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

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| UNITED STATES MARINE CORPS, WASHINGTON, D.C.<br><br>and<br><br>MARINE CORPS FINANCE CENTER, KANSAS CITY, MISSOURI<br><br>and<br><br>MARINE CORPS CENTRAL DESIGN AND PROGRAMMING ACTIVITY, KANSAS CITY, MISSOURI<br><br>and<br><br>MARINE CORPS RESERVE SUPPORT CENTER, OVERLAND PARK, KANSAS<br><br>and<br><br>MARINE CORPS LOGISTICS BASE, ALBANY, GEORGIA<br><br>Respondents<br><br>and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES<br><br>and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2904<br><br>Charging Parties. | Case Nos. 7-CA-70370<br>7-CA-70635<br>74-CA-70637 |

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For the General Counsel

Bonnie M. Kerber
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For the Respondents

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to amended charges first filed on March 9, 1987 in Case No. 7-CA-70370, July 6, 1987 in Case No. 7-CA-70635, and June 15, 1987 in Case No. 74-CA-70637, by Local 2904, American Federation of Government Employees, AFL-CIO, (hereinafter called AFGE Local 2904) American Federation of Government Employees, AFL-CIO, (hereinafter called the AFGE), and Local 2317, American Federation of Government Employees, AFL-CIO, (hereinafter called AFGE Local 2317), and collectively, (hereinafter called the Union), an "Amended Consolidated Amended Complaint and Amended Notice of Hearing" was issued on October 6, 1987, by the Regional Director for Region VII, Federal Labor Relations Authority, Denver, Colorado. The Complaint alleges in substance that the United States Marine Corps, Washington, D.C., (hereinafter called the Respondent Washington, the Marine Corps Finance Center, Kansas City, Missouri, (hereinafter called Respondent MCFC), the Marine Corps Central Design and Programming Activity, Kansas City, Missouri, (hereinafter called Respondent MCCDPA), the Marine Corps Reserve Support Center, Overland, Kansas, (hereinafter called Respondent MCRSC), and the Marine Corps Logistic Base, Albany, Georgia, (hereinafter called Respondent MCLB), and collectively called Respondents, violated Sections 7116(a)(1), (5) and (6) of Federal Service Labor-Management Relations Statute, (hereinafter called the Statute) by virtue of their actions in implementing a "no smoking" policy at a number of installations while the matter was pending before the Federal Service Impasses Panel.1/

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1/ Specifically, all the aforementioned Respondents are accused of violating Sections 7116(a)(1) and (6) of the
(footnote continued)

A hearing was held in the captioned matter on November 19, 1987, in Kansas City, Missouri. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on December 28 and 21, 1987, respectively, which have been duly considered.2/

Upon the basis of 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 3/

At all times material to the captioned cases, AFGE has been the certified exclusive representative of a national consolidated unit of certain non-professional Marine Corps employees, including certain employees located at the Kansas City, Missouri facilities of Respondent MCFC and Respondent MCCDPA, at the Overland Park, Kansas facility of Respondent MCRSC, and at the Albany, Georgia facility of Respondent MCLB. The consolidated bargaining unit consists of twenty

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(footnote 1 continued)

Statute by virtue of their actions in failing to maintain the status quo while the matter was before the Panel pursuant to an impasse in negotiations at the national level. All the Respondents except MCRSC are also accused of violating Sections 7116(a)(1) and (5) of the Statute by virtue of their actions in implementing the "no smoking" policy without first bargaining with the respective union Locals at the various installations.

2/ In the absence of any objection, General Counsel's Motion to Correct Transcript is hereby granted.

3/ Inasmuch as the facts, for the most part, are not in dispute, I have adopted the General Counsel's proposed findings of fact where consistent with the record as a whole. To the extent that there is a dispute between witnesses as to a particular fact, the facts hereinafter set forth, represent a resolution of such dispute upon the basis of my analysis of the testimony of the respective witnesses and my observation of their demeanor while on the witness stand.

component Activities of the Marine Corps. The AFGE has delegated to the Council of Marine Corps Locals (Council 240), herein called the Council, the authority to represent Respondents' employees in the national consolidated unit described above. AFGE 2904 and AFGE 2317 have, at all material times, been affiliates and agents of AFGE. During the hearing, it was estimated that AFGE 2904 represents approximately 93 unit employees at Respondent MCRSC's facility in Overland Park, Kansas and approximately 800 additional unit employees at Respondent MCFC's and Respondent MCCDPA's Kansas City, Missouri facilities. Respondent MCFC and Respondent MCCDPA are co-located at a single facility in Kansas City, Missouri comprised of a concrete building with two floors above ground and three basement levels. AFGE 2317 represents certain unit employees at Respondent MCLB's Albany, Georgia facility.

The AFGE and Respondent Washington are parties to a Master Labor Agreement, herein called the MLA, covering the above-described unit employees which became effective on April 27, 1985 for a period of at least three years. Article 4 of the MLA addresses the subject of "Bargaining During the Term of the Agreement." Article 4, Section 1 & 2 of the MLA provides as follows:

> Section 1 The employer will notify the council of policy changes originating above the activity level that give rise to a bargaining obligation under the statute. Where such changes originate at the activity level, the activity will notify the appropriate local union.4/
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> Section 2 Any bargaining that might result from changes initiated above the activity level will be accomplished by the employer and the council unless they mutually agree otherwise. Normally bargaining resulting from changes initiated at the activity level will be accomplished by the local parties, however, either party to this MLA retains the right to transfer such negotiations to the level at which the recognition exists.

Mr. Raymond R. McKay, employed since June 1983 as Head of the Labor Relations Branch of Respondent Washington,

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4/ According to the MLA "employer" means the U.S. Marine Corps, Washington, D.C.

served as the Marine Corps' Chief Negotiator for the MLA and was present for the initial discussion of Article 4 at the bargaining table on April 30, 1984. According to the credited testimony of Mr. McKay, the AFGE's initial proposal provided that national level initiatives would be negotiated at the national level between the Council and Headquarters, Marine Corps and that matters to be negotiated at the local level would be confined to local implementation unless the parties agreed otherwise. The Council also proposed that local level initiatives would be bargained between the local union and the local Command. Further, according to Mr. McKay the Marine Corps had problems with the Council's proposal regarding national level initiatives since the Marine Corps had no intention of negotiating over the implementation at the local level of matters negotiated at the national level. With regard to the Council's proposal for local level initiatives, Mr. McKay had no problem conceptually with starting negotiations at the local level, but insisted that management be able to elevate such negotiations to the national level. The Marine Corps then submitted Management Counterproposal #1, proposing the following language for Article 4, Section 2:

> Section 2 Any bargaining that might result from changes initiated above the activity level will be accomplished by the employer and the council unless they mutually agree otherwise. Bargaining resulting from changes initiated at the activity level will be accomplished by the local parties unless either the council or the employer objects.

According to McKay, the Council's Chief Negotiator, Mary Lynn Walker, indicated there were no problems conceptually with management's proposal, but that the Council had certain political problems with the word "objects." Ms. Walker said that the Council wanted to soften the language because it sounded like the national could boss the local unions around. Management agreed to caucus and submit new language. Thereafter, the Marine Corps submitted a counterproposal which was eventually initialed off by the parties and incorporated into the MLA as Section 2.

Mr. McKay testified that one of the primary reasons underlying Article 4, Section 2 was to ensure that the Council understood that the Marine Corps was not waiving its right to negotiate at the national level over changes in working conditions and to make clear in the MLA that the obligation to bargain resided at the national level, i.e., at the level of recognition. Mr. McKay further indicated

that the Marine Corps wanted to get language in the contract to the effect that either party could insist upon national level negotiations even with respect to local level initiatives. Mr. McKay also testified that unless there was mutual agreement, there would be no local negotiation concerning national initiatives. According to Mr. McKay's interpretation of the MLA, local unions could not negotiate concerning the local impact of national changes unless the parties mutually agreed otherwise. However, Mr. McKay acknowledged that if a local Commander implemented a change, the process of negotiation would occur at the local level.

Mr. McKay further testified that the Marine Corps had previously negotiated approximately a dozen MOUs with the Council on various topics following notification to the Council of a national policy change and the Council's request to bargain. One such MOU received in evidence during the hearing concerned lumber treated with pentachlorophenol or copper napthenate (treated lumber). Mr. McKay indicated that the treated lumber MOU was the result of a national level initiative, and that when it was negotiated, it was to cover the entire subject of treated lumber. Mr. McKay also testified that paragraphs 1, 2, and 3 of the MOU represented the parties' entire agreement, that the local Commanders were to implement locally, and that no local negotiations were to take place with respect to paragraphs 1, 2, or 3. However, when Counsel for the General Counsel on cross-examination inquired as to what would happen if the Commander at Respondent MCLB required employees working with treated lumber to wear respirators, a condition with no application to any other Marine Corps facilities and an issue over which the parties had not agreed at the national level, Mr. McKay acknowledged that if a bargaining obligation existed over the use of respirators, that obligation would be discharged at the local level. However, Mr. McKay later changed his position by testifying that under the MLA, it was impermissible to negotiate anything at the local level as an addition to a MOU negotiated at the national level. Thus, according to Mr. McKay once a MOU was negotiated at the national level, the obligation to negotiate over that subject was "zipped up." Mr. McKay further testified that local Activities could only implement what is covered in MOU negotiated at the national level, that any local-level initiative which added to an MOU negotiated at the national level would not be permitted, and that the Marine Corps would avoid the obligation to bargain over such a local initiative by rescinding the local initiative.

The principal figures in the negotiations concerning the Marine Corps' Tobacco Prevention Program, herein called the TPP, were Mr. Harold Melton for the Council and Colonel Charles Dorman for the Marine Corps.5/ Mr. Melton, employed at all times material herein as a cook at the Navy Hospital at Camp LeJeune, North Carolina, in a Leave Without Pay Status, has also served as President of AFGE, Local 2065 for four years. Colonel Dorman has worked in Respondent Washington's Labor Relations Branch for three years, the last year as Assistant Head of the Labor Relations Branch. There were no ground rules in effect for the TPP negotiations. However, Mr. McKay testified that the Council could designate whomever it wanted to bargain over the TPP or, indeed, that the Council could designate a number of people to bargain over the TPP. Mr. McKay also indicated that there is nothing in the MLA which in any way limits the Council's right to delegate its bargaining authority to local union officials as AFGE representatives. Although Mr. McKay stated that he would insist on dealing with a single Council spokesperson, he also admitted that the Council retained the right to designate the local president at each of the twenty Marine Corps Activities and to delegate to each local president the authority to negotiate a portion of a national level initiative. Thus, the local representative would be acting as Council representative and bargaining on a national level.

By letter dated September 23, 1986, addressed to Council President Dale B. Schafer, Mr. McKay notified the Council of Respondents' intent to implement the Tobacco Prevention Program for civilian employees within the consolidated bargaining unit on October 15, 1986. Mr. McKay also enclosed copies of three military directives, including ALMAR 203/86 which directed the Marine Corps to establish the "Tobacco Prevention Program." By letter dated September 25, 1986, addressed to Mr. McKay, Council President Schafer demanded to bargain over the TPP and designated Mr. Melton to serve as the Council's representative for the negotiations. By letter dated October 2, 1986, addressed to Mr. Melton, Mr. McKay requested Mr. Melton to submit the Council's bargaining proposals by October 24, 1986. Mr. Melton submitted the Council's proposed Memorandum of Understanding

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5/ Colonel Dorman was assisted by Mr. McKay, who assigned negotiation of the TPP to Colonel Dorman and who frequently listened in on Colonel Dorman's end of telephone conversations with Mr. Melton, the Union's representative.

(MOU) and questionnaire to Mr. McKay by letter dated October 8, 1986.6/ Mr. McKay acknowledged receipt of the Council's bargaining proposals by letter dated October 21, 1986 and stated that implementation of the Tobacco Prevention Program would be delayed until further notice.

Mr. Melton did not receive any further response to his bargaining proposals until January or February 1987 (hereafter all dates are 1987 unless otherwise indicated) at which time he received a telephone call from Colonel Dorman. Colonel Dorman told Mr. Melton that much of the material Mr. Melton had submitted was unnecessary, stating that they were not going to negotiate a smoking policy, but a tobacco awareness program. Colonel Dorman referred to various directives, including a Secretary of the Navy Instruction, but because Mr. Melton did not have copies, Colonel Dorman agreed to forward such directives. Mr. Melton agreed to drop the proposed questionnaire and asked Colonel Dorman to send a bargaining proposal. Colonel Dorman sent Mr. Melton a proposed MOU by letter dated February 19, which included the following provision:

> SECTION IV: DESIGNATION OF SMOKING AREAS
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> A. Smoking will be prohibited in all enclosed common work areas, unless the area is designated by the Activity Commander, or his or her delegate, as a smoking area. Smoking areas will be designated only where the ventilation is adequate in the judgment of the Commanding Officer to provide a healthy environment [sic].

Mr. Melton had problems with Section IV of Dorman's proposed MOU since the proposal that the Activity Commanders would designate smoking areas was contrary to the Council's position that the designation of smoking areas should be negotiated at the local level. Mr. Melton's counterproposal, submitted to Colonel Dorman by letter dated March 4, proposed, at Section 2, that smoking not be permitted in common work areas unless adequate ventilation were provided. However, when Colonel Dorman phoned Melton concerning the Council's counterproposal, Colonel Dorman contended that

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6/ The Council's initial proposal was that the employer would meet and confer (i.e., negotiate) with designated Union representatives over smoking areas prior to their designation.

there was no acceptable definition of the term "adequate ventilation" for purposes of their negotiations. Colonel Dorman continued to maintain that Activity Commanders would decide where employees would be permitted to smoke, but agreed that the Marine Corps would accept input from various Union locals. It was at that point, however, that Mr. Melton renewed the Council's proposal that smoking areas should be negotiated at the local level.

Mr. Melton called Colonel Dorman on March 23 proposing language to the effect that the Activity would meet and confer with designated representatives of the locals regarding smoking areas. When Colonel Dorman asked why Mr. Melton submitted this new proposal after a month and a half of negotiating over the designation of smoking areas, Mr. Melton responded that the Council wanted to ensure that local Commanders gave deference to the Union's views regarding where employees could or could not smoke. Following some discussion of whether the Council wanted to negotiate locally 7/ and of what Mr. Melton meant by "meet and confer," 8/ Colonel Dorman expressed his concern that it would be too costly, too time consuming, and too large an issue to negotiate locally at each and every Activity location. Thus, Colonel Dorman told Mr. Melton of the practical problem of conducting twenty separate negotiations, stating that it would not be an efficient use of time to engage in as many as twenty separate local level negotiations with perhaps five or six going to impasse. Colonel Dorman insisted that if the parties were going to impasse it be at the national level. Colonel Dorman also stated that management was not going to impasse five or six times all across the country because MPL (the Labor Relations Branch) would have to provide representation for all those cases. Colonel Dorman agreed to research the meaning of "meet and confer" and get back to Mr. Melton. Colonel Dorman spoke with Mr. Melton several times that week, but was unable to propose language acceptable to Mr. Melton. On March 27, Colonel Dorman called Mr. Melton again to list the reasons

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7/ According to Colonel Dorman, Mr. Melton stated at one point that the Council did not really mean to negotiate locally. However, Mr. Melton denied telling Colonel Dorman that the Council did not wish to negotiate at the Activity level.

8/ Colonel Dorman told Mr. Melton that, to him, "meet and confer" meant to negotiate.

why the Marine Corps would not negotiate locally. Colonel Dorman noted that the Statutory duty to bargain rested at the level of recognition and emphasized the practical problem of negotiating locally. Colonel Dorman also noted the contractual problem posed by Article 4, Section 2 of the MLA.9/ During the hearing, Colonel Dorman testified that management's position that the Council's proposal for local negotiation of the designation of smoking areas conflicted with Article 4, Section 2 was based on the first sentence of that MLA provision because the TPP was initiated above the activity level. Colonel Dorman spoke to Melton on March 30, at which time, according to Colonel Dorman, Mr. Melton said that the Council wanted to negotiate at the local level over designation of smoking areas. At that point, Dorman rehashed what had happened in their negotiations, asked Mr. Melton to think over the Council's position, and asked Mr. Melton to submit the Council's final offer.

Mr. Melton submitted the Council's "final offer" to Colonel Dorman by letter dated March 30.10/ Melton's "final offer" included the following language:

> SECTION V. DESIGNATION OF SMOKING AREAS
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> A. Prior to designating smoking areas, the Activity will meet and confer with the designated Union representatives over the new smoking areas and other appropriate arrangements consistent with the Memorandum of Understanding.

Colonel Dorman understood that the language "meet and confer" in Melton's proposal meant to negotiate. When the Marine Corps noted that the Council's final proposal insisted on Activity-level negotiations, Respondent Washington decided to implement the Tobacco Prevention Program.

On April 13, Colonel Dorman issued a letter, by Direction of the Commandant of the Marine Corps, authorizing Commands

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9/ According to Mr. McKay, Colonel Dorman also told Mr. Melton that the local level did not have any more ability to resolve the problem than the parties did at the national level, and that the Marine Corps was not going to waive Article 4, Section 2 of the MLA.

10/ Colonel Dorman testified that he did not receive Mr. Melton's final offer until April 6.

to begin immediate implementation of the Tobacco Prevention Program for bargaining unit employees and, in so doing, to adhere to the provisions of enclosure #2 which was the MOU proposed by the Marine Corps. Section 5 of the MOU proposed by the Marine Corps indicated that Activities were to solicit the views of the local unions prior to designating smoking areas. Both Colonel Dorman and Mr. McKay admitted that this meant that Activities were to consult (but not to negotiate) with the local unions regarding the designation of smoking areas. Although the parties had reached agreement over Sections I through IV of the MOU, it is undisputed that there was no agreement at the national level on Section V concerning the designation of smoking areas.11/ Colonel Dorman admitted that at the time he issued the April 13 letter authorizing local implementation, the Marine Corps and the Council were "deadlocked" over Section 5 of the MOU. Colonel Dorman was reluctant, however, to use the word "impasse" to describe the parties' deadlock. Colonel Dorman's April 13 letter (or in enclosure #2 to that letter) to Activity Commanders did not give specific directions regarding the designation of actual smoking areas. Rather, the local Commanders retained absolute discretion regarding the designation of smoking areas. The Marine Corps never made any proposal regarding which buildings would actually be designated as smoking areas at local Activities, never proposed a policy on how smoking areas would be designated, and never told the Council in which buildings smoking would be permitted or what the smoking policy would be at each facility. Indeed, at the time of the TPP negotiations, Headquarters, Marine Corps had no idea how each local Commander would go about designating smoking areas. Because the Marine Corps wanted to leave the discretion to each Commander as to how to set up smoking areas, each Commander's implementation would be different, and each Activity Commander's smoking policy would apply only to that individual Command.

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11/ Despite the absence of agreement on Section V, Colonel Dorman authorized local implementation because he felt that the Marine Corps had bargained over every negotiable proposal submitted by the Council. Colonel Dorman testified that, in his view, the Council's proposal for local negotiation of the designation of smoking areas was nonnegotiable based on his reading of Authority decisions, the MLA, and on what he termed the Statutory right to bargain at the national level. Both Colonel Dorman and Mr. McKay testified that the Marine Corps would not agree to local level negotiations and would not waive its "right" to bargain at the national level.

It is undisputed that neither Mr. Melton nor the Council was given advance notice of the issuance of Dorman's April 13 letter or of management's implementation of the Tobacco Prevention Program. It was not until April 14th that Colonel Dorman called Mr. Melton to state that Section V of the Council's proposal was nonnegotiable and to indicate that the Marine Corps was going forward with implementation of the TPP. After Colonel Dorman's call, Mr. Melton contacted the FMCS, which referred him to the Federal Service Impasses Panel (FSIP or Panel) since the Marine Corps had already implemented. Mr. Melton then called the FSIP which suggested that he send a telegram that day requesting Panel assistance. Mr. Melton sent such a telegram that day and served a copy on Respondent Washington. Mr. Melton also sent an official "Request for Assistance" to the FSIP on April 15, with a copy to Respondent Washington by certified mail, return receipt.12/ The Panel notified Mr. McKay and Mr. Melton of the Council's request for Panel assistance by letter dated April 16.13/ The Panel did not issue its decision until September 24. Following a meeting in Washington, D.C. and submissions by the parties, the Panel declined jurisdiction in the absence of any resolution of the two threshold questions related to the duty to bargain.

While the matter was pending before the Panel, Respondents MCFC, MCCDPA, MCRSC and MCLB implemented numerous changes in smoking policies affecting bargaining unit employees at each of Respondents' facilities. Thus, the parties stipulated that on or about April 28, Respondent Washington, Respondent MCFC, and Respondent MCCDPA, by and through H.J. Kreibach, then serving as Acting Commander at the Kansas City, Missouri facilities of Respondent MCFC, issued Center Order 5090.1, Smoking Regulation thereby implementing a change in the smoking policy at the Kansas City, Missouri facilities of Respondent MCFC and Respondent MCCDPA, effective May 4, affecting approximately 858 bargaining unit employees represented by AFGE and AFGE 2904.

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12/ Mr. McKay testified that when the Panel contacted him regarding management's position, he told the Panel that there was no impasse because the dispute did not concern a negotiable matter and because the Marine Corps had already implemented the TPP.

13/ Colonel Dorman testified that he did not become aware of the Council's FSIP request until he received the Council's mailgram on April 17.

Ms. Coralee Thompson, at all times material herein employed as a Military Pay Systems Technician at the Marine Corps Finance Center in Kansas City, Missouri and as President or Acting President of AFGE 2904, testified that Center Order 5090.1 changed the smoking policy by designating only certain areas for smoking (mostly restrooms and breakrooms), whereas employees had previously been permitted to smoke anywhere. Center Order 5090.1 was issued by Respondent MCFC at the local level, and both Colonel Dorman and Mr. McKay admitted that under the MLA, negotiation of a Center Order such as 5090.1 should take place at the local level. Colonel Dorman testified that the Marine Corps did not notify the Council of an intent to implement Center Order 5090.1 and had no intention to negotiate over issuance of Center Order 5090.1. Center Order 5090.1 (with its change in smoking policy) was implemented without any further discussion with the Council at the national level and without providing AFGE 2904 the opportunity to bargain over the substance, impact and implementation of the change.

The parties further stipulated that on or about May 18, Respondent Washington and Respondent MCRSC, by and through J.P. Arms, employed at all times material as Deputy Director at the Overland Park, Kansas facility of Respondent MCRSC, implemented the Tobacco Prevention Program and a new smoking policy at Respondent MCRSC's Overland Park, Kansas facilities, affecting approximately 80 bargaining unit employees represented by AFGE and AFGE 2904. MCRSC employees were informed of the smoking policy change by "Plan of the Day" dated April 28 issued by J.P. Arms, but signed by Captain Hubbard. Whereas MCRSC employees were previously permitted to smoke at their desks or anywhere else in their building, employees have been required to smoke outside since implementation of the smoking policy change on May 18.

The parties also stipulated to the following changes in smoking policy at Respondent MCLB's Albany, Georgia facilities: On or about May 6, Respondent Washington and Respondent MCLB, by and through F.X. Hamilton, Jr., at all material times employed as Deputy Commander at the Albany, Georgia facilities of Respondent MCLB, issued a memorandum implementing the Tobacco Prevention Program in Building 3700 and thereby implemented a change in the smoking policy in Building 3700 affecting approximately 670 bargaining unit employees represented by AFGE and AFGE 2317. On or about May 14, Respondent Washington and Respondent MCLB, by and through C.N. Pastino, employed at all material times as Director of the Repair Division at the Albany, Georgia

facilities of Respondent MCLB, issued a memorandum implementing the Tobacco Prevention Program in Building 2200 and thereby implemented a change in the smoking policy in Building 2200 affecting approximately 659 bargaining unit employees represented by AFGE and AFGE 2317. Charles Smith, employed at all material times as a Pipefitter at the Marine Corps Logistics Base in Albany, Georgia and as Chief Steward of AFGE 2317, testified that the May 14 memorandum issued by Pastino was issued at the local level and would normally be negotiated at the local level. Mr. McKay confirmed that if Respondent MCLB issued a local regulation concerning a strictly local matter, the parties would discharge their bargaining obligation at the local level. Mr. McKay also testified that prior to implementing a division-wide change, management would have to notify the local union and give them an opportunity to bargain. On or about May 18, Respondent Washington and Respondent MCLB, by and through Pastino, issued a memorandum implementing an additional change to the smoking policy in Building 2200 and further implementing the Tobacco Prevention Program in Building 1310 and Warehouse 1331 and thereby implemented a change in the smoking policy in Buildings 2200 and 1310 and in Warehouse 1331 affecting approximately 659, 15 and 10 bargaining unit employees, respectively, represented by AFGE and AFGE 2317. On or about May 7, Respondent Washington and Respondent MCLB, by and through William L. DeLung, at all material times employed as Civilian Personnel Director at the Albany, Georgia facilities of Respondent MCLB, issued a memorandum implementing the Tobacco Prevention Program in Building 3010 and thereby implemented a change in the smoking policy in Building 3010, effective May 11, affecting approximately 22 bargaining unit employees represented by AFGE and AFGE 2317. Charles Smith testified that the change implemented by Mr. DeLung was issued at the local level and would ordinarily be negotiated at the local level. On or about June 10, Respondent Washington and Respondent MCLB, by and through Charles R. Batchelor, employed at all material times as Commissary Officer at the Albany, Georgia facilities of Respondent MCLB, issued a memorandum implementing the Tobacco Prevention Program in Building 7501 and thereby implemented a change in the smoking policy in Building 7501, effective June 15, affecting approximately 35 bargaining unit employees represented by AFGE and AFGE 2317. Mr. Smith also testified that Mr. Batchelor's June 10 memorandum was issued locally and would normally be negotiated locally. Also on or about June 10, Respondent Washington and Respondent MCLB, by and through J.M. Nolan, employed at all times material as Chief of Staff at the Albany, Georgia facilities of Respondent MCLB, issued a memorandum

implementing the Tobacco Prevention Program in Buildings 3500 and 3600 and thereby implemented a change in the smoking policy in Buildings 3500 and 3600 affecting approximately 314 bargaining unit employees in Building 3500 and approximately 18 bargaining unit employees in Building 3600 represented by AFGE and AFGE 2317. Mr. Smith again testified that Mr. Nolan's June 10 memorandum was issued locally and would ordinarily be negotiated at the local level. On or about June 16, Respondent Washington and Respondent MCLB, by and through R.F. Bailes, employed at all material times as Director of the Facilities and Services Division at the Albany, Georgia facilities of Respondent MCLB, issued Policy Statement No. 29 implementing the Tobacco Prevention Program in the Facilities and Services Division and thereby implemented a change in the smoking policy in that Division affecting approximately 168 bargaining unit employees represented by AFGE and AFGE 2317. Colonel Dorman admitted that Policy Statement No. 29 was issued below the national level and under the MLA would normally be negotiated at the local level. Colonel Dorman also admitted that Policy Statement No. 29 had not been negotiated at the national level. In fact, none of the local designations of smoking areas were negotiated at the national level.

The parties further stipulated that Respondent Washington and Respondent MCLB implemented the Tobacco Prevention Program and the changes in smoking policies described in the paragraph above without providing AFGE 2317 the opportunity to bargain over the substance, impact and implementation of such changes, despite AFGE 2317's written May 29 demand to bargain over such changes in smoking policy.

Colonel Dorman was unsure whether the TPP had been implemented at each of the twenty Marine Corps activities. Mr. Melton testified that the TPP had not been implemented at Camp LeJeune.

Mr. McKay testified that it would be difficult for the Marine Corps to rescind the smoking policy changes implemented in these cases because the TPP had been implemented for both bargaining unit employees and non-bargaining unit employees. Thus, Mr. McKay stated that the Marine Corps could not maintain a smoke-free environment or administer the TPP if bargaining unit employees were permitted to smoke but non-bargaining unit employees were not.

## Discussion and Conclusions

The General Counsel's position is summed up in its post-hearing brief as follows:

> "Based on all the evidence, Counsel for the General Counsel submits that Respondents Washington, MCFC, MCCDPA and MCLB violated Section 7116(a)(1) and (5) of the Statute by implementing the Tobacco Prevention Program and by designating smoking areas at activity facilities without providing AFGE, AFGE 2904 or AFGE 2317 the opportunity to bargain over the substance, impact and implementation of such changes. Respondents were obligated to bargain over the Council's proposal that activities negotiate with designated union representatives prior to designating smoking areas. The Council merely proposed a procedure to discharge the duty to bargain concerning changes in smoking policy at the local level and sought to preserve its right to designate its bargaining representatives. Although the duty to bargain resides at the level of exclusive recognition, parties may authorize lower level negotiations. The Council's proposal sought lower level negotiations of the designation of smoking areas, and local level negotiations were contemplated by the parties' MLA. Respondents' assertion that the Council's proposal conflicted with Article 4, Section 2 ignores the distinction between the TPP (implemented at the national level) and the designation of smoking areas (implemented locally). In the absence of agreement, a failure to invoke the FSIP's services or a waiver of bargaining rights (none of which are established by the evidence), Respondents' implementation of the TPP and of designated smoking areas was violative of Section 7116(a)(1) and (5) of the Statute. Such implementation by Respondents was also violative of Section 7116(a)(1) and (6) since it constituted a failure to maintain the status quo while the parties' impasse was pending before the Panel. Moreover, such implementation exceeded the scope of Respondents' bargaining proposals submitted during the TPP negotiations."

Respondent, on the other hand, takes the position that the Union's proposal, i.e., that Commanders at the activity level negotiate with the respective Local Union representatives the specific areas to be designated no smoking, is a

nonnegotiable subject of bargaining since it is contrary to the provisions of the Master Labor Agreement and would compel bargaining below the level of exclusive recognition. In such circumstances Respondent contends that it did not violate the Statute when it unilaterally implemented the no smoking policy at a time when the disputed union proposal was pending before the Impasses Panel. In this latter connection, it is Respondent's position that no impasse existed since Respondent had no obligation to bargain over the proposal for which Panel assistance was sought. To the extent that it is contended that the Union's proposal was merely an exercise of its right to select its own bargaining representative, it is Respondent's position that the record evidence fails to support such contention.

The parties do not appear to be in disagreement with respect to the principles of law applicable to the instant controversy. Thus, they agree that a union is entitled to select it's own bargaining representative, that the "no smoking" policy is a bargainable matter, that a change in a condition of employment may not be implemented while the matter is before the Impasses Panel, and that, absent agreement to the contrary, bargaining is to be conducted at the level of exclusive recognition.

The disagreement between the parties concerns the negotiability of the Union's proposal with respect to having the final designation of smoking areas bargained at the Activity level, rather than the National level, and the intent of such proposal. In this latter context, as noted above, it appears to be the General Counsel's contention that the proposal was nothing more than a designation of Local officers at the Activity level to be the Council's bargaining representative for purposes of bargaining the specific smoking areas.

Based upon a literal reading of Article IV of the Master Labor Agreement and the credited testimony of Mr. McKay, who served as the Respondent's Chief Negotiator for the MLA and who is currently head of labor relations for Respondent Washington, I find that Respondent Washington had at no time surrendered its right to negotiate changes in conditions of employment at other than the level of exclusive recognition. I further find that to the extent the Council and Respondent Washington negotiated memorandums of understanding in the past at the National level concerning various changes in conditions of employment at the Activity level, such changes were to be implemented at the Activity level without any further bargaining thereon at the Activity level. This is

true despite the fact that the National negotiations leading up to the particular change which was subsequently incorporated in a memorandum of understanding might well have overlooked some possible impact on the employees working in a particular Activity where the change was to be implemented.

While it is true that Section 2 of Article IV of the MLA does provide for bargaining at the Activity level with respect to changes initiated at that level by the respective Commanders at the various Activities, it also provides that such negotiations may, at the option of either the Council or Respondent Washington, be elevated to the National level. Thus, it is clear that the authority for Activity level bargaining is merely permissive and that both Respondent Washington and the Council, individually, always retained the right to elevate any local bargaining negotiations to the National level, the level of exclusive recognition.14/

In view of the foregoing, I find that Respondent Washington was within its rights in refusing to accede to the Council's demand, made as a bargaining proposal, that it transfer bargaining on the designation of "smoking areas" to the Activity level. Inasmuch as the proposal was non-negotiable, since it was contrary to the terms of the MLA and below the level of exclusive recognition, I find that the Respondents did not violate the Act when they implemented the "no smoking" policy while the Council's non-negotiable proposal was before the Impasses Panel.15/

To the extent that the General Counsel takes the position that the Council's proposal was nothing more than an exercise of its right to designate its own bargaining representative, I find that such contention is unsupported by the record evidence. According to Colonel Dorman, whose testimony is credited in all respects, Mr. Melton, the Council's Chief Negotiator, informed him that the Council wanted to negotiate at the Activity level over the designation of smoking areas.

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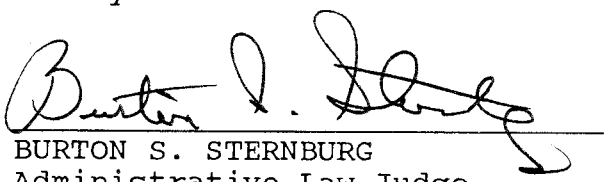
14/ Cf. Department of Health and Human Services, Social Security Administration, and American Federation of Government Employees, Local 3186, AFL-CIO, 18 FLRA No. 13.

15/ Cf. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, and National Treasury Employees Union, 18 FLRA No. 61.

Having concluded above that the Respondents did not violate the Statute when they implemented the "no smoking" policy at the Activity level, it is recommended that the Federal Labor Relations Authority adopt the following order dismissing the complaint in its entirety.

ORDER

IT IS HEREBY ORDERED, that the Complaint should be, and hereby is, dismissed in its entirety.



BURTON S. STERNBURG
Administrative Law Judge

Dated: March 31, 1988
Washington, D.C.