maintains that "the nature of the Sacramento and Chula Vista projects/pilots does not fit the intent and meaning of "Teaming" as envisioned by agency DPR and the National Early Decision List, Teaming and Sequential Interviewing." The General Counsel nonetheless proposes that the answer must be "yes." The General Counsel suggests that this is simply another of respondent's numerous attempts to deny its responsibility to bargain at the regional level, as provided by the national MOU. The main issue thus appears to be whether respondent met its obligation to bargain pursuant to the November 1995 MOU, prior to implementation of arrangements encompassed in the November 1995 MOU, no matter what those arrangements are called.

It is not contested that CR/DE Baseline Teaming was adopted by the agency as a means to one of the essential ends proposed by the disability redesign project, the establishment of the DCM position. Teaming was viewed as one tool, along with sequential interviewing and EDL, for providing cross training opportunities for CRs to learn the medical aspects of disability claims determination performed by State DEs, and, perhaps secondarily, for the DEs to learn interviewing techniques and how to handle nondisability determinations.

The record clearly discloses, through documents of the agency, which were adopted and incorporated in the national Teaming MOU, DE/CR, that teaming encompasses a wide variety of staffing arrangements. The underlying documents also are the basis for the parties' shared concept of teaming--documents prepared by the Agency's DRPT and utilized by the parties during their negotiations of the Teaming MOU are the Claims Representative and Disability Examiner Teaming Informational Document and the Claims Representative/Disability Examiner Baseline Teaming Practices. Both make it clear that while "teaming implies that a literal pairing of CRs and DEs will be established, actual team composition is likely to vary due to

the operational needs of the FO and DDS." The models of person-to-person teaming, group-to-group teaming, unit-to-unit teaming and case-by-case teams, are described in the memorandum of November 21, 1995, and its attachments are as follows:

> Only suggestions of how teams may be formed. There are certainly other ideas for team structures or combinations of structures that could be used depending upon local FO and DDS operational needs . . . It should be emphasized that teaming neither presumes nor bars team members being physically collocated . . . .

The November 21 document describes "a summary of different teaming arrangements that have been piloted among DDSs and FOs" throughout the country. It also shows that these teaming arrangements run the full range of interrelationships between the FO and DDS, and between the CRs and the DEs, from those where the DE, outstationed at the FO, basically performed his or her normal work making medical determinations while physically located in the field office, as in the Roseville FAST Project[4] to those where the CR conducted the nonmedical interview and then handed off the claimant to the DE for an interview by telephone, as in the Florida DDS/Jacksonville Area Project[5] or the Kingsport Tennessee Project, to those where outstationed DEs were directly involved with a CR in the initial claims taking process, as in the Virginia DDS/Southwest Regional Office Outstationing Project. In some cases, the CRs and DEs were paired or "buddied" with specific DEs for the length of the pilot but not collocated, as in the Wisconsin DO/DDS initiative,

[4] Under the FAST project, as described in Jt. Exh. 2, Tab B, pp. 5-6, the DE performs his or her medical determination work in the Agency field office but through interviewing the claimant, may be involved in the development of medical evidence. The main difference between FAST and the Sacramento CE project was that under FAST, the DE in some cases actually made the final medical determination while physically working in the agency office (rather than returning to the DDS office and later notifying the claimant of the decision), while under the Sacramento project, the DE primarily decided whether a CE was needed.

[5] "Initially, after a CR conducted the face-to-face non-medical interview, the CR telephoned the DDS so a DE could complete the medical interview. When it was noted that reaching an available DE by telephone was cumbersome, the procedure was revised. The CR now mails a referral to the DDS to signal that a medical interview by a DE is needed. Each claimant is given a notice . . . to call the DDS if they have not made contact within 14 days."

SI project; other teaming pilot programs, such as the Spokane Pilot Project or the Greenville FO/North Carolina DDS Project did not involve specific matched pairs of DEs and CRs but were teaming because they involved State and the Agency offices working together (through their DE and CR employees) to try to find ways to reduce claims processing time. In the FAST project, the entire FO staff was teamed with the onsite DE.

In the same vein, a compilation of a series of conference calls in the summer of 1996, during which representatives of the agency, AFGE and the states "shared their teaming experiences", shows a wide range of arrangements which fall within the scope of the teaming concept, including outstationing of DEs in field offices (Boston, Dallas, Kansas City, Denver), outstationing of CRs to DDS offices (Atlanta), cross training by teamed CRs and DEs and by DDS training of CRs (Chicago, Denver), and a variety of other projects, many designed to expedite homeless claims, in which CRs and DEs work together physically (New York City Homeless Project) or through telephone contact (Bronx FO and DDS Homeless Project).

The pilot projects undertaken by the agency throughout the country make it clear that DE/CR teaming was intended to, and does, encompass a broad range of staffing arrangements. In fact, in a December 1995 letter to Campbell, seeking to initiate regional bargaining following negotiation of the November 1995 Teaming MOU, Respondent's Regional Commissioner, McMahon, provided the very definition of teaming which respondent now seeks to deny:

> Teaming is the bringing together of Field Office (FO) and Disability Determination Services (DDS) staff to facilitate the development and adjudication of disability claims. There are some suggested models for pairing these resources . . . The model used in any given field office will vary with local conditions and service area needs.

McMahon's definition of teaming is remarkably similar to the definition of teaming included in the regional MOU negotiated with AFGE in the agency Region III:

> The joint effort between the FO and DDS to improve internal communications and to product the best possible disability produce in terms of quality, timeliness and meeting customer expectations. It is anticipated that Teaming will result in promoting better communications and understanding of the job demands and concerns of all team members.

And virtually identical to the tentative definition with which the parties were working during April 1997 negotiations: "that teaming was a process that improved the relationship between state Agency and field offices with the goal of improving job skills for our employees and improving public service; and that it could be done in a variety of ways."

Notwithstanding the teaming configuration used, an objective of all of the pilots was to improve disability claims processing, i.e., all of the teaming pilots were concerned with service enhancement, and to increase cooperation between the field office and state DDS. Thus, a service enhancement may also be a teaming arrangement. Respondent's attempt to call the Sacramento early CE project or the Chula Vista Prearranged CE project "service enhancement" arrangements, rather than teaming arrangements, is self-serving.

The General Counsel urged that the Sacramento CE project is similar to the FAST project, an acknowledged teaming arrangement which the parties had as an example before them when negotiating the November 1995 Teaming MOU, and clearly constitutes a teaming arrangement within the meaning of the parties' MOU. Under the FAST project, the outstationed DE performed his or her own DE work, i.e., obtaining the evidence necessary to make the final medical determination while in the agency field office[6] just as in the Sacramento CE project, the DE performs DE work while in the field office.[7] In both projects, the outstationed DE has face-to-face contact with the claimant for the first time. While in the FAST project, the DE may have had an expanded role of obtaining the medical evidence necessary to make the medical determination for which they are responsible, in neither project does the agency claims representative perform any of the DE's medical determination work, nor the DEs perform any of the CR's nonmedical eligibility determination work.

Under FAST "the teaming of the FO staff with the onsite DE produced positive results in their daily communication and association," as would the interaction between the Sacramento field office staff and the onsite DE in the Sacramento CE project, despite respondent's attempts to deny that there was

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[6] "The six month pilot consisted of outstationing a Disability Examiner (DE) in the DO for half-days. All initial claims, including those with no medical evidence of record and reconsideration, were routed to the DE to screen the case. The DE made the medical determination, requested additional evidence and/or scheduled a Consultive Examination (CE)."

[7] Under the Sacramento CE pilot, the outstationed DE determines whether a consultative examination is needed while the claimant is in the office and the DE schedules the exam.

any interaction or contact between them at all. Clearly, when it suits respondent, a state DE performing DE work in a field office is teaming (as in the FAST project) but when it does not want to honor its bargaining obligation, a similar interaction is merely outstationing. Respondent's attempt to make this artificial distinction should be rejected. The Sacramento CE project was a teaming arrangement within the meaning of the 1995 Teaming MOU.

Similarly, the prearranged CE project proposed in San Diego and implemented in Chula Vista constitutes a variation on the office-to-office teaming included in the November 1995 memorandum. The Chula Vista prearranged CE project involves the CRs scheduling the consultative examinations which were previously within the exclusive purview of the DDS. While admittedly only to be done in limited cases with established criteria, nevertheless, the decision to schedule the examination requires a certain level of knowledge and discretion. In recognition of this need, the pilot insures that assistance is available to the CRs from specialists at the DDS. Clearly, the Chula Vista CE pilot is a form of cross-training in which the CR can begin to learn aspects of the medical determination.

It is undisputed that elements present in the Sacramento and Chula Vista projects were also involved in the acknowledged teaming pilots: having a DE outstationed in the agency field office where the DE has face-to-face contact with a disability claimant for the first time (compare Sacramento with the Spokane Pilot Project or the Virginia DDS/Southwest Regional Office Outstationing Project) or having a CR begin to perform a portion of the DE work, such as deciding whether a consultative examination is needed and scheduling exam with DDS personnel available to answer questions or provide assistance (compare Chula Vista with Wisconsin DO/DDS Initiative).

Sacramento and Chula Vista, like all of the teaming scenarios set out in the memorandum and the compilation, coordination between the DDS and the Agency is required, and thus, constitute teaming arrangements within the meaning of that term as used by Commissioner McMahon--the bringing together of FO and DDS staff to facilitate the development and adjudication of disability claims.

Based on the foregoing, it is found and concluded that the Sacramento early CE project, the proposed San Diego pre-arranged CE pilot and the prearranged CE project implemented in Chula Vista are all teaming arrangements within the meaning of the 1995 Teaming MOU.

C. The Sacramento Early CE Project is Not Barred By a Previously Filed Grievance From Consideration in This

Case as Evidence of Bad Faith Bargaining

It is uncontroverted that prior to filing the instant unfair labor practice charge, the union filed a grievance concerning "the Agency's refusal to negotiate with AFGE over the implementation of the CE Project in Sacramento." Respondent asserts, in essence, that the aforementioned grievance constitutes a 7116(d) bar to any issues in this case raised by implementation of the CE Project in Sacramento. As already noted, the General Counsel submitted that notwithstanding a section 7116(d) bar concerning the Sacramento CE project as an unfair labor practice violation in itself, the evidence surrounding that change is not barred from consideration in this matter. Clearly, the General Counsel recognized that pursuing an independent violation relative to implementation of the Sacramento CE project would not be appropriate. The absence of such an allegation does not prohibit one from considering such evidence with respect to an alleged bad faith bargaining violation, however. It is my understanding that the evidence of the Sacramento CE project was proffered not to show a separate violation, but only to support the theory that respondent's total conduct herein constituted bad faith bargaining. Thus, it is unchallenged that the evidence concerning the Sacramento CE project cannot be used to establish a unilateral change or repudiation violation in this case. The General Counsel wisely has not sought to use this proffered evidence in such a fashion.

In determining whether a grievance bars a later filed unfair labor practice, the Authority will examine whether "the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar." *Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797, 802 (1996), citing *U.S. Department of the Army, Army Finance and Accounting Center, Indianapolis, Indiana and American Federation of Government Employees, Local 1411*, 38 FLRA 1345, 1351 (1991) *petition for review denied sub nom. AFGE, Local 1411 v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992).

In this matter the grievance, filed by the same aggrieved party as the unfair labor practice concerned, "the Agency's refusal to negotiate with AFGE over the implementation of the CE Project in Sacramento." Clearly, the Sacramento CE grievance does not allege any violation relative to respondent's bad faith conduct during the April 1997 negotiations, as it was filed before the proposal to implement early CE in San Diego and before actual implementation of early CE in Chula Vista. Furthermore, it does not concern respondent's conduct relative to those two teaming arrangements. While the grievance and

unfair labor practice both involve consideration of respondent's unilateral implementation of the Sacramento CE project, the theory of the instant complaint, for which evidence of the CE Project in Sacramento was offered, is that respondent engaged in a course of bad faith bargaining. On the other hand, the theory of the grievance appears to be limited to refusal to negotiate only for the Sacramento CE project and does not involve other actions by respondent that are alleged to be violative of the Statute. The alleged bad faith bargaining allegation herein included respondent's actions during the April 1997 negotiations, as well as its subsequent proposal to implement, and the implementation of teaming arrangements in three different offices.

In short, the bad faith bargaining allegation of the complaint in this case requires a determination of respondent's course of conduct in the "totality of the circumstances." Consequently, the trier of facts must examine the whole of respondent's conduct during and subsequent to the regional teaming negotiations; the grievance meanwhile, is concerned only with respondent's conduct relative to the Sacramento CE project and whether respondent's implementation of the Sacramento CE project fulfilled its contractual and statutory obligations. It appears that the theories of the complaint and the grievance are different since "there would be no need for the arbitrator to address the unfair labor practice issue because the grievance sought only to establish a unilateral change while the ULP sought to establish a statutory violation of bad faith bargaining." *Id.* at 805. Thus, it seems that the grievance and unfair labor practice complaint in this case are based on different legal theories. Since the theories are different, there is no bar to considering such evidence as it relates to the allegation of bad faith bargaining in this matter.

Accordingly, it is found that use of evidence related to respondent's conduct relative to the Sacramento CE project, is admissible for purposes of establishing a bad faith theory of violation, and therefore is not barred by section 7116(d) of the Statute.

D. Respondent Repudiated the National MOU by Implementing Teaming Arrangements Prior to Completion of Bargaining at the Regional Level

The General Counsel takes the position that the 1995 Teaming MOU requires negotiation at the Regional level regardless of the Region's intent to implement any teaming arrangement in the Region, and at a minimum, the National MOU plainly requires Respondent to complete regional bargaining prior to implementing any teaming arrangements in the Region.

The General Counsel also submits that by implementing a teaming arrangement in Chula Vista without bargaining at the regional level, Respondent repudiated the 1995 agreement and thereby violated section 7116(a)(1) and (5) of the Statute. Having found that the proposed San Diego prearranged CE pilot and the prearranged CE project implemented in Chula Vista are all teaming arrangements within the meaning of the 1995 Teaming MOU, the question becomes whether respondent's action in implementing these arrangements without completing the April 1997 negotiations is, indeed, a repudiation of that agreement.

In *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211, 1218-19 (1991), the Authority found that while not every breach of contract is a violation of the Statute, repudiation of a collective bargaining agreement does constitute an unfair labor practice.

The Authority examines two elements in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (*i.e.*, was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (*i.e.*, did the provision go to the heart of the parties' agreement?). *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858 (1996).

In the instant case, respondent's admitted failure to bargain with the union prior to implementing the CE project in Chula Vista, constitutes a clear and patent breach of a provision at the heart of the November 1995 Teaming MOU. The November 1995 Teaming MOU unequivocally commits the agency to bargain CR/DE teaming and SI at the regional level, leaving all issues concerning implementation of these processes to such regional bargaining: "The Agency plans to implement CR/DE teaming and SI as quickly as possible. Management agrees to bargain these issues at the regional level . . . in accordance with the Operations Partnership Agreement MOU dated 9/6/95."[8]

In view of this language, respondent's failure bargain with the union at the regional level prior to implementing the teaming arrangement in Chula Vista was a "clear and patent breach" of a clear contract term--the provision for regional bargaining over teaming. Thus, respondent's failure to comply with its agreement to negotiate is unmistakably a failure to comply with a contract term which goes to the heart of the

8 Nothing in the Operations Partnership Agreement limits the agency's agreement to bargain over teaming at the regional level. The agreement does, however, provide a basis for using IBB in such negotiations.

agreement. *Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 52 FLRA 225 (1996)(*Warner Robins*).

Accordingly, it is found that by implementing the teaming arrangement in Chula Vista without bargaining at the Regional level, respondent repudiated the 1995 agreement and, thereby, violated section 7116(a)(1) and (5) of the Statute.

E. Respondent's Conduct in Connection With Regional Teaming Negotiations Constituted Bad Faith Bargaining in Violation of the Statute

In the alternative, the General Counsel seeks a violation of section 7116(a)(1) and (5) of the Statute based on respondent's total course of conduct relative to the April 1997 teaming negotiations.

Respondent asserts that during the April 1997 negotiations, its representative realized that "it really did not have any Early Decision List, Teaming or Sequential Interviewing initiatives to implement and that it was not prepared to continue the bargaining process." Thus, respondent maintains that what did happen here was that it was really not ready to bargain at that time." *Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina*, 34 FLRA 554 (1990).

Section 7103(a)(12) of the Statute defines collective bargaining as the "performance of the mutual obligation of the representative of an Agency and the exclusive representative of employees in an appropriate unit in the Agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]" Further, the duty to negotiate in good faith includes the obligation, under section 7114(b)(1), to approach the negotiations with a sincere resolve to reach a collective bargaining agreement and, pursuant to section 7114(b)(2), to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment.

In determining whether a party has engaged in bad faith conduct, the Authority considers the totality of the circumstances in a given case. E.g. *Army and Air Force Exchange Service*, 52 FLRA 290 (1996)(AAFES); *U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524 (1990)(*Wright-Patterson*); see also *Veterans Administration, Washington, D.C. and Veterans Administration Medical Center, Leavenworth, Kansas*, 32 FLRA 855, 872 (1988).

The General Counsel urges that several factors together constitute overall bad faith bargaining during the April 1997 meetings. Clearly, each of the suggested factors standing alone might not be sufficient to constitute bad faith bargaining, but in combination with other factor they show a course of conduct that established bad faith bargaining by respondent. These factors include: (1) negotiators representing the agency who were not authorized to enter into agreements;(2) withdrawal from an agreed-to provision; (3) unilaterally canceling the mediator; and(4) ultimately withdrawing from the negotiations. The General Counsel also relies on respondent's action following the failed negotiations, including: (1) implementation of the aforementioned teaming arrangement in Sacramento; (2) proposing a teaming arrangement in San Diego; and (3) implementing a teaming arrangement in Chula Vista.

It is well settled that the Statutory obligation to bargain in good faith requires both parties to send negotiators to the table who are "duly authorized" and "prepared to discuss and negotiate on any condition of employment." *Internal Revenue Service and Internal Revenue Service Brooklyn District*, 23 FLRA 63 (1986). In the absence of an agreement or practice to the contrary, a party to the
negotiations has the right to expect that the other party has sent negotiators to the table who are duly authorized to enter into an agreement. *U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 44 FLRA 205 (1992).

In the instant case, respondent allegedly held Carlson and Otto out as having full authority to bargain and enter into agreements on behalf of the Region. Indeed, the parties engaged in serious bargaining for two days in reliance upon Carlson and Otto's apparent authority to act on behalf of respondent. *National Council of Social Security Administration Field Operations Locals, Council 220, AFGE, AFL-CIO*, 21 FLRA 319 (1986). Ultimately, Carlson and Otto's inability to abide by the agreement they reached, under orders from regional management, demonstrates that, whatever their initial charter, respondent failed to send individuals to the table for the April 1997 teaming negotiations who were fully authorized to bargain on its behalf. The failure to send authorized representatives to the table is certainly relevant to the issue of bad faith bargaining.

By the same token, respondent's withdrawal from the consensus agreement could also evince bad faith conduct. While a party's withdrawal of a tentative agreement or a previous proposal without good cause does not establish a *per se* violation, it nevertheless can be evidence of bad faith bargaining. *AAFES*, 52 FLRA at 304 citing *Department of Treasury, Internal Revenue Service, Memphis Service Center*,

15 FLRA 829, 845 (1984); *Division of Military and Naval Affairs, State of New York, (Albany, New York)*, 7 FLRA 321, 338 (1981).

The record reveals that when the union negotiators protested that respondent had no right, consistent with its bargaining obligation under the 1995 MOU, to withdraw from its consensus agreement, management engaged in further bad faith conduct by then imposing an ultimatum for continuing negotiations whereby the union would have to agree to local level negotiations, and when the union refused to agree to this demand, canceled the mediator and withdrew from negotiations.

Conditioning further bargaining on the union agreeing to retreat from a previously agreed to subject can also constitute evidence of bad faith bargaining. In the private sector, such conduct would be considered regressive bargaining as it was clearly designed to frustrate the progress of the negotiations. *See, e.g., Golden Eagle Spotting Co., Inc.*, 319 NLRB 64 (1995) (Employer engaged in bad faith bargaining by regressive bargaining regarding union security, where this conduct was part of employer's effort to stall collective bargaining process); *Massillon Newspapers, Inc.*, 319 NLRB 349 (1995)(Employer found to have engaged in bad faith bargaining where, among other things, it failed to show good cause for reneging on agreements reached on non-economic issues); *Hilton International Hotels*, 187 NLRB 947 (1971)(Employer engaged in bad faith bargaining by, among other things, withdrawing from concession to which it had previously agreed, i.e., union shop provision).

It is undisputed thats during the April negotiations, an agreement was reached by the parties to regional level notice as part of their negotiations for a regional framework. While this admittedly was not a full and final agreement, it was nevertheless an agreement arrived at through collective bargaining. Once agreement was reached, the union should have been able to rely on respondent's good faith commitment, as this agreement formed the basis for any further progress in their negotiations. The fact that this agreement was reached in the context of the IBB process does not diminish respondent's commitment. *See for example, U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 319 (1997). The union negotiators reasonably believed that Carlson and Otto had authority to enter into such an agreement and, at that point in time, reasonably believed that the parties were engaged in genuine collective bargaining. *See e.g. American Federation of Government Employees, Local 2207 and U.S. Department of Veterans Affairs Medical Center, Birmingham, Alabama*, 52 FLRA 1477 (1997).

The General Counsel maintains that although the agreement to regional notice was only one element of the framework the parties were negotiating, conditioning further bargaining on the union agreeing to local bargaining constitutes evidence of bad faith bargaining. Inasmuch as there appears to be an absolute right, under the parties agreed-to 1995 MOU, for the union to insist on regional level bargaining over teaming, once the parties' reached agreement on regional level bargaining, there would be no obligation for the union to change its position or to continue to bargain on that subject, in view of its negotiations over teaming. In these circumstances, where the parties at the level of exclusive representation have delegated bargaining to the regional level, local bargaining would be a permissive subject. *U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions*, 53 FLRA 1269, 1274 (1998). Accordingly, in my view, respondent's insistence that the union surrender its agreement is akin to a party insisting to impasse on a permissive subject of bargaining. Such a demand has been held to violate the Statute. *See, Sport Air Traffic Controllers Organization (SATCO)*, 52 FLRA 561 (1996)(Order denying motion for reconsideration); *Federal Deposit Insurance Corporation, Headquarters*, 18 FLRA 768 (1985).

Respondent's unilateral cancellation of the mediator is further relevant evidence that respondent engaged in bad faith bargaining. In this regard, in the federal sector, mediation and the Federal Service Impasses Panel are essential parts of the good faith bargaining process. See, e.g., *Equal Employment Opportunity Commission, Washington, DC*, 52 FLRA 459, 468-70 (1996); *Department of Health and Human Services, Social Security Administration*, 44 FLRA 870, 883 (1992). While the cancellation here may not be a violation in itself, it certainly is relevant to show that respondent had no commitment to reach agreement in this matter.

The General Counsel also suggested that as there was no specific proposal which initiated the bargaining, since respondent had no "proposal" to withdraw. As Hernandez acknowledged in the letter he prepared for Mollenauer's signature initiating the 1997 negotiations and in his testimony at hearing, bargaining was initiated in 1997 because "the Disability Redesign Team has indicated to the regions its desire to complete any bargaining associated with this MOU." Such bargaining was required regardless of whether the region had any immediate plans to implement teaming arrangements. The purpose of the bargaining was to negotiate a framework for implementing teaming and SI in the future, a purpose made abundantly clear by the MOUs negotiated in other regions which Carlson offered to Campbell as models to use during their negotiations, none of which addresses specific teaming plans and all of which set out a framework for future teaming arrangements to be implemented.

It appears that negotiating such a framework is precisely what the negotiators were doing when they agreed to regional level notice and would have continued to do had not management withdrawn from its proposal and terminated the negotiations.

It does not appear that there was any basis for terminating negotiations, regardless of whether it is a "proposal" management was withdrawing or its "notice" of intent to bargain. As previously discussed, the April 1997 negotiations were conducted because of the obligation imposed by the November 1995 MOU. While it is true that under the MOU, the bargaining does not commence until initiated by management,[9] once begun, however, good faith bargaining requires that the negotiations proceed to agreement or impasse, as in the case of any mandatory subject of bargaining under the Statute. Bargaining in this case was clearly under way.

Respondent offered several reasons for its withdrawal from the regional negotiations. In its submission to the Panel, respondent argued that the negotiations terminated because the union "changed to traditional bargaining" by submitting its proposal. The uncontroverted evidence makes it clear, however, that the union prepared the document only after respondent conditioned further negotiations on the union relinquishing its agreement to regional notice, and as a good faith attempt to provide tangible material to move into the third party proceedings (i.e., continue negotiations before the mediator or the FSIP) to which respondent's action was forcing them. The document encompassed not only the union's ideas but incorporated all of the interests, options and criteria which management had raised during their negotiations, and included the entire framework to which the parties had agreed during their initial (and successful) negotiation sessions.

The evidence established that the union prepared its "proposal" in order to provide a vehicle for third party review, a direction in which the union reasonably believed the parties to be headed after respondent's representatives withdrew from their consensus agreement and issued an ultimatum. It thus appears that, the union's concern that it would be difficult to submit their impasse to a third party was well founded.

At the hearing and in its brief, respondent offered yet another reason for withdrawing from negotiations, contending that, in essence, the parties were simply too far apart on the definition of teaming. Unfortunately, that explanation was

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[9] "Management will provide AFGE with notice in accordance with Article 4 of the National Agreement, 5 USC 71 and Executive Order 12871. The parties encourage the regional bargaining process to commence within 10 calendar days from the date the notice is given to the union."

never communicated to the union, either at the time of the negotiations or, it should be noted, in respondent's FSIP submission. Thus, the relevant record evidence does not support such a claim. Instead it shows that the parties were already working with a tentative definition of teaming. Furthermore, the relevant evidence shows that it is inconsistent with the timing of respondent's action. Respondent's withdrawal from negotiations after it considered the union's "proposal" shows, in my view, that the withdrawal was not because of any differences over the definition of teaming, but because the union refused to consent to respondent's insistence on local level bargaining. I agree with the General Counsel that, if the parties had differences concerning the definition of teaming, those are the type of differences that a mediator or the FSIP is intended to resolve.

It appears that respondent withdrew from negotiations, despite an acknowledged obligation under the 1995 MOU to complete the regional negotiations, simply because regional management did not like the way the negotiations were progressing and did not care for the agreement reached by its negotiators. Respondent thus decided to discontinue negotiations rather than continue bargaining in good faith through the mediation and impasse procedures provided for in the Statute.

Respondent left little doubt of its intent when it implemented a teaming arrangement in Sacramento, proposed a teaming arrangement in San Diego, and implemented a similar arrangement in Chula Vista without completing the April 1997 bargaining. Although it is urged that respondent was free to "withdraw" its notice and walk away from the regional teaming negotiations, respondent was still faced with the obligation to bargain at the regional level prior to implementing any teaming arrangement within the region, as it agreed to do in the MOU. Respondent's implementation of projects which certainly appear to be teaming arrangements within the meaning of the 1995 MOU and its decision to propose a CE project, shortly after it withdrew from the April 1997 negotiations, undercuts its claim that it had no intention to implement teaming arrangements in the region, at the time it terminated the April 1997 bargaining. Regardless of whether respondent's conduct during the April negotiations, standing alone, amounts to bad faith bargaining, its conduct following the unilateral termination of the April regional negotiations helps establish that respondent's entire course of conduct relative to the regional teaming negotiations constituted bargaining in bad faith in violation of the Statute.

Based on the foregoing, it appears that respondent's total conduct during the April 1997 negotiations, including sending negotiators to the table who were not authorized to enter in agreements, withdrawing from an agreed-to provision,

unilaterally canceling the mediator, and ultimately, withdrawing from the negotiations, makes light of the agency's obligation to engage in good faith bargaining imposed by Statute and thus constitutes an unfair labor practice in violation of section 7116(a)(1) and (5) of the Statute. *Wright-Patterson, supra.* Furthermore, it is found that respondent's unilateral implementation of the Sacramento and Chula Vista CE project and its proposal to implement a CE Project is cumulative evidence of respondent's entire course of conduct relative to the April 1997 negotiations and helps establish that respondent violated the Statute.

F. Respondent Violated the Statute by Unilaterally Implementing the Prearranged CE Project in Chula Vista

It has long been established that an agency is obligated to bargain with the exclusive representative regarding the impact and implementation of a change in working conditions of bargaining unit employees where the change has more than *de minimis* impact upon the employees. *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403 (1986). In determining whether a change has the necessary impact, the Authority examines the actual or reasonably foreseeable effect of the change on conditions of employment. *U.S. Customs Service (Washington, D.C.) and U.S. Customs Service Northeast Region* (*Boston, Massachusetts)*, 29 FLRA 891, 899 (1987).

In this case, the General Counsel contends that respondent committed an independent violation of the Statute when it unilaterally implemented the Chula Vista prearranged CE project without bargaining at any level concerning the impact and implementation of this change in working conditions. Thus, the General Counsel maintains that, even if respondent is not found to have repudiated the national MOU, it still has not met its bargaining obligation with respect to the Chula Vista prearranged CE project.

Respondent argues that the impact in this case was *de minimis* and, therefore, it had no bargaining obligation. In any event, the record disclosed that at the time the Chula Vista Prearranged CE project was proposed, it was reasonably foreseeable that the additional duties required by the project would have an adverse impact on the employees, and that a duty to bargain thus arose at that time. Thus, CRs were required to make determinations about consultative exams, even using the "Desk Guide for Exam Selection", required the claims representative to make decisions which were not within the scope of their regular duties. Under the project, the CRs also were required to schedule the examination, including psychiatric examinations, to explain to the claimant the nature of the

examination and answer any questions which the claimant might have, questions which could well call for information concerning the medical determination which the CR would not be qualified to answer. The project itself anticipated that problems would arise and that the CRs could be required to contact a DE for assistance. As proposed, there was no indication as to how many claimants would come within the scope of the project.

In the view of the undersigned, it could be reasonably anticipated that the addition of this new responsibility would affect the amount of time the CR would spend in the interview. It is undisputed that CRs' claimant interviews are set up for a prescheduled block of time and that unanticipated longer interviews can adversely impact on the CR's ability to maintain that schedule. Under the circumstances, it is found that the reasonably foreseeable adverse impact was sufficient to trigger a duty to bargain in this case. *Social Security Administration, Gilroy Branch Office, Gilroy, California*, 53 FLRA 1358 (1998).

Thus, even if the Chula Vista project was not a teaming arrangement, there was still an obligation to bargain the impact and implementation of this change prior to its implementation, at the local level. Accordingly, respondent's refusal to bargain and its unilateral implementation of the Chula Vista prearranged project, violated section 7116(a)(1) and (5) of the Statute.

The Remedy

In addition to the normal cease and desist order and posting in this case, the General Counsel argues with regard to the repudiation of the 1995 teaming MOU, any appropriate remedy would require respondent to abide by the provisions of the 1995 teaming MOU, and would require it to rescind any teaming arrangements implemented in the region in contravention of its bargaining obligation. E.g. *Warner Robins*, 52 FLRA at 225. Further, it is urged that the rescission of any teaming arrangements implemented in the region following the failed April 1997 negotiations is also required in order to remedy respondent's bad faith bargaining violation.

Additionally, the General Counsel argues that, in view of respondent's denial of any bargaining obligation, similar *status quo ante* relief would be appropriate to remedy its unilateral implementation of the Chula Vista CE project under the guidelines set out in *Federal Correctional Institution*, 8 FLRA 604 (1982).

Respondent makes no argument with respect to a remedy in this matter since it apparently considered that no violation had been committed.

In the circumstances of this matter, I agree with the General Counsel's proposed remedy and, therefore, recommend that the Authority adopt the following:

ORDER

Pursuant to section 2423.41 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Social Security Administration, Region IX, San Francisco, California, shall:

1. Cease and desist from:

(a) Implementing any teaming arrangements affecting employees in the unit represented by the American Federation of Government Employees, Council 147, without fulfilling its obligation to bargain with the American Federation of Government Employees, Council 147, at the regional level in accordance with the 1995 Early Decision List, Teaming, Sequential Interviewing (Teaming) MOU.

(b) Repudiating the 1995 Teaming MOU requiring negotiations at the regional level over agency plans to implement teaming and SI arrangements.

(c) Engaging in bad faith bargaining in its negotiations with American Federation of Government Employees, Council 147, over teaming and SI as required by the 1995 MOU.

(d) Implementing the Chula Vista CE project without bargaining with the American Federation of Government Employees, Council 147, to the extent required by the Statute.

(e) 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 polices of the Statute:

(a) Rescind all teaming arrangements, including but not limited to the Sacramento and Chula Vista CE projects, which have been implemented in the San Francisco Region without bargaining with the American Federation of Government Employees, Council 147.

(b) Notify and, upon request, bargain with the American Federation of Government Employees, Council 147, regarding all teaming arrangements which have been implemented in the Region.

(c) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. On receipt of such forms, they shall be signed by the Regional Commissioner 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. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41 of the Authority's Rules and

Regulations, notify the Regional Director, San Francisco 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, DC, May 28, 1998.

_____

ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE
THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Social Security Administration, Region IX, San Francisco, California 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 implement any teaming arrangements without fulfilling our obligation to bargain with the American Federation of Government Employees, Council 147 at the San Francisco regional level in accordance with the 1995 Early Decision List, Teaming, Sequential Interviewing MOU.

WE WILL NOT repudiate the 1995 Teaming MOU requiring negotiations at the regional level over Agency plans to implement teaming and SI arrangements.

WE WILL NOT engage in bad faith bargaining in our negotiations with the American Federation of Government Employees, Council 147, over teaming and SI as required by the 1995 MOU.

WE WILL NOT unilaterally implement changes in working conditions of employees in the unit represented by the American Federation of Government Employees, Council 147, without bargaining to the extent required by the Statute, such as our implementation of the Chula Vista CE project without bargaining.

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

WE WILL rescind all teaming arrangements which have been implemented in the San Francisco Region without bargaining with the American Federation of Government Employees, Council 147, including but not limited to the Sacramento and Chula Vista CE projects.

_____

(Activity)

Dated:_____ By:_____

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of the 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, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone is: (415) 356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. SF-CA-70506, were sent to the following parties:

CERTIFIED MAIL, RETURN RECEIPT NOS:	**CERTIFIED**
Stefanie Arthur, Esquire Federal Labor Relations Authority 901 Market Street, Suite 220 San Francisco, CA 94103	P168-059-565
Craig Campbell, President AFGE, Council 147 1050 West Main Mesa, AZ 85201	P168-059-566
Ralph Patinella West Highrise Bldg, GH-10 6401 Security Blvd. Baltimore, MD 21235	P168-059-567
Wilson Schuerholz, Representative SSA, G-H-10, WHR 6410 Security Blvd. Baltimore, MD 21235	P168-059-568

REGULAR MAIL:

Bobby Harnage, President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

_____

Dated: May 28, 1998
Washington, DC