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

DEPARTMENT OF THE ARMY FORT STEWART SCHOOLS FORT STEWART, GEORGIA Respondent	
and	Case No. 4-CA-50417
FORT STEWART ASSOCIATION OF EDUCATORS, NATIONAL EDUCATION ASSOCIATION Charging Party	

Philip T. Roberts, Esquire
For the General Counsel

Captain Scott A. Mugno, Esquire
For the Respondent

Gladys M. Hernandez, Esquire
For the Charging Party

Before: JOHN H. FENTON
Chief 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 a charge filed on April 4, 1985, by the Union, a Complaint and Notice of Hearing was issued on November 19, 1987, by the Regional Director for Region IV, Federal Labor Relations Authority, Atlanta, Georgia. The Complaint alleged that Respondent violated Sections 7116(a)(1) and (5) of the Statute, by refusing to bargain in good faith with the Union with respect to proposals which are not

substantially different from proposals found negotiable by the Authority in prior cases. The charge was filed simultaneously with a petition for review of negotiability issues. The Charging Party selected to proceed with the latter, and on July 31, 1987, the Authority issued its decision on negotiability holding that the proposals at issue were negotiable. This Complaint followed.

Respondent's Answer denied only that the proposals were not substantially different from proposals previously held negotiable. It also asserted that its appeal to the U.S. Court of Appeals for the Eleventh Circuit with respect to the negotiability order extends that procedure and that the unfair labor practice procedure cannot proceed while that appeal is pending.

On January 19, 1988, Counsel for the General Counsel filed a Motion for Summary Judgment contending that two proposals made by the Union and declared nonnegotiable by the agency had been previously found to be negotiable by the Authority in Fort Bragg Unit of North Carolina Association of Educators, NEA and Fort Bragg Dependent Schools, 12 FLRA 519. Under the teaching of Department of the Air Force, U.S. Air Force Academy, 6 FLRA 548, it is an unfair labor practice to refuse to bargain over a proposal which is substantially identical to a proposal which the Authority has determined to be negotiable.

The proposals at issue here, and the corresponding proposals found to be negotiable in Fort Bragg are:

Fort Stewart Association of Educators
Proposal 1(F)

> The salary schedule shall reflect the cost of living increase no later than thirty (30) days after it is released by the Federal government.

Fort Bragg Unit Proposal 10

> The salary schedule shall automatically reflect the actual percentage increase in the Consumer Price Index no later than 30 days of their release by the Federal government.

Fort Stewart Association of Educators
Proposal 1(J)

> Any unit member whose employment is terminated by the Employer will be given a lump sum payment for unused sick leave.

Fort Bragg Unit Proposal 15

> Persons whose employment [is] terminated at Fort Bragg will be provided a lump sum payment for unused sick leave.

Respondent acknowledges the similarity of the proposals, but asserts that it has not been shown that there are not meaningful differences between them. It further argued that, even if identity exists, the Authority has found proposals to be both negotiable and nonnegotiable depending upon the arguments of the parties,1/ and that the unfair labor practice case ought not go forward while the negotiability case is pending on appeal, both because the second forum should not be in use "simultaneously" with the first, and because it is a waste of resources to go forward when a dispositive decision from the Circuit Court should soon come down.2/

On February 8, 1988 I issued an Order indefinitely postponing the hearing on the ground the case was ripe for Summary Judgement, and requesting further briefs. In essence, I held that many of Respondent's arguments were not germane because, under Air Force Academy, my inquiry was limited to the question whether the proposals in this case were substantially identical to those in Fort Bragg. If they were (and I found they were) then it would follow that an unfair labor practice had occurred. However, I asked for

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1/ It relies upon AFGE Local 30 and OPM, 14 FLRA 354, and NTEU and HHS, Region IV, 11 FLRA 254. In these cases the Authority found "competitive area" proposals to be negotiable where the defense of application to nonunit employees was raised and nonnegotiable when it was not raised.

2/ Enforcement of the bargaining order was sought well before this complaint issued. It was granted on November 21, 1988 (860 F.2d 396). The consequences of the two actions, if successful, will be identical, except that the Court's order is prospective, whereas retroactive relief is a possibility in this delayed proceeding.

further briefs on the question whether this Statute and the Regulations[3/] really contemplate reactivation of the suspended unfair labor practice charge after the very same proposals had been determined to be negotiable in the other arena. I noted a tentative disposition to dismiss the Complaint on the ground that this matter was ripe for disposition in the unfair labor practice arena from the beginning, and that the remedies which are the only reason for the present proceeding would have been secured. Instead

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3/ Sections 2423.5 and 2424.5 are identical. They provide that:

> Where a labor organization files an unfair labor practice charge pursuant to this part which involves a negotiability issue, and the labor organization also files pursuant to Part 2424 of this subchapter a petition for review of the same negotiability issue, the Authority and the General Counsel ordinarily will not process the unfair labor practice charge and the petition for review simultaneously. Under such circumstances, the labor organization must select under which procedure to proceed. Upon selection of one procedure, further action under the other procedure will ordinarily be suspended. Such selection must be made regardless of whether the unfair labor practice charge or the petition for review of a negotiability issue is filed first. Notification of this selection must be made in writing at the time that both procedures have been invoked, and must be served on the Authority, the appropriate Regional Director and all parties to both the unfair labor practice case and the negotiability case. Cases which solely involve an agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained and which do not involve actual or contemplated changes in conditions of employment may only be filed under Part 2424 of this subchapter. (Emphasis mine)

the Union secured half a loaf (a prospective bargaining order) in the negotiability case and now seeks the other half (a posting and retroactive bargaining order) in a sequential proceeding. As I noted, one visit to the bakery would have sufficed, raising questions whether the Statute's purposes are served by resort to the two procedures with the attendant delay and, arguably, unnecessary expenditure of resources.

It may be useful here briefly to recapitulate the procedural history. The declaration of nonnegotiability occurred on October 22, 1984. The charge was filed on April 8, 1985, and with it a statement of the Union's decision to proceed with its petition for review of the negotiability issues. The Authority ruled that the proposals were negotiable on July 31, 1987 in Fort Stewart Association of Educators and Fort Stewart Schools, 28 FLRA No. 67. As noted, Respondent filed for review of this decision in September, and the Authority petitioned for enforcement of its award. The Complaint was thereafter issued, in November. It of course is concerned with the very same proposals which the Authority had determined to be negotiable in July, but it does not rest on such determination, which has no direct relevance to it. Rather, the Complaint relates to the events of 1984, when Respondent declared the matters nonnegotiable in the face of the then outstanding Fort Bragg decision finding them to be negotiable. Thus the substantive issue here is simply whether the proposals at issue are substantially indistinguishable from those determined to be negotiable in Fort Bragg. The fact that the Authority found these very proposals to be within the duty to bargain in its Fort Stewart determination has no bearing on a declaration of nonnegotiability made long before that decision.

On these facts, where unfair labor practice remedies were as available in the beginning as they are now, my question in essence was whether Congress intended, or the Rules in any event require, that the General Counsel must in such circumstances issue a Complaint after completion of the first selected negotiability procedure.4/ While the Rules strongly suggest that such reactivation of the Complaint case is appropriate by requiring that the procedure not selected will ordinarily be suspended, they also curiously provide that the Authority and the General Counsel ordinarily will not process the charge and the petition simultaneously.

4/ I am, of course, bound by the Authority's Rules, whether or not I think they appropriately implement the Statutory purposes.

Counsel for the General Counsel very forcefully argues that the Rules strongly imply that both an unfair labor practice finding and a negotiability determination may successively be sought concerning the same proposals. Thus, they provide for a choice to be made as to the procedure to be set in motion first, and thereupon for suspension rather than dismissal of the subordinated process. They are stripped of meaning, it is urged, if the suspended procedure cannot be reactivated when the first has been completed. Simply put, says the General Counsel, the fact that one procedure is to be pursued first makes it clear that the other may be pursued second.

General Counsel also contends that the Statute's purposes are clearly effectuated by prosecuting a refusal to bargain after the negotiability determination has been made. This follows, it is claimed, from the fact that a posting will, and, more importantly, retroactive imposition of contract terms may, result from successful prosecution of the Complaint. And the Authority has indicated that the latter is appropriate in a case such as this one (VA, VA Regional Office, Buffalo, N.Y., 10 FLRA 167). Further, to deny a charging party access to both would require it, in the midst of negotiations, to review FLRA case law and locate decisions which might provide unfair labor practice remedies for proposals declared nonnegotiable. Close calls may be required, forcing the charging party to second-guess the Authority and lose such remedies if it is wrong, choosing the negotiability route where in fact an actionable violation was already presented. Not only is such a process unfair to the union, asserts General Counsel, but it defeats the purpose of the negotiability process, which envisions a quick resolution of such questions in the course of negotiations. Thus, Section 7117(C)(6) calls for expedited resolution of such determinations, and it would be undermined if negotiations had to await completion of the Complaint process. Further indication that Congress did not intend that completion of negotiations await resolution of alleged unfair practices arises from the fact that Congress did not make a mere declaration of nonnegotiability violative of the duty to bargain.

The Charging Party tracks the General Counsel's argument from the Rules, and adds several significant points, based on the Statute and decisional law. Thus, it asserts that Congress' intention not to have resort to one procedure operate to preclude later resort to the other is made clear by the fact that it specifically provided for preclusion in other areas of the Statute where such was its purpose, as

for example, in Sections 7116(d), 7121(d) and 7121(e). its failure to make such a provision respecting the interplay of Sections 7117 and 7118 means, Charging Party contends, that Congress intended to permit resort to both procedures. The Charging Party also relies on decisional authority, as well as the language of the Rules and the Statute, citing a case[5/] in which the Authority ruled upon the negotiability of a proposal which had been the subject of an unfair labor practice proceeding. The latter proceeding had resulted in an order that management bargain over the proposal, after its only defense-compelling need - had been rejected. In the negotiability case, which was then reinstituted by the Authority in the absence of withdrawal of the Union's petition, the agency asserted a different defense: that the proposal would require management to bargain concerning terms which would affect non-bargaining unit employees. It is to be noted that the union there took a position similar to my tentative one, contending that the question of management's duty to bargain had been laid to rest in the earlier complaint case. Implicit, at least, in its argument was the contention that something in the nature of res adjudicata or collateral estoppel should be applied to prevent management from escaping a bargaining duty (already recognized by FLRA in its bargaining order), by raising new issues available to it, but not employed in the earlier forum. The union there rested on this defense, failed to kill the inquiry by withdrawing its review petition and failed to join issue on the question whether its proposal would have required bargaining over the terms and conditions of people it did not represent. It thus lost by default on that matter, and the Authority, without addressing the merits of its other defense, held the duty to bargain did not extend to the matter it had formally ordered the agency to bargain about. No mention was made of the effect of the negotiability determination upon the bargaining order, it being presumably self-evident that such order had succumbed to the agency's second line of defense.

From this, the Charging Party argues that if a party can choose the unfair labor practice route, and upon its completion then proceed to a negotiability determination regarding the same matter (not quite what happened and not quite what any union successful in the unfair labor practice arena

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5/ NTEU and DHHS, Region VII, Office of Human Development Services, 17 FLRA 589.

would ever intelligently do[6]), then it follows that the converse can be done.

There is yet another case[7] of which I am aware in which the Authority acted upon a petition for review of a negotiability issue after an unfair labor practice decision finding no duty to bargain concerning the very same proposal: there, no new arguments were brought to the Authority's attention, and it dismissed the petition as moot in the circumstances. It is clear then, that the Authority has entertained negotiability cases after parallel complaint proceedings had run their administrative course.

Respondent contends, like the General Counsel, that the Rules provide an obvious answer. In its view, those Rules require that a declaration of nonnegotiability, unaccompanied by any actual or contemplated change in such employment term, may only be processed in the negotiability forum. This is such a case. It acknowledges however, the Authority's holding in Air Force Academy, that a ULP exists when a proposal is declared to be nonnegotiable in the face of clear Authority precedent to the contrary. So much for the Rules as a clear guide to which course a party may opt to pursue first. They literally support Respondent's argument that the absence of unilateral action by the agency should have led to dismissal of the case against the Academy. Respondent also argues that a negotiability determination ought not be a predicate for a ULP proceeding because an agency can entertain a good faith belief that such precedent

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6/ It could add nothing, serving only to jeopardize the remedy secured in the earlier proceeding by affording the agency an opportunity to present new defenses and, perhaps, simply new evidence to polish up defenses previously found wanting. Such a situation presents the counterpart of the General Counsel's effort to prove a refusal to bargain, after a charging party's petition for review has been dismissed, by bringing forward evidence which the Authority noted was lacking in its negotiability determination. Quite arguably, the goose's sauce is also the gander's. If it is appropriate for an agency to get a second chance to perfect its defense, it is equally appropriate for the General Counsel to provide the union with a second chance to demonstrate that a subject is bargainable.

7/ NTEU and Department of the Treasury, U.S. Customs Service, Honolulu, Hawaii, 11 FLRA 17.

is not controlling because different determinations are made regarding the same subject depending entirely on the records made and the arguments advanced by the parties.8/

Discussion and Conclusions

It is evident that no party sees this issue as a difficult one. As advocates understandably are prone to do, they find altogether clear and convincing (even, perhaps, compelling) support for their positions in the very words of the Rules and the Statute.

Like the Court in NLRBU v. FLRA, (834 F.2d 191, CCA-DC, 1987), I find the entire Statutory scheme "profoundly ambiguous." The court there sustained the Authority's Rule requiring that a refusal to bargain based on alleged conflict between the proposed subject matter and federal law or government-wide rule or regulation may only be processed as a negotiability appeal in the absence of unilateral action, i.e., it is not a proper subject for the ULP procedures or remedies. It is important to note that the Court did not say that the Statute mandated such a result. Rather, it said that given the deference owed the Authority in construing its own enabling legislation, and the profound

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8/ The cases discussed immediately above certainly give comfort to Respondent. At a minimum they suggest that an agency, in a proceeding such as this one, must have the right to "reopen" the underlying negotiability determination. Thus, it should be bound by the holding in Fort Bragg only if the Authority addressed in that decision all the defenses it is prepared to raise. If it has new, non-frivolous ones, its conduct arguably presents a "pure" question of negotiability of the kind Congress apparently intended should be subject only to a negotiability determination. That is to say, so long as the Authority permits a second bite at the apple, reopening the issue whether the duty to bargain extends to some subject matter, it is difficult to invoke stare decisis. This is a ULP built on the sand of an earlier negotiability decision which is subject to change upon the introduction of new facts or argument. If, as I remarked in Brockton (OALJ 88-103), a negotiability determination is, even as respects the very same parties, a ticket good for this day only, how can disregard of such guidance as it provides constitute a violation of law? One would first have to know that the earlier determination disposed of every argument the agency was prepared to make.

ambiguity concerning Congress' intent respecting the relationship, or connection, between the negotiability procedures and the ULP procedures, the Authority's Rule was a "permissible" interpretation of the Statute. It found some support for its conclusion in the fact that the Rule was consistent with the practice under the Executive Order and was arguably grandfathered into the Statute by Section 7135(b). Thus, the Court observed that under the Executive Order "only refusals to negotiate that were accompanied by unilateral changes in an established personnel policy, practice or matter affecting working conditions were processed as unfair labor practices." This statement is in error, as the ULP arising from a refusal to negotiate concerning a matter previously determined to be negotiable had long been recognized under the Order, and by this very Court in FLRA v. OPM, 778 F.2d 844, 847 (1985).

In FLRA v. OPM the Court spoke of a union's right, when faced with a declaration of nonnegotiability, to file a ULP charge for failure to bargain in good faith or to file a negotiability appeal, commenting that the latter course was clearly intended to provide a "speedy alternative to the traditional (ULP) procedures."9/ It noted that the appeals procedure contemplated a "simple process, designed to resolve mostly straight-forward legal questions focused on the negotiability of specific bargaining proposals," that a full-blown trial was unnecessary, that the resolution could be swift, and the Authority could then compel compliance with its bargaining orders in Court. Perhaps anticipating the instant problem, the Court went on to say the following:

> The problem of long delays in the expedited procedure is compounded by an FLRA regulation requiring unions to use the negotiability appeal process in all cases in which an agency declares a proposal non-negotiable. In other words, under current FLRA regulations, a union may elect to use the traditional unfair labor practice procedures to challenge improper agency unilateral actions and

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9/ The Supreme Court has since held, a least for compelling need cases, that the negotiability route is not a speedy alternative, but rather the only course available to the union. FLRA v. Aberdeen Proving Ground, 108 S.Ct. 126, (1988).

> other such refusals to bargain, but it is required to use the so-called expedited procedure in cases, such as this one, involving agency declarations that a bargaining proposal is non-negotiable. Although this court need not address the issue in this case, there are potentially serious problems with this regulation if it is applied to a case in which an agency's refusal to bargain may merit retroactive relief.

That serious problem may have here reared its ugly head. The Union could have filed an actionable ULP charge originally. But the Rule indicated otherwise, there having been no unilateral action taken. Since a negotiability determination yields a prospective bargaining order and is not a proper foundation for sanctions, i.e. the retroactive imposition of any terms eventually negotiated, we are at a minimum faced with the question whether, even if a ULP finding is warranted, retroactive "relief" is appropriate during the period prior to the negotiability determination of August 1, 1987.

Much of this discussion, as well as the trouble experienced by both the Authority and the Circuit Courts (witness Aberdeen) illustrates the difficulty in separating that which is subject to negotiability determination from that which is a proper subject for ULP remedies. For most of us - and pity the nonspecialists called upon to make the correct choices - the dividing line is hardly a bright one, although it seems simple to state. A negotiability determination is confined to comprehending the meaning of a union proposal and then deciding whether it is inconsistent with federal law, government-wide rule and regulation or an agency regulation for which there is compelling need. It is not concerned with other matters having to do with whether, at this time and place there is a duty to sit down and bargain with the union. Thus it ought not address such matters as whether (formerly) the proposal could be negotiated during mid-term of a contract, or has been waived. The particular context in which the question arises may be relevant to a ULP inquiry, but is not germane to the question whether the subject matter is negotiable. Nevertheless the Authority has stumbled in its attempts to force cases presenting both kinds of issues into the ULP forum, whether out of the mere desire to use the administratively more convenient forum, the belief that it provides, in the long run, the swiftest complete resolution of the

controversy, or the conviction that a hearing process is necessary to resolve questions of fact that are common to both cases.

The entire area seems sufficiently confused to warrant a thorough exploration of its origins under the Executive Orders, and the highlights of the "elucidating" litigation under the Statute. Perhaps then we can make an informed guess whether the Rules or the procedure employed here are consistent with the scheme Congress had in mind or otherwise forces upon us in the effort to make sense of the two procedures it has created.

Executive Order 10988 established this program in 1962. It required agencies and unions to meet and negotiate on personnel policies and practices and matters affecting working conditions, subject to almost limitless limitations of law and policy. There was no explicit requirement that negotiations be undertaken in good faith, and the scope of bargaining was largely dictated by management through its power to issue regulations.

In 1969 the Study Committee issued its Report and Recommendations to the President, urging many changes in the program. This document, the "legislative history" of Executive Order 11491, called for a central body to administer the program (the Federal Labor Relations Council), for an enlarged scope of negotiation and "better rules for insuring that it is not arbitrarily or erroneously limited by management representatives." The new Order gave the Assistant Secretary of Labor the power to remedy ULPs, one of which (Section 19(a)(6)) was a refusal to consult, confer or negotiate as required by the Order, which, in Section 11, required parties to "meet at reasonable times and confer in good faith." A third-party mechanism was established in Section 11(c) to deal with disputes over the scope of the duty to negotiate, empowering the Council to determine whether a given proposal was negotiable. The Study Committee said it wished to give unions "a way of resolving, during negotiations, questions as to whether a matter proposed for negotiations is in conflict with law, applicable regulation or controlling agreement." (Emphasis mine)

Thus the need for speedy resolution of such disputes was recognized. And, twenty years ago, the Committee specifically recognized that a union "should be permitted to file an unfair labor practice complaint when it believes that a management official has been arbitrary or in error in

excluding a matter from negotiation which has already been determined to be negotiable through the process described in (Section 11(c))." It apparently did not, however, anticipate the problem presented when the Assistant Secretary was confronted with the claim that a unilateral change in working conditions constitutes a ULP, and the defense interposed was that the matter changed lies outside the scope of the bargaining duty. Neither the Order nor the regulations issued dealt with either of these issues. However in 1971 the Assistant Secretary, in Report Number 26, held that the ULP complaint procedure was not available as a means of resolving negotiability disputes, unless management excluded from negotiation a matter which the Council had already determined to be negotiable.

In 1975 the Council recommended amendment of Executive Order 11491 so as to enable the Assistant Secretary to deal with unilateral changes where the defense of nonnegotiability was raised. It noted that, while the Assistant Secretary had authority to decide ULP cases arising from an alleged refusal to negotiate, he had consistently ruled that the ULP procedures were not available for "complaints arising in connection with negotiations and posing negotiability issues unless there exists applicable Council precedent on which he can rely to resolve the negotiability issues." It recommend that he be vested with authority to resolve negotiability issues, even in the absence of Council precedent, "so long as these issues do not arise in connection with negotiations . . . but rather as a result of a respondent's alleged refusal to negotiate by unilaterally changing an established (term or condition of employment)" and that a party adversely affected by the Assistant Secretary's decision should have the right to appeal the negotiability determination to the Council.

The Council viewed this procedure as, on balance, the best approach to the problem of confining the prospect of conflicting lines of precedent (which should be reduced in any event as the Council made more determinations) and avoiding the procedural delays which would result if negotiability issues were brought to the Council first, and then had to be remanded to the Assistant Secretary for further action on the ULP case. Nor did the Council think well of the alternative of having the Assistant Secretary forward to it negotiability issues which arose in ULP proceedings, thus requiring him to defer decision until the Council acted. Where negotiability issues arise in the context of ULP proceedings it observed, "they are often inextricably intertwined with disputed issues of fact which

must be resolved in order to arrive at a conclusion concerning the motivation of the parties . . . (thus posing issues which) . . . are best resolved through the adversary process of a formal hearing."

Accordingly, subsection 11(d) was added to E.O. 11491, by E.O. 11838 so as to permit the Assistant Secretary to make such negotiability determinations as may be necessary to resolve an alleged ULP based upon a unilateral change in employment terms or conditions, and to permit an aggrieved party to appeal such determination to the Council. The amended Order made no mention of disregard of negotiability precedent as a ULP, and the regulation promulgated thereunder remained silent on both subjects.

The Statute changed matters. Section 7104 established a General Counsel empowered to prosecute ULPs, including those arising from the a refusal to negotiate in good faith. In Section 7117 an expedited procedure was created for resolving negotiability disputes. Section 7117(b)(1) directed the Authority (which replaced the Council and the Assistant Secretary for decision-making purposes) to make compelling need determinations "[i]n any case of collective bargaining in which an exclusive representative alleges no compelling need exists for any (agency) rule or regulation . . . which is then in effect and which governs any matter at issue in such collective bargaining." Section 7117(c) set forth the procedures to be used where "an agency involved in collective bargaining . . . alleges that the duty to bargain . . . does not extend to any matter" (for reasons other than compelling need) and the union appeals the allegation to the Authority. In each kind of case the Authority could hold a hearing, but the General Counsel was expressly excluded form it. Finally, the Statute contained no counterpart to Section 11(d) of the Order, explicitly recognizing that negotiability determinations could be made in ULP proceedings, where an agency has taken unilateral action which it defends on the ground that it is acting in an area which is beyond the scope of the duty to negotiate.10/

10/ One Court found this apparent omission significant, concluding that Congress did not wish to permit negotiability determinations in ULP proceedings, even noting that President Carter, in Executive Order 12107, deleted Section 11(d) from the Order twelve days before the Statute took effect, thus

(Footnote continued)

With the passage of the new law, regulations were issued designed to force unions which filed both negotiability appeals and ULP charges to choose the arena in which to proceed first, where such a choice was not simply eliminated. Confusing at best, they made one thing quite clear: cases which solely involved an allegation that the duty to bargain did not extend to the matter proposed to be bargained and which did not involve actual or contemplated changes in conditions of employment had to be processed as negotiability appeals (Rules 2423.5 and 2424.5). Thus the Rules literally require unions to resort to Section 7117 when a declaration of nonnegotiability is unaccompanied by actual or contemplated change. In this respect they do not recognize a union's right to enter the ULP forum in such circumstances, where the Authority had previously determined that the matter at issue was within the scope of the duty to bargain.

Of course "scope" questions are often mired or enmeshed in other questions of "good faith" bargaining. Such "mixed-bag" cases have caused the Authority and its clients no little difficulty over the years. In 1985 the Circuit Court for the District of Columbia observed that "the irrelevance of the bargaining context in negotiability determinations is exemplified by the fact that, under clear and longstanding FLRA precedent, a negotiability determination is binding on all federal agencies faced with the same union proposal." FLRA v. OPM, 778 F.2d 844, 847. Nevertheless, that irrelevancy was not easily perceived, and the Authority dismissed negotiability appeals as presenting disputes better suited to resolution by the ULP or grievance/arbitration processes because of defenses such as waiver or other matters involving factual circumstances that are most easily handled in a

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(Footnote 10 continued)

"abolishing the old procedure" relied upon by the Authority. U.S. Army Engineer Center v. FLRA, 762 F.2d 409 (4 CCA, 5/85). It seems far more likely that Section 11(d) was abolished for procedural reasons. Under the Statute there was no reason, as there had been under the Order, to grant the Assistant Secretary power (otherwise reserved to the Council) to make negotiability determinations where the need arises in connection with a ULP proceeding brought because an agency has taken unilateral action regarding a disputed subject matter. The powers of those two entities to decide negotiability disputes and ULPs were now joined in the Authority.

hearing. For example, in AFGE Local 2736, 9 FLRA 733, the Air Force declared a proposal nonnegotiable, and added contentions that it had in fact reached agreement on the same subject matter in contract provisions which were intended to be substitutes for the disputed proposals and that the union had otherwise waived its right to bargain the matter under the contract's reopener clause. The Authority deemed the dispute one improperly before it as a negotiability issue, noting that the waiver defenses involved factual circumstances surrounding negotiation and execution of the agreement.

In 1983 the U.S. Circuit Court for the District of Columbia, reversed the Authority, and ordered it to cease what it labeled a consistent practice of refusing to make negotiability determinations pursuant to Section 7117 where a case presented a "factual" issue, such as waiver, as well as the "pure" negotiability issue whether the matter at issue was consistent with law, rule or regulation. The Court noted legislative history indicating that Congress intended that negotiability disputes were not to "be subject to the cumbersome unfair labor practice procedures but (were to) be resolved through the streamlined Section 7117(c) process." It further perceived the Authority's defense of its practice as "apparently" being based on the notion that the Authority is required to dispose of negotiability issues as expeditiously as is practicable, that Section 7117(c)'s procedures did not lend themselves to fact-finding, and that the Authority should have the discretion to make a reasonable judgement that the negotiability and factual issues can best and most expeditiously be determined together in a ULP proceeding. The Court rejected such argument, finding the Authority's action clearly contravened the requirement that negotiability issues be processed as expeditiously as possible. The Court noted that "neither the relevant statute and regulations nor the factual posture of this dispute preclude the Authority from granting expedited review of the negotiability claim while processing the factual dispute . . . in some fashion." It further observed that the regulations "apparently contemplate" allowing a union "to bifurcate the issues and receive an expedited review of its negotiability appeal, while the unfair labor practice proceeding involving the other issues is stayed." AFGE Local 2736 v. FLRA.

The Authority and the Courts have experienced equivalent trouble on the other side of this coin. That is, just as the Authority has been reversed where it has attempted to force "mixed-bag" cases into the presumably superior ULP

forum, thus depriving unions of their right to an expeditious negotiability determination, so also has it, as well as one reviewing Court, run into trouble where they permitted resolution of negotiability questions in the ULP forum because the agency had taken unilateral action. Thus far, such trouble has been encountered only where the defense of nonnegotiability was tied to an agency regulation for which a compelling need was asserted to exist. Perhaps ominously, the Supreme Court held that the Statute does not permit resolution of such a question in a ULP context. Aberdeen Proving Ground v. FLRA, 108 S. Ct. 1261.

The Court noted in particular two provisions of Section 7117 which barred such an approach. The first, (7117(a)(2)), states that the duty to bargain, where it conflicts with an agency regulation, arises "only if the Authority has determined" that there is no compelling need for the regulation. The other, (7117(b)(3) and (4)), states that any hearing held for purposes of such a determination shall not include the General Counsel as a party, but shall include the agency (which is not a necessary party in a ULP case). From this and other text the Court concluded that it was clear that the duty to bargain does not even arise until the negotiability determination has been made. Or, as the Court put it, the Authority was in error in believing that "the compelling need determination could be properly unified with the ULP proceeding.11/

It added to this analysis the fact that legislative history showed that Congress tried to achieve a balance between the rights of federal employees to bargain collectively and the "paramount public interest in the effective conduct of the public's business."

It then said the following about that balance:

> Section 7117(b) is carefully constructed to strike such a balance. Under §7117(b) employees are provided with a means to clarify the scope of the agency's duty to bargain: if the agency then refuses to bargain, the union may

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11/ It sustained the result reached by the Fourth Circuit Court (U.S. Army Engineer Center v. FLRA, 762 F.2d 409) and reversed the D.C. Circuit Court. (Defense Logistics Agency v. FLRA, 754 F.2d 1003.

> seek relief through an ULP proceeding. At the same time §7117(b) provides special procedures designed to promote effective government. For instance under a negotiability appeal, but not in the ULP forum, the agency that issued the relevant regulation is a necessary party, §7117(b)(4); the FLRA General Counsel is not a party §7117(b)(3); and the negotiability appeal is presented directly to the Authority, rather than first to an administrative law judge, 5 CFR pt. 2424 (1987). Moreover, a §7117(b) hearing is an expedited proceeding, §7117(b)(3), thus resolving doubt as to whether a regulation is controlling as promptly as practicable. Most importantly, requiring that compelling need be resolved exclusively through a §7117(b) appeal allows agencies to act in accordance with their regulations without an overriding apprehension that their adherence to the regulations might result in sanctions under an ULP proceeding. See §7118(a)(7). To allow compelling need to be adjudicated in the context of an ULP proceeding without any prior §7117(b) negotiability appeal, would frustrate this careful balance and would disregard Congress's direction that Title VII "be interpreted in a manner consistent with the requirement of an effective and efficient Government." §7101(b). (Emphasis mine)

In this quoted passage the Court puts great emphasis on the procedures of Section 7117(b) which it finds are designed to promote effective government. It set them forth, finding most important the fact that the exclusivity of the compelling need determination route permits agency managers to devise and adhere to regulations which they think serve the public interest free from any hobbling or paralyzing anxiety that their judgement can be second-guessed in a ULP forum and be subject to sanctions. Thus, the dreadful prospect of retroactive imposition of any agreement reached pursuant to a bargaining order might deter them from assuming the risk of fashioning or following regulations which their unfettered judgement tells them are in the public interest.

It is hardly clear to me why agency managers, confronted with a proposal they think conflicts with management rights, or with their interpretation of other law or government-wide regulation, were intended to be any less free from the fear of ULP sanctions in deciding what course of conduct to follow. If anything their fearless judgement would appear to be more important in these more weighty matters. A rather compelling argument can be made as follows. If the duty to bargain does not even arise until a regulation (perhaps issued at the manager's whim) has been shown not to be supported by any compelling need, how can it have an earlier existence where the asserted obstacle is a mere act of Congress or a rule that applies across the government?

All of this meandering establishes that the Authority's approach to the interface between negotiability determinations and unlawful refusals to bargain has been flawed in fundamental ways from the very beginning. Its refusal to render negotiability determinations in cases where that issue is enmeshed in other "factual" controversies has been rejected as a deprivation of a union's right to an expedited decision, and appears to have been abandoned. Its use of the unified ULP forum in making negotiability determinations in cases involving compelling need and unilateral change has been rejected in an analysis which throws doubt on use of the ULP forum for <u>any</u> negotiability determination. It also establishes that the guidance provided by the Regulations is presently misleading in at least two respects: it invites the above-described dead-end ULP option as an apparently viable course, and appears to prohibit the ULP option in cases devoid of unilateral change but in which the disputed subject-matter has previously been determined to be negotiable.

For the moment, the Authority regards its power to address negotiability issues not involving compelling need as unaffected by <u>Aberdeen</u>. (<u>Professional Airways Systems Specialists, MEBA, AFL-CIO</u>, 32 FLRA 517). The Rules, then, are consistent with decisional law as regards the use of the ULP forum for negotiability determinations tied to unilateral changes which are not defended by reference to agency regulation.

The Rules otherwise seem to achieve little. Thus, there appears to be no need to hold a charge in suspension while an appeal is processed except, perhaps, when unilateral change has been made, and the union seeks a quick determination respecting whether the duty to bargain extends to the subject. If it does not, end of the matter. If it does,

the charge can be activated to address the changes which were thereby determined to have been unlawful. As noted, this cannot be the case if compelling need for a regulation is at issue. In the absence of unilateral change, or of clear precedent establishing negotiability of the matter, the ULP route is simply unavailable. Hence there is no discernible need to hold a charge. Prompt dismissal would seem the obvious course, although arguably a case posing negotiability as well as other defenses might be held for reactivation in the event negotiability is determined to exist. However, such an approach would tread the thin ice of a finding that misplaced reliance on, say, waiver, would be unlawful prior to any determination that the subject matter was within the duty to bargain. If such is not the case, a new charge addressed to any further refusal to bargain after the matter was found within the scope would be necessary in any event.

In the other side of the coin, it may make sense to hold a negotiability appeal pending disposition of a charge. It could be activated upon a finding that the precedent relied upon is not controlling in the ULP case, or, perhaps, where a ULP case is found not to involve the unilateral change alleged, so as to enable the Authority to promptly address the question in the absence of a ULP context. Of course, so long as the Authority deems it appropriate to automatically reactivate the suspended matter, much of the above remains questionable. That disposition, it would seem, could usefully be curtailed by addressing true scope of bargaining issues only in negotiability determinations, i.e., to look for conflict with management rights, other laws or government wide regulation and to ignore other considerations of "bargaining context" which may vary from day to day and place to place, depending upon the conduct or practices of the parties or their agreements.

Finally, it would seem worth recapitulating, again, what has happened here. The Union responded to a declaration of nonnegotiability by filing an appeal and a charge. It opted to proceed first with its appeal, even though the case thereby suspended appeared to be prohibited by the Rules because unilateral change had not occurred. The presumably prohibited proceeding (although viable under decisional law) was held in abeyance while the Union sought and secured a wholly redundant decision, restating the holding in Fort Stewart. There was, of course, the possibility that Fort Stewart would be overturned upon consideration of new facts or argument, or that it would thereby be reinforced. Whatever this may mean for our purposes, successful conclusion of the negotiability case had two consequences.

First, Respondent sought Circuit Court review of that negotiability determination and the Authority cross-petitioned for enforcement of its bargaining order. Thus the stage was set for a decree granting a prospective bargaining order, if deemed warranted.12/ Second, a complaint issued, which, if successful, could add to any decree issued only two things: the posting of a notice and the retroactive imposition of any agreement on money terms eventually reached. That, of course, could lead to reenactment of this litigation concerning the validity of such a two-stage approach at the Court level. Could Congress have meant to create such a repetitious, overlapping, double-barrelled and convoluted approach to whether Respondent had a duty to bargain about these matters?13/ Does application of the law or Rules indicate these procedures are appropriate? And even if prosecution is considered warranted over the same matter deemed suitable fodder for a negotiability determination, is it appropriate to seek a make-whole remedy for that period of time preceding the Authority's negotiability determination?

Judicial economy is always a concern if the Authority is to husband resources and maximize its ability to regulate this field. It is clearly one reason for the Rules which impose routes or require choices so as to avoid useless or overlapping proceedings. It is offended I think, by holding

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12/ Recently the Sixth Circuit issued a decision in Fort Knox Dependent Schools v. FLRA (No. 87-3395, 5/11/89) finding teachers salaries nonnegotiable. The majority noted that five other Circuits had grappled with the issue with varying results and no majority view. The dissent noted that Congress in 1985 amended the law respecting dependent schools, providing for their transfer to local school districts by July 1, 1990. It thus seems highly likely that this controversy will have been mooted before it is resolved.

13/ See, e.g., Brockton VA Hospital, OALJ 88-103. There, the General Counsel issued complaint in the teeth of a determination of nonnegotiability. In my view that determination was faulty, focusing on "bargaining context" or "factual" considerations which are appropriate in a ULP case, rather than on the question whether law or regulation precluded negotiations over employee consumption of surplus coffee. In any event Respondent was charged with a ULP for refusing to bargain not long after being "vindicated" in a negotiability determination.

a viable ULP case while a negotiability determination is made which adds nothing to the fund of negotiability law, and contributes nothing to resolution of the ULP case, and then reactivating the latter for an inquiry which plows no new substantive ground.

Furthermore, it would seem that a decision to seek a negotiability determination - especially where the subject has already been determined to be negotiable, but in any case - ought to preclude the coexistence of a viable ULP charge. The two proceedings are, in theory, incompatible. The first is designed to determine whether the duty to bargain extends to a subject matter and to provide prospective relief. The second assumes the refusal to bargain was unlawful, i.e. that the subject matter has already been determined to be one for the bargaining table, and contemplates the possibility that retroactive relief is appropriate to make whole the victim of the ULP and deter the violator.

Finally, even if such duplicative or overlapping proceedings can be harmonized as actions which somehow further the purposes and policies of this Statute, it strikes me as wholly inappropriate to grant a "make whole" remedy for any time prior to the Authority's determination that the proposals were negotiable. The wrong sought to be remedied is conduct long predating the negotiability determination, and the the Union's decision to explore negotiability while icing the ULP proceeding deprived Respondent of an early opportunity to join issue in the dormant case and shorten its exposure to such liability. Thus Respondent was powerless to prevent the accumulation of monetary relief while the second determination of negotiability was being made. The meter was running, in the General Counsel's view, during the time the Union chose not to seek a prosecution (and the General Counsel had no occasion to indicate whether one was warranted), thus postponing resolution of the ULP case while an apparently redundant negotiability determination was made. Had the ULP proceeding been launched simultaneously with, rather than after proceedings upon the appeal were completed, or had it been selected as the first forum, Respondent could have promptly addressed the question of a retroactive remedy long ago. Had that remedy been imposed (and precedent supported its imposition), it would at least have had an opportunity to commence bargaining and cut-off any continuing accumulation long before that matter was even litigated in this two-step delayed procedure. In addition, the disagreement within the Authority and among the reviewing Courts argues

against make-whole relief being imposed here and not there among various dependent schools from circuit to circuit. Such a split among the Courts indicates not only a very difficult area of statutory construction, but one where Respondent's resistance can hardly be labelled a bad-faith refusal to carry-out reasonably clear commands of the law. There is no willful misconduct to be deterred, and a chaotic pattern of requiring bargaining leading to retroactive imposition of terms here, but not there, among teachers of the same school system can only be severely disruptive. Hence, even if this proceeding is appropriate the only appropriate relief in my judgment would be a posting.

Quite obviously, I find no clear guidance concerning what should be done with this case. For reasons just given, I am strongly inclined to recommend that the Authority dismiss this complaint as one improvidently issued. Yet the Authority does in fact routinely reopen and process "suspended" cases sometimes with results which conflict with the earlier decision. There is, however, no reason to believe that the Authority would agree that reactivation of this charge warranted issuance of Complaint rather than dismissal in these circumstances. I therefore, recommend that the Authority dismiss this Complaint and modify its Rules to preclude use of the ULP procedures after a negotiability appeal has run its course, based on precedent which predates the decision to seek a negotiability determination. The history of this case, all the way to the Circuit Court, only to return to the beginning on an absolutely independent inquiry into the same subject matter, perhaps to be followed by another visit to the Court, strongly argues, I think, that the course here taken is one which needlessly burdens both the administrative and Court systems with two proceedings where one will do. If there exists precedent clearly governing the proposals at issue, so as to render the matter ripe for a ULP decision, then a union ought not be permitted to use both the negotiability proceeding and the ULP forum in that order.

Accordingly, I recommend that the Authority enter an Order dismissing this Complaint.

Issued, Washington, D.C., June 23, 1989

John H. Fenton

JOHN H. FENTON
Chief Administrative Law Judge