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

DEPARTMENT OF TRANSPORTATION AND FEDERAL AVIATION ADMINISTRATION Respondents		
and	Case Nos.	3-CA-70647-1-2 3-CA-70648-1-2 3-CA-70649-1-2 3-CA-70650-1-2 3-CA-70651-1-2
PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS, MEBA, AFL-CIO Charging Party		

Diane R. Liff, Esquire
For Respondents

Peter A. Sutton, Esquire
Phillip Boyer, Esquire
For General Counsel of FLRA

Howard E. Johannssen
For Charging Party

Before: SAMUEL A. CHAITOVITZ
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. § 7101 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV § 2410 et seq.

On September 8, 1987, Professional Airways Systems Specialists, MEBA, AFL-CIO (hereinafter called PASS) filed charges in Case Nos. 3-CA-70647-1, 3-CA-70647-2, 3-CA-70649-1, and 3-CA-70649-2 against Department of

Transportation (hereinafter called DOT) and in Case Nos. 3-CA-70648-1, 3-CA-70648-2, 3-CA-70650-1, 3-CA-70650-2, against Federal Aviation Administration (hereinafter called FAA).1/ On September 9, 1987, PASS filed charges in Case Nos. 3-CA-70651-1 and 3-CA-70651-2 against FAA.

Based upon the foregoing charges the General Counsel of the FLRA, by the Regional Director of Region III of FLRA, issued a Complaint in Case No. 3-CA-70651-1-2; Order Consolidating Cases and Complaint in Case Nos. 3-CA-70647-1-2, 3-CA-70648-1-2, 3-CA-70649-1-2, and 3-CA-70650-1-2; and Order Consolidating Cases in Case Nos. 3-CA-70647-1-2, 3-CA-70648-1-2, 3-CA-70649-1-2, 3-CA-70650-1-2, and 3-CA-70651-1-2. Respondents filed timely Answers to the foregoing complaints denying they violated the Statute.

A hearing was conducted before the undersigned in Washington, D.C. PASS, Respondents and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Extensive post-hearing briefs and reply briefs were filed and have been fully considered.

Respondents filed extensive Post-Hearing Motions to Correct the Transcript and the Exhibit List and to Admit Additional Exhibits. No opposition to these motions have been received. Respondents' motion to correct the transcript is granted and the submitted requested corrections are attached hereto as Attachment A. Similarly Respondents' motion to correct the exhibit list submitted by the General Counsel of the FLRA is granted and the submitted requested corrections are attached hereto as Attachment B. Respondents' motion to add two additional documents is granted, the two documents marked R-I and R-J, are made a part of the record herein and a submitted list of these two documents is attached hereto as Attachment C. Respondents' motion to add 21 additional documents is granted, the 21 documents marked R-K, R-K(1), R-L, R-M, R-N, R-O, R-P, R-Q, R-R, R-S, R-T, R-U, R-V, R-W(1), R-W(2), R-W(3), R-X(1), R-Y, R-Z and R-AA are made a part of the record herein and a submitted list of these twenty-one documents are attached hereto as Attachment D.

1/ DOT and FAA will hereinafter collectively be referred to as Respondents.

General Counsel of the FLRA filed a Motion to Correct the Transcript. No opposition to this motion has been received. Accordingly, this motion is granted and the motion with the requested corrections are attached hereto as Attachment E.

Based upon the entire record in this matter and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

DOT is an Executive Department of the Government, comprised of the Office of the Secretary (OST) and nine operating administrations, including the FAA. DOT has approximately 100,000 employees working in almost nine hundred facilities, with fewer than 1,000 employees working directly in the OST.2/

OST is responsible for formulating and executing national and international transportation policies and programs, for coordinating the various transportation programs of the Federal Government and for management of DOT. The nine operating administrations, including FAA, have delegated authority to conduct programs in each area of responsibility.

At all times material herein PASS has been the collective bargaining representative for FAA employees in two separate collective bargaining units. The larger of these two units is the National Airways Facilities Division unit (hereinafter called the AF unit or the Electronic Technician unit) and consists of about 6500 employees, primarily Electronic Technicians (GS-856) whose duties are to maintain, certify repair and install electronic equipment throughout the FAA. The smaller unit (hereinafter called the AVN unit), consists of about 350-400 employees and includes, among others, pilots, co-pilots and flight inspectors.

Since March 1982 PASS has held National Consultation Rights (herein referred to as NCR) with DOT. DOT, at various levels, recognizes collective bargaining representatives for 89 separate units. Prior to September 1987, FAA had its own drug testing program, a periodic testing program for employees who are required to take an annual physical. This program affected certain employees, such as pilots, in the

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2/ Approximately 40,000 of the employees are uniformed Coast Guard personnel.

AVN unit, but did not affect any employees in the AF unit. PASS had no objection to this program so it did not ask to bargain concerning it.

On January 21, 1987, Secretary of Transportation Elizabeth Dole issued a memorandum to all DOT employees announcing a proposed drug testing program for DOT, including random testing for some DOT employees. PASS was provided a copy of this memorandum by William Hufnell, DOT's Director of Labor Relations, under PASS' NCR. The proposed program indicated it would affect certain employees, pilots, etc., represented by PASS in the AVN unit, but included none of the employees within the AF unit. In a telephone conversation PASS President Howard Johannssen advised Hufnell that PASS wanted to invoke its NCR at the appropriate time, when DOT got its "package" ready. At this time no employees in the AF unit were included in the drug testing program.

On January 28, 1987, OST conducted a briefing for union representatives, which was attended by PASS Executive Vice-President Mark Schneider. Hufnell provided PASS with the draft appendix of the forthcoming DOT Order. The appendix, entitled "Categorization of Employees For Drug Testing", listed positions proposed to be covered by the DOT random drug testing program and included certain positions including Safety Inspectors and Flight Test Pilots, within the AVN unit represented by PASS. Electronic Technicians employed within the AF unit were not included in the appendix, but the appendix did include "Electronics" positions within the Coast Guard, as being covered by random testing. Hufnell advised Schneider that Electronics Technicians, in the AF unit, were under consideration to be subject to random testing.

On February 13, 1987, PASS received a draft copy of the proposed DOT Order together with a draft of a questions and answers pamphlet. Each of the documents indicated some employees in AVN unit were included in the random drug testing program, but none of the employees in the AF unit would be affected by the random drug testing program. This transmission included a request for comments within 30 days. PASS filed extensive comments on March 13, 1987.

In April or May 1987, Melisa Allen, DOT's Deputy Assistant Secretary for Administration, recommended to Dole that the Electronics Technicians in the AF unit be included in the random drug testing program. In late May or early June, 1987 Dole accepted this recommendation.

On June 22, 1987, Hufnell and Johannssen had a telephone conversation regarding changes in the drug testing program. Hufnell told Johannssen that DOT had revised the proposed program and that Hufnell was sending Johannssen a revised draft which had not yet been approved by Dole. Hufnell also informed Johannssen that DOT was including Electronics Technicians in the AF unit in the random drug testing program. This change affected between 5,600 and 6,000 employees in the AF unit represented by PASS and resulted in the vast majority of employees represented by PASS being included within the random drug testing program. Hufnell did not indicate when the drug testing program would be implemented and indicated that pursuant to its NCR rights PASS should respond by Friday, June 24, 1987.

On June 24, 1987, Johannssen received a package of documents outlining the changes discussed in the June 22 phone conversation. The documents included a draft copy of the proposed 60 day notice which DOT planned to give employees the following week; a revised copy of the draft DOT Order, which contained the Electronics Technicians in the AF unit; and a letter notifying PASS that DOT was amending the program to include the Electronics Technicians in the AF unit within the random drug testing program.

On June 25, 1987, Johannssen wrote to Hufnell complaining about the brief time for comments and demanding to negotiate to the fullest extent allowed by law prior to implementation of the program within the units represented by PASS. Johannssen sent copies of this demand to bargain to Dole and to three levels within the chain of command within FAA, including to Joseph Noonan, FAA Director of Labor Relations.

On June 25 and 26, 1987, Hufnell and Johannssen had some conversations concerning the proposed changes in the drug testing program, discussing the proposed 60 day notice which DOT intended to send to DOT employees on June 26, 1987. Johannssen reiterated PASS's demand to negotiate at the appropriate level over the implementation of the proposed drug testing program. Hufnell agreed that bargaining would take place at the appropriate level. Pursuant to two suggestions from Johannssen, the proposed 60 day notice was changed to include Electronics Technicians and by stating that management would comply with its bargaining obligation as the program was implemented. Hufnell stated that the 60 day notice did not mean anything in regard to when implementation would occur, it was just notification, getting the ball rolling.

On June 30, 1987, Hufnell sent Johannssen a copy of the final DOT Order, DOT Order 3910.1, Drug-Free Department Work Place, dated June 29, 1987, and signed by Dole.3/ Chapter VIII of the DOT Order, entitled Implementation Procedures had been reserved and was left blank, with no explanation. Johannssen assumed it had been left blank until an agreement could be reached with PASS as to how the program would be implemented.4/

By letter dated July 1, 1987, FAA sent PASS a copy of the 60 day notice sent to employees. This was PASS's first communication from FAA concerning the drug testing program. This 60 day Notice was a memorandum dated June 29, 1987, to all DOT employees which stated, inter alia, "The drug testing component of the DOT Drug Program will commence no sooner than 60 days after the date of this memorandum. In addition to this general notification, a specific notice will be provided to each employee in test-designated positions at least 30 days before testing begins."

During July Johannssen had three conversations with FAA representatives regarding the drug testing program and in each one Johannssen advised FAA of PASS's desire to bargain over the impact and implementation of the drug testing program and that PASS desired to see FAA's proposed implementation procedures. FAA did not provide PASS with any suggestions as to what it proposed to do in regard to the drug testing program nor did FAA indicate when the program would be implemented.

With a cover letter dated July 16, 1987, FAA sent PASS a copy of the DOT Order. In a subsequent telephone conversation between Johannssen and Raymond B. Thoman, a member of the FAA labor relations staff coordinating the drug testing program, Johannssen was advised that FAA did not have any idea when the procedures for implementation would be completed and that FAA had "no idea" when the drug testing program would be implemented. Thoman indicated that he did not know if the FAA letter of June 25, 1987, was a

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3/ Hereinafter referred to as the DOT Order.

4/ The DOT Order established a relatively broad program with a number of aspects, i.e. drug awareness, rehabilitation, etc., which included drug testing which, in turn, included random, periodic, reasonable suspicion, and manditory testing, among others.

sufficient demand to bargain. Johannssen renewed PASS's demand to bargain. During the week of July 20, 1987, at a luncheon meeting, Johannssen told Noonan that Thoman felt the PASS request to bargain might not be sufficient. Johannssen advised Noonan that PASS wanted to negotiate about the drug program. Johannssen asked Noonan when they would get implementation proposals so PASS could come up with its own. Noonan said he'd try to get something to Johannssen.

On July 23, 1987, Johannssen and Gary Baldwin, FAA's manager of the Union Management Relations Division, met together with other representatives of their respective principals, to discuss the impending collective bargaining for a new collective bargaining agreement. PASS presented FAA with contract proposals.5/ Baldwin raised the issue of drug testing6/ and how it would fit in and be handled. Baldwin concluded, and PASS agreed, he thought, that the drug testing should be handled separately from the national contract negotiations.

By letter dated August 3, 1987, Johannssen wrote Noonan repeating PASS's demand to bargain prior to the implementation of the drug testing program concerning both the AVN and AF units and that it would be most efficient to negotiate the drug testing during the contract talks.

On or about August 6 or 7, 1987, Baldwin and Johannssen had a telephone conversation.7/ Johannssen asked Baldwin when FAA was sending its implementation proposals regarding drug testing to PASS. Baldwin did not agree to send such proposals to PASS, in the absence of PASS's proposals. Baldwin advised Johannssen of the 30 day notice and that Baldwin would send Johannssen a copy of this notice. Baldwin did not indicate, in this conversation, that FAA was unwilling to negotiate about drug testing during the

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5/ The FAA and PASS master collective bargaining agreement involving the AF unit was about to expire. The parties were meeting to discuss the logistics and ground rules for these national contract negotiations. The national contract negotiations were scheduled for August 18-27, 1987.

6/ As well as two other items in addition to the national contract negotiations.

7/ Johannssen was at his home on vacation. Baldwin knew this.

national contract talks. By letter of August 7, 1987,8/ Hufnell sent a copy of the 30 day notice to Johannssen together with a copy of a question and answer publication about the drug program which was to accompany the 30 day notice. The cover letter restated that the agency will begin delivering the 30 day notice to covered employees on August 7, 1987. This letter was received in the PASS office on August 10, 1987, and Johannssen saw it on August 18, 1987, when he returned from vacation. The 30 day notice advised the particular employee who received it that "Random drug testing will commence no earlier than 30 days from the date of this notice." Both the 30 day notice and the attached questions and answers set forth, in detail, the procedures to be followed in the random drug testing.

I find the record does not establish when any members of the AVN or AF units first actually received the 30 day notices. The record evidence that an unnamed employee in one of the units received the 30 day notice on August 9, 1987 is too weak, too indefinite and too far removed from the fact to justify making a finding based on it.9/ The record establishes that some FAA employees were given their 30 day notices almost immediately after August 7, 1987 but others were not provided such notices until much later in August.

On August 12, 1987, Noonan sent a letter to Johannssen, replying to Johannssen's letter of August 3, 1987. Noonan stated, in this letter, that FAA is prepared to meet with PASS and negotiate about the drug program, but did not agree it should be part of the national contract negotiations. FAA expressed its belief that the bargaining concerning the

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8/ OST also sent PASS a copy of the 30 day notice and the cover letter stated that the 30 day notice was being distributed to employees commencing August 7, 1987.

9/ In this regard the only evidence of such receipt is Johannssen's testimony, on cross-examination. Johannssen testified that the first employee received the notice "I think it was on August 9th, if I recall correctly." He went on to testify that one, unnamed, PASS Regional Vice President in the Southern Region "indicated that an employee had received a letter on August 9th." Although hearsay is admissible and findings can be based upon it, this is 2nd hand hearsay and too unreliable and too far removed from the fact to base such a basic and important finding of fact.

drug testing program should be separate and apart from the contract negotiations. Noonan also stated, in this letter, that the drug testing program was scheduled "to go into effect as early as September 8." Noonan went on and asked PASS to submit any proposals as soon as possible so FAA can complete discussions prior to implementation. This letter was apparently received in the PASS office on August 13, 1987. Johannssen saw this letter for the first time on August 18, 1987.

On August 18, 1987, Johannssen and Baldwin met prior to the national contract talks. Baldwin, at this meeting, indicated again that FAA did not want to negotiate the drug testing program during the national contract bargaining. On August 19, 1987 FAA and PASS started bargaining for the national contract.

On August 24th or 25th, 1987, an incident was raised during the contract negotiations. PASS became aware of an incident in California wherein the list of employees subject to testing under the drug testing program, who were supposed to receive the 30 day notice, was posted on a bulletin board. Johannssen raised this incident. Baldwin advised Johannssen that September 8 would be the date that the drug testing program would be implemented and that Baldwin didn't have authority nor ability to change the date. Baldwin did indicate to Johannssen that to the best of Baldwin's knowledge, the actual testing of bargaining unit employees would not commence as early as September 8, but it would be much later in September because of the triggering mechanism of the issuance of the 30 day notices to individual employees. Johannssen asked for proposals and was told there wasn't going to be any. Johannssen then asked for a caucus for the remainder of August 25th to allow PASS to finalize its drug testing proposals. Johannssen asked Baldwin to seek a delay in implementation and Baldwin agreed to check with Noonan and the "folks over at DOT" about such a delay.10/

10/ In determining what occurred at this and subsequent meetings I note there was general agreement among witnesses as to what occurred. However, when there is a disparity I found Baldwin a more credible witness than Johannssen. I found Baldwin to be more forthcoming and less evasive than Johannssen. Further Baldwin's version was more consistent with surrounding facts. Also his memory seemed more reliable and less helpful to his position than Johannssen's. Finally Baldwin's demeanor, as compared to Johannssen's

(footnote continued)

On August 26, PASS requested the day off to prepare its proposals with respect to the drug testing program for negotiation. FAA agreed. PASS advised FAA that PASS would meet and provide FAA with a copy of PASS's drug testing proposals. Also on August 26 Johannssen sent Baldwin a letter requesting certain information for bargaining and Johannssen characterized Baldwin's statements of the prior day that the drug screening program covering PASS represented employees will be implemented on September 8 whether the parties reach agreement or not. Baldwin did not respond to these characterizations of the conversations. This August 26 letter notes that on August 18 PASS was advised that the DOT Order constituted FAA's proposal for drug screening in its entirety. This letter requested eleven pieces of information so PASS could fully develop its negotiating position. One of the items requested was "a complete listing of all drug-related disciplinary/adverse incidents that have occurred over the past 3 years in the PASS bargaining units and for which the employer has been upheld in either a grievance on an MSPB proceeding. (Information provided should be sanitized in accordance with any Privacy Act provisions)."

By letter dated September 1, 1987 and received by PASS on September 2, FAA responded to PASS's request for information by supplying some and refusing to supply some. With respect to the foregoing item FAA stated, "the agency does not maintain such reports at the national level. Providing the specific individual records would be overly burdensome and this information is neither relevant nor necessary for the development of proposals. In addition, this request seeks information the disclosure of which is limited by the Privacy Act. Accordingly, we cannot comply with this request."

PASS and FAA representatives met on August 27, 1987 and, at the beginning of the meeting Johannssen presented PASS's first set of bargaining proposals concerning the drug testing program composed of 30 paragraphs, hereinafter

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10/ (footnote continued)

convinces me Baldwin is the more credible witness. I do not rely on Respondents' novel contention that Johannssen's version of what Baldwin said at these meetings is hearsay, because Johannssen is testifying as to what he heard, whereas Baldwin's version is not hearsay because Baldwin was the speaker. I specifically reject this unusual contention, noting that the two versions of what was said at these meetings do not constitute hearsay at all.

referred to as PASS 1, and advised FAA that PASS was prepared to begin drug testing negotiations immediately, with the understanding that the September 8 date was hard and fast and would not be changed. Baldwin pointed out that PASS had received copies of the 60 and 30 day notices, so the time frame was known to PASS. Johannssen wanted to get to the bargaining because they were under this pressure to implement by September 8th. Baldwin noted that actual testing of bargaining unit employees would probably not take place until later in September because of the problem issuing the 30 day notices to the specific employees. The FAA representatives indicated that they were not prepared to negotiate at that time and that they would review the proposals and then set a date to get back to PASS to begin negotiations. Johannssen went over and explained PASS's proposals and stated that PASS was prepared to come back and negotiate that evening, the next day or over the weekend. Johannssen stated they were willing to make any accommodation to get down and start negotiating "because the clock in fact was ticking." The FAA representatives advised PASS that they needed to study and discuss the proposals with DOT and that they would advise PASS on Monday, August 31st as to when they would get back together. FAA denied PASS's request to keep its national contract negotiating team in Washington.

Baldwin discussed PASS 1 with Hufnell of DOT and they concluded that the proposals presented serious negotiability problems. On Friday, August 28 in a telephone conversation Baldwin advised Johannssen that Baldwin had to check with DOT concerning PASS 1 and it would be Monday before Baldwin could advise PASS when FAA could resume negotiations. Johannssen asked Baldwin to join him in asking FMCS for assistance because of the "time frame and pressure". Baldwin did not commit one way or the other, so Johannssen called FMCS for assistance and sent confirmatory letters. One dated August 28 to FMCS requested FMCS's assistance at negotiating meetings. In this letter Johannssen stated that FAA was under pressure from DOT to implement the drug screening program on or about September 8. A copy of this letter was sent to Baldwin. On August 28, Johannssen also wrote to Baldwin citing the need to set a bargaining date as quickly as possible and reciting PASS's availability at any time. Johannssen enclosed his home telephone number. In this letter Johannssen advised Baldwin that Johannssen and other PASS representatives were scheduled to appear at an arbitration in Miami on September 8 to 11. Thus, he urged Baldwin to meet at the earliest possible time.

On Monday August 31 Johannssen called Baldwin twice to find out when FAA would be prepared to meet. During the afternoon Baldwin advised Johannssen that FAA would prepare

to meet on Thursday, September 3 at 1:00 p.m. Johannssen protested the delay because FAA intended to implement the drug program on Tuesday of the next week. Johannssen asked Baldwin to start meetings sooner but FAA was not prepared to begin negotiations any sooner. Johannssen asked Baldwin to delay the implementation of the drug testing programs, indicating the short period of time before implementation, "day by day" as the parties negotiate. Baldwin stated that he had no authority to stop the implementation date, but added that he would check with DOT.

On September 3 at 1:00 p.m. representatives of PASS and FAA met to negotiate concerning the drug testing program, in the presence of mediator Emmett DeDeyne. Baldwin stated that PASS 1 was non-negotiable. PASS gave FAA a second set of proposals, hereinafter referred to as PASS 2, and FAA presented PASS with its first set of proposals, hereinafter referred to as FAA 1. PASS 2 consisted of 30 proposals covering nine pages and FAA 1 consisted of seven proposals on one page. PASS 2 contained, inter alia, the following proposals:

> "Proposal 3. The employer shall use the Secretary of Health and Human Services Scientific and Technical Guidelines For Drug Testing Programs. All drug testing will be performed by an independent contract laboratory certified by Department of Defense (DOD).
>
> Proposal 11. The employer shall provide all designated representatives of the Union the opportunity to attend drug related training sponsored by the employer. This training shall be on official time, including travel and per diem.
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> Proposal 18. A. When it is determined that an employee is to be tested for illegal drug use, the employee shall be notified privately and in writing of the following:
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> 1. the reason for the test;
> 2. the consequences of a confirmed positive test result.
> 3. the types of drugs to be tested for;
> 4. the prescription drugs, non-prescription drugs, or other substances which could compromise the test;

5. the process for an employee to contest the drug test when the employee feels the collector or the employer violated the collective process;
6. procedures used by the collector;
7. security;
8. sample handling;
9. collector certification of the sample;
10. the employee's rights under this agreement;
11. chain of custody; and
12. the time and place for specimen collection.

Proposal 22. . . .

C. the employee shall be given a sample of his/her own specimen so that a separate test can be administered at a laboratory of the employee's own choosing. The employee shall be allowed official time to deliver such samples to a laboratory.

E. Any employee who tests positive shall be given access to all written documentation available from the testing laboratory which verifies the accuracy of the equipment, the qualifications of lab personnel, the chain of custody of the specimen, and the accuracy rate of the laboratory.

Proposal 23. The employer shall ensure, to the maximum extent possible, that quality assurance procedures are followed. Upon request, the Union shall be provided, in writing, the quality assurance procedures the employer relies upon for the integrity of the process.

Proposal 30. Effect of Agreement

A. Any provision of this Agreement shall be determined a valid exception to and shall supersede any existing agency rules, orders and practices which are in conflict with this agreement."

There was then a brief discussion of the proposals and the parties then met separately to review each others proposals. When the parties met again Baldwin advised Johannssen that PASS 2 was very similar to PASS 1 and raised the same negotiability problems. PASS then presented FAA with a typed and prepared letter requesting FAA to provide PASS with written allegations of non-negotiability for those PASS 2 proposals which FAA considered non-negotiable. These written allegations were to be presented to PASS the following day by 10:00 a.m. Baldwin indicated that he would try to comply. PASS then gave FAA another set of proposals, hereinafter referred to as PASS 3, which PASS designated as impact and implementation proposals.11/ PASS also gave FAA a prepared and typed letter which indicated that PASS was prepared to immediately begin bargaining over impact and implementation procedures of the proposed drug testing program and that by putting forth PASS 3 it was not waiving its right to bargain over PASS 2 proposals which are declared non-negotiable. The letter also advised FAA that PASS would consider implementation of the drug testing program prior to the completion of bargaining as a violation of FAA's duty to bargain in good faith. PASS representatives asked for a delay in implementation of the program. Baldwin advised PASS that he did not have the ability to postpone the implementation date, that was determined by DOT, but the 30 day notices hadn't been out in time to meet the September 8 implementation. Johannssen asked Baldwin if one of the bargaining unit members had received a 30 day notice as of August 9, did FAA feel it would implement on September 9 and

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11/ PASS 3 contained, inter alia, the following proposals:

Proposal 9 which is identical to Proposal 11 of PASS 2.

Proposal 14A which is identical to Proposal 18A of PASS 2.

Proposal 17C which is identical to Proposal 22C of PASS 2.

Proposal 17E which is identical to Proposal 22E of PASS 2.

Proposal 18 which is identical to Proposal 23 of PASS 2.

Proposal 24A which is identical to Proposal 30A of PASS 2.

Baldwin replied that was correct.12/ Baldwin stated that he needed some time to review the proposals. PASS urged the parties to caucus for a few hours and then to resume meetings that evening. Baldwin indicated that the parties should meet the next day, so FAA could study the proposals that night and so some matters could be checked with DOT. The meeting adjourned at 2:30 p.m., about 1 and one half hours after it began. Baldwin advised he would call Johannssen later that day to get the time for the next days meeting. Johannssen again noted that the implementation date was pressing.

Baldwin called Johannssen on September 3 and advised him that FAA would be available to meet on Friday September 4 at 11:00 a.m. Johannssen protested that they were starting so late and again asked for a delay in implementation. Baldwin replied that he did not have the authority or ability to stop the implementation on September 8 and that FAA can't change it.

During the afternoon of September 3 FAA and DOT representatives met to discuss the negotiability of PASS 2 and jointly prepared FAA's written allegations of non-negotiability.

The FAA and PASS representatives met on September 4 at 11:00 a.m. to discuss the drug testing proposals. FAA presented PASS with FAA's written allegations of non-negotiability with respect to PASS 2. This letter stated that a large number of the proposals were non-negotiable because they were in conflict with DOT's Order establishing the drug program, for which a compelling need exists13/ and others because they were inconsistent with other laws.14/

12/ During this general period of time FAA representatives had approached DOT regarding a delay in implementation and DOT had decided not to delay implementation and to continue to implement on September 8.

13/ This includes PASS 2 Proposals 18 (all parts), 22E, 23, and 30A.

14/ This includes:

Proposals 3, which was alleged to be non-negotiable because it concerns matters covered under 5 USC 7106(a)(1) and 5 USC 7117(a)(2) and is contrary to Public Law 100-71 Section 503;

(footnote continued)

It did not declare Proposals 1, 4, 7, 14, 17, 19, 24, 25, 26, 28, 29, and 30B, C and D to be non-negotiable. The cover letter from FAA also stated that to the extent the proposals submitted as PASS 3 duplicate the PASS 2 proposals, the same determinations of non-negotiability apply.15/ FAA agreed at the meeting that the proposals that were not declared non-negotiable in its letter were negotiable. FAA gave PASS another letter, briefly recounting FAA's version of the proceeding contacts and communications concerning the drug program, contending it had conducted itself in good faith and noting that it had pointed out on August 12 that the "drug testing program is scheduled to go into effect as early as September 8."

The parties discussed those proposals FAA agreed to be negotiable and FAA's proposals. After some discussion Johannssen asked Baldwin if Baldwin felt the parties were at impasse. Baldwin replied that he did not and Johannssen agreed but stated that PASS was going to ask the Federal Service Impasses Panel (FSIP) for assistance. PASS showed the FAA a previously prepared package of material to invoke the assistance of FSIP. FAA declined to join PASS in filing with FSIP.

14/ (footnote continued)

Proposal 11, which is alleged to be inconsistent with 5 USC 7106(a)(2)(A) and (B); and

Proposals 22C because it concerns matters covered by 5 USC 7106(b)(1).

15/ This would therefore apply to:

PASS 3 Proposal 9 which is the same as Proposal 11 of PASS 2.

PASS 3 Proposal 14A which is the same as Proposal 18A of PASS 2.

PASS 3 Proposal 17C which is the same as Proposal 22C of PASS 2.

PASS 3 Proposal 17E which is the same as Proposal 22E of PASS 2.

(footnote continued)

At the close of the meeting PASS indicated it was willing to work that evening and through the weekend. Baldwin indicated that because time was of the essence the earlier they could meet, the better, hopefully the following week. Johannssen indicated he would not be available the week of September 8, September 7th being labor day. Johannssen stated he would be unavailable because he was to be in Miami for an arbitration during the week of September 8. Baldwin stated that he couldn't change the implementation date, but stated that for individuals the 30 days are different depending when each got notice. With respect to implementation Baldwin said it wasn't up to FAA, its up to DOT. The meeting broke up at 4:00 p.m. Either at the close of the meeting or by telephone soon thereafter both parties agreed to meet again on September 16. At close of meeting Baldwin agreed with Johannssen that FAA would re-evaluate its counterproposals to determine whether FAA could accommodate some of PASS's interests.16/

With respect to much of Johannssen's testimony regarding the meeting, especially on rebuttal, I find it non-credible. I find his testimony and his expanded version of the meeting not believable and his improved memory too convenient and too helpful to his position.

On September 8 Johannssen wrote to Dole asking her to delay the September 8 implementation date and not to implement the program in the PASS bargaining unit until the law had been complied with. On September 8, PASS filed the first unfair labor practice charges in the subject case.

During the morning of September 16 FAA representatives, including Baldwin, met with PASS representatives, including Johannssen, in the presence of Mediator DeDeyne. FAA submitted its counter proposals, hereinafter referred to as FAA 2. The parties discussed FAA 2 and, to a lesser extent, PASS 2. Baldwin explained FAA 2 and Johannssen rejected them. At 11:00 a.m. the parties agreed to caucus and to

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15/ (footnote continued)

PASS 3 Proposal 18 which is the same as Proposal 23 of PASS 2.

PASS 3 Proposals 24A which is the same as Proposal 30A of PASS 2.

16/ The FAA was available before September 16.

take a lunch break until 2:00 p.m. When the FAA representatives and DeDeyne returned they were met only by PASS representative Long, who had been there during the morning session, who advised them that Johannssen would not meet with them. DeDeyne went to talk to Johannssen privately, but was unable to persuade Johannssen to return to the meeting. DeDeyne advised the FAA representatives that he would attempt to arrange for another meeting. The meeting then adjourned. No further meetings were held.

In preparation for the September 16 meeting, Baldwin ascertained that there had yet been no testing of unit members and none were scheduled. This meeting lasted about one hour.

By letter dated September 16 Long confirmed to Baldwin that the September 16 meeting recessed with no definite date set for reconvening and that DeDeyne would arrange for the next meeting. The first time members of the units represented by PASS were tested was during the week that began on September 28, 1987.

DOT could have and was prepared to postpone testing of the unit members, at the request of the FAA.

Discussion and Conclusions of Law

The General Counsel of the FLRA alleges that FAA violated Section 7116(a)(1) and (5) of the Statute by unilaterally implementing the DOT Order on September 8, 1987, notwithstanding that PASS and FAA had not concluded bargaining over the impact and implementation of the Order and in effect in the alternative, that DOT violated Section 7116(a)(1) and (5) of the Statute because on or about August 25, DOT directed FAA to implement the DOT Drug Order effective September 8 notwithstanding the fact that the impact and implementation bargaining between FAA and PASS had not concluded.

The FLRA has held and Section 7106(b) of the Statute proves that when an agency intends to make a change in working conditions, and is privileged to make such a change without bargaining about its substance, it must nevertheless bargain with the collective bargaining representative of its employees concerning the procedures management officials will observe in exercising any such authority and appropriate arrangements for employees adversely affected by the change. This has commonly been referred to as impact and implementation bargaining. An agency can not implement any such change

in working conditions until it has met and exhausted its obligation to engage in impact and implementation bargaining. See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 31 FLRA 651 (1988).

In the subject case all parties recognize that the promulgation and implementation of the DOT Order by DOT and FAA constituted such changes in the working conditions of the FAA employees and that neither FAA nor DOT had to bargain about the substance of the changes.17/ Respondents contention that the imposition of DOT Order would reasonably have no adverse effect on employees is rejected. The entire drug testing program would reasonably foreseeably have many and varied adverse effects on employees and clearly the imposition of the DOT Order by FAA would be the very type of change in working conditions which would entitle PASS to bargain with FAA concerning the impact and implementation of the DOT Order. In fact FAA and PASS engaged in such bargaining. The General Counsel of the FLRA contends that FAA, either on its own or so compelled by DOT, implemented the DOT Order in the FAA before the parties had completed the impact and implementation bargaining and before impasse had been reached.

The record establishes that on September 16, 1987, PASS in effect abandoned the impact and implementation bargaining. Johannssen did not attend the afternoon session and Long just announced the session was over and the Mediator would schedule a new meeting. This was confirmed by letter, but PASS made no request for another bargaining session. The operative date for implementation of the DOT Order with respect to the FAA becomes a pivotal issue. If the implementation date was subsequent to September 16, then FAA did not implement prior to meeting its impact and implementation bargaining obligation. On the other hand if implementation before September 16, then the implementation occurred before FAA had met its obligation.18/

17/ But see Johnson-Bateman Co., 295 NLRB No. 29 (1989) and Star Tribune, A Division of Carales Media Co., 295 NLRB No. 63 (1989).

18/ This is solely with respect to those PASS proposals which FAA agreed were negotiable. This does not apply to those PASS proposals which FAA declared non-negotiable.

General Counsel of the FLRA urges that the drug testing program was implemented on September 8. The record establishes that the DOT Order and the drug program, as a whole, became effective on September 8. The record establishes that the DOT Order and the drug program involved more than just drug testing and with respect to testing, various kinds are involved.

The record establishes that only one aspect of the drug program involved a change in working conditions with respect to the AVN and AF units represented by PASS and that was the random drug testing.19/ The record establishes that the random drug testing aspects of the DOT Order became effective on September 8, with respect to some FAA employees, i.e. those who received their 30 day notices on or about August 7. However, the record does not establish when any employees in the AVN or AF units received their 30 day notices, except that some had apparently received them to justify their being tested during the week of September 28, 1987. Thus, although the FAA representatives spoke in terms of the drug program being implemented on September 8, Baldwin also, on a number of occasions, assured the PASS representatives that no employees in the AVN or AF units would be eligible to be tested until later in September. Although Baldwin did not specifically state when such employees could first be tested, PASS did not try to ascertain the date but rather kept trying to have the September 8 date postponed. The record does establish that although some FAA employees, primarily employees in headquarters or Washington, received their 30 day notices on or about August 7, there also were some substantial delays in getting the 30 day notices to the FAA employees in field facilities. The only specific evidence as to when any AVN or AF unit employee received a 30 day notice was too remote and far removed from the incident to justify basing a finding of fact on it, and I did not make such a finding. General Counsel of the FLRA produced no other evidence as to when any employees in the two units in question actually received the 30 day notice. The only substantial evidence is that same such employees were tested during the week of September 28 and therefore

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19/ In so finding, I do not find that implementation of the DOT Order did not involve any other changes in working conditions with respect to the AF and AVN units. Rather, my finding is limited to the record herein and no evidence was adduced that, other than random testing, there were any changes in working conditions with respect to the AF and AVN units.

they received their notice no later than 30 days prior to September 28. There is no credible evidence that as of September 16 any employee in the AF or AVN units was subject to randum testing or had received a 30 day notice 30 days or more prior to September 16.

The FLRA has traditionally held that management, to discharge its statutory obligation, must notify the collective bargaining representative of the agency's employees prior to the implementation of any change in working conditions and then, upon request, bargain concerning the impact and implementation of the change before implementation of the change. This is to permit the collective bargaining representative to engage in meaningful and effective bargaining with the agency. After implementation of a change in working conditions bargaining about the impact and implementation of such change would not, absent very unusual circumstances, be very effective and would be much less effective than bargaining before such change.

In the subject case therefore PASS was entitled to bargain about impact and implementation of the random drug testing program prior to its implementation. The determination of the date of implementation became a fundamental question in this case. There is no doubt that the drug program as a whole, including the random drug testing program as to certain FAA employees, was implemented on or about September 8. However, I conclude this date is not particularly relevant to PASS's right to bargain concerning the impact and implementation of FAA's random drug testing as it applies to the AVN and AF units represented by PASS. Rather I conclude that PASS and FAA could continue to engage in effective and meaningful impact and implementation bargaining until the random drug testing program was implemented with respect to the AVN and AF units. Thus until the first employee in either the AVN or AF units became eligible for random testing PASS and FAA could engage in meaningful and effective impact and implementation bargaining. Further if the parties had not reached agreement FAA could have sought from DOT a delay as to when such employees could be first tested.20/ However, when the first AVN and or AF units became eligible for

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20/ In this regard, based upon the record, I conclude that after reasonable bargaining and as the date of testing unit employees approached FAA could have sought a delay in testing and DOT would have considered such a request and might have granted it.

immediate random testing and the random testing program was implemented vis-a-vis these units, PASS's capacity to meaningfully and effectively bargain over impact and implementation with FAA became deminished. Once such employees became eligible for immediate random drug testing, absent a prior agreement postponing such testing, PASS was in a less advantageous position to bargain about impact and implementation because such employees were already subject, at any moment, to testing and all that flowed therefrom. The employees in the unit were at that time directly affected by and subject to the change in working conditions. See U.S. Air Force, Lowry Air Force Base, 22 FLRA 171 (1986).

The record fails to establish by the weight of credible evidence that on September 16 any employee in the AVN or AF unit was then immediately eligible for random drug testing. Therefore on September 16, when PASS abandoned the impact and implementation bargaining, the record does not establish that the random drug testing of the AVN and AF units had yet been implemented.21/ Thus, solely with respect to the extent FAA and PASS were engaged in impact and implementation bargaining, I conclude that FAA did not implement the random drug testing program in the AVN and AF units before the bargaining between FAA and PASS had been concluded by virtue of PASS's abandonment of the bargaining. Thus, the record fails to establish that either FAA or DOT failed to comply with their Section 7106(b) obligations.22/ Accordingly, I conclude that in this aspect of the case neither FAA nor DOT violated Section 7116(a)(1) and (5) of the Statute.

The General Counsel of the FLRA contends that FAA violated Section 7116(a)(1), (5) and (8) of the Statute by failing to furnish PASS with a complete listing of all

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21/ In so finding I do not find, as urged by DOT and FAA, that PASS's bargaining conduct was so egregious and in such bad faith as to somehow relieve FAA and DOT of their statutory obligations. Thus, I find that no party acted in such a manner, standing by itself, as to either constitute bad faith or a failure to meet its statutory obligation. In so stating however, I do not render any opinion as to the propriety or desirability of any party's conduct.

22/ Again I reiterate this applies only to the bargaining over PASS proposals which FAA concluded were negotiable and about which the parties were bargaining.

drug-related disciplinary/adverse action incidents that have occurred over the past three years in the bargaining units for which PASS is the exclusive collective bargaining representative and for which FAA has been upheld in either a grievance or MSPB proceeding.

PASS requested this information, along with other information, from FAA by letter dated August 26 with a parenthetical note to this specific item that, "Information provided should be sanitized in accordance with any Privacy Act provisions." In its general introductory paragraph to the request for all the information FAA stated, "Although we are prepared to commence negotiations tomorrow we will require the following additional information to fully develop our negotiating position: . . ." The letter then listed 11 specific requests for information, one of which is the one set forth above that is the subject of this case. FAA responded in its letter of September 1 and stated that with respect to the specific requested information that is the subject herein, it would not comply with the request because the agency did not maintain such reports at the national level, it would be burdensome, the disclosure of the information is limited by the Privacy Act and "this information is neither relevant nor necessary for the development of proposals . . ."

Section 7114(b)(4) of the Statute provides that part of an agency's duty to negotiate in good faith includes the obligation to furnish the exclusive representative, to the extent not prohibited by law, data which is normally maintained by the agency in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

The requested data, as requested, is not guidance, counsel or training which would prevent its disclosure and FAA does not raise such a contention. FAA in its letter to PASS denying the requested information, and in the proceeding herein, contends that the requested data is not maintained at the national level and to provide it would be overly burdensome. The simple fact, undisputed, that the data was not maintained at the national level does not relieve FAA of its obligation to provide the requested data, see, Department of Defense Dependents Schools, 28 FLRA 202 (1987) Decision on Remand, and 19 FLRA 790 (1985); and Supervisor of Ship-building, Conversion and Repair, 31 FLRA 717, 724 (1988). Further, other than the general statement that collection of

the data would be "unduly burdensome," FAA did not establish sufficient evidence to support a conclusion that collection of the data would be unnecessarily costly, time consuming or difficult. See 22nd Combat Support Group (SAC) March Air Force Base, California, 30 FLRA 582 (1987). Accordingly, I conclude based upon the foregoing and the nature of the requested data and FAA's statement in the letter, that the requested data is normally maintained by FAA in the regular course of business.

FAA contends that providing the requested information, "might well conflict" with FAA's right to determine internal security matters because FAA is not obligated to disclose information that "might compromise its investigations;" and would violate the Privacy Act and the Supplemental Appropriations Act of 1987 (P.L. 100-71); and the Executive Order Section 6 and OPM Systems, 52 Fed Reg 22564 (June 12, 1987). However PASS indicated the requested data could be provided in a sanitized form and FAA made no showing or even contention that it could not be sufficiently sanitized to meet all of the above considerations. In this regard FAA contends that it is the General Counsel of the FLRA's burden to establish that the requested information could actually be adequately sanitized to meet FAA's objections. Such a position is unreasonable. The information was requested in sanitized form, the data was in the custody of FAA and not of PASS or the General Counsel of the FLRA and FAA knew exactly by which requirements it felt limited. In such a situation once PASS and the General Counsel of the FLRA meet the requirement of establishing it is otherwise entitled to the information and PASS is willing to accept it in sanitized form, FAA must then establish that such data cannot be sanitized to meet the perceived limitations on disclosure.23/ FAA is clearly in a better position to establish this than PASS or the General Counsel of the FLRA are to establish the contrary. FAA did not establish that the requested data could not be furnished in sanitized form so as to meet FAA's perceived limitations on disclosure.24/

23/ In fact with respect to the "internal security" limitation FAA contended, not that disclosure of the data would interfere with FAA's obligations, but rather such disclosure "might well conflict" with FAA's rights.

24/ Further, in balancing the interests of PASS's need for the information and the interests of the Privacy Act, I conclude PASS is entitled to the information. American Federation of Government Employees, AFL-CIO, Local 1858, 27 FLRA 69, 76-77, (1987); U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 22 FLRA 667 (1986).

Finally, FAA contends that it has not been established that the requested information is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. FAA points out that the FLRA has held that a union must show more than abstract relevance and that PASS's request stated no such showing of the relevance or necessity for any of the requested data.

The FLRA has held that "a determination must be made in the particular circumstances of each case whether data requested by an exclusive representative is 'necessary' within the meaning of section 7114(b)(4) of the Statute and whether such information must be disclosed . . ." Defense Mapping Agency, Aerospace Center, St. Louis, Missouri, 21 FLRA 595, 596 (1986).

In the subject case the parties were preparing to negotiate concerning the impact and implementation of the new DOT Order and PASS was preparing its bargaining proposals when it wrote the letter requesting the subject data. PASS stated in the letter that it needed the information so PASS could develop its negotiating position. In these particular circumstances, I conclude PASS adequately demonstrated to FAA and to the undersigned that the requested data was 'necessary' within the meaning of section 7114(b)(4) of the Statute. Thus, in all the circumstances present, especially in light of PASS's request and the impending impact and implementation bargaining, obtaining any information about the extent of the drug problem in the units represented by PASS would be necessary for PASS to prepare its drug testing impact and implementation proposals and to bargain. In these circumstances PASS's need for the data was evident. FAA knew the circumstances and PASS sufficiently advised FAA why it needed the information. To require a labor organization, in these circumstances, to be even more specific in justifying its need for data would be unrealistic and would hamper the collective bargaining process by making it overly formal. Thus, I conclude PASS, in the particular circumstances of this case, needed the requested data and sufficiently advised FAA as to why it needed the information. Further, I conclude that PASS was entitled to this data under section 7114(b)(4) of the Statute and FAA's failure to provide it violated section 7116(a)(1)(5) and (8) of the Statute, Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 25 FLRA 1060 (1987); U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, supra and National Weather Service, 21 FLRA 455 (1986).

Finally General Counsel of the FLRA alleges that FAA violated section 7116(a)(1) and (5) of the Statute by

declaring certain PASS proposals non-negotiable and then by implementing the random drug testing program. A number of the PASS proposals were declared non-negotiable by FAA because they were in conflict with DOT's Order establishing the drug program for which a compelling need exists and others because they were inconsistent with other laws.

In light of FLRA v. Aberdeen Proving Ground, Department of the Army, 108 S. Ct. 1261 (1988), hereinafter called the Aberdeen Case, and Federal Emergency Management Agency, 32 FLRA 502 (1988), herein called the FEMA Case, the General Counsel of the FLRA withdrew the allegation that FAA violated the Statute by declaring non-negotiable all the PASS proposals that were alleged to be in conflict with DOT's Order for which there was an alleged compelling need, except for Proposals 18A, 22E, 23, and 30A of PASS 2 and Proposals 14A, 17E, 18 and 24A of PASS 3. In the FEMA Case, supra.25/ The FLRA held that when a determination of non-negotiability is based upon the allegation that a proposal violated an agency-wide rule or regulation for which there is a compelling need, the negotiability determination can be made by the FLRA exclusively pursuant to section 7117(b) of the Statute procedures and not in unfair labor practice procedures. Thus, the General Counsel of the FLRA withdrew its allegations as to such proposals, in this matter.

PASS filed a negotiability appeal in Case No. O-NG-1456 in which it brought FAA's determinations of non-negotiability before the FLRA. In DOT's response26/ to the submission, filed with the FLRA, DOT withdrew its allegation that the duty to bargain did not extend to Proposals 18A, 22E, 23 and 30A of PASS 2. 27/ DOT's submission was filed pursuant to section 2424.6 of the FLRA's Rules and Regulations.28/

25/ The other proposals which are the subject of this case, which were declared non-negotiable by FAA because they allegedly violated other laws will be discussed later herein.

26/ Presumably also filed on behalf of FAA.

27/ Which are the same as Proposals 14A, 17E, 18 and 24A of PASS 3.

28/ Section 2424.6 of the FLRA's Rules and Regulations provides for the filing of the position of the agency and sets forth one response as "(1) Withdrawing the allegation that the duty to bargain in good faith does not extend to the matter proposed to be negotiated; . . ."

Upon filing its petition for review of the negotiability issue, PASS requested, pursuant to section 2424.5 of the FLRA's Rules and Regulations, that the subject unfair labor practice case be processed and the negotiability matter was to be suspended. The Agency asked that the FLRA process the negotiability matter and stay the unfair labor practice case. The FLRA denied this request. Professional Airways Systems Specialists, MEBA, AFL-CIO and Department of Transportation, Federal Aviation Administration, 32 FLRA 517 (1988).

General Counsel of the FLRA urges that because, in its submission to the FLRA in the negotiability case, DOT withdrew its allegations on non-negotiability, those proposals are properly before me because they no longer raise the compelling need issue. Thus the General Counsel of the FLRA contends the negotiability of these proposals can be determined in this unfair labor practice procedure and are not limited under the FEMA Case, supra, to the procedure provided in section 7117(b) of the Statute. FAA urges that it not be penalized in this case because it tried to reasonably resolve issues in a different procedure.

I conclude that these proposals, which originally were deemed by FAA to be non-negotiable because they were in conflict with the DOT Order for which there is a compelling need and such allegation of non-negotiability was withdrawn in the negotiability proceeding, are not properly before me in the subject unfair labor practice proceeding.

In the Aberdeen Case, supra, the Supreme Court stated that when a compelling need determination must be made, it must be done so by the FLRA in a proceeding under section 7117(b) of the Statute and not under the unfair labor practice procedure. The FLRA in the FEMA Case, supra stated that when a compelling need issue is raised the matter must be determined by the FLRA in a negotiability proceeding and can not be determined in an unfair labor practice proceeding. Section 2424.5 of the FLRA Rules and Regulations permits the labor organization to select, when there are both unfair labor practice and negotiability proceedings pending, which proceeding it wishes to pursue. However, if the labor organization were to choose the unfair labor practice proceeding it could not, by so doing, have a compelling need determination made in such an unfair labor practice proceeding.

In the subject case, at an early stage of the negotiability proceeding, DOT withdrew the allegation on non-negotiability as to Proposals 18A, 22E, 23 and 30A of

PASS 2 and presumably as to the corresponding Proposals in PASS 3. However, there has been no final or ultimate disposition of O-NG-1456 and presumably until such disposition, the dispute as to these Proposals have not been finally resolved. In this regard I note that 2424.8 of the FLRA's Rules and Regulations provides for the filing of additional submissions with the approval of the FLRA. DOT's document is merely part of the negotiability proceeding and is not an admission or concession for the purpose of the subject unfair labor practice case. Thus, until the negotiability case is closed, a final disposition made as to Proposals 18A, 22E, 23 and 30A of PASS 2, and the corresponding proposals of PASS 3, and the compelling need issue there involved, I conclude that it would not be proper to consider the negotiability issues in the subject unfair labor practice case. FEMA Case, supra. Thus, although PASS had the option of proceeding with the unfair labor practice case first, by so doing it meant that no proposals involving compelling need could be disposed of in the unfair labor practice case.29/ Accordingly, I conclude that I cannot rule upon the negotiability of these proposals and therefore cannot make any conclusion as to whether DOT and FAA violated the Statute in declaring such proposals non-negotiable and then implementing the random drug testing program.

When an agency declares a proposal made by a collective bargaining representative non-negotiable in connection with a change in working conditions, the agency does so at its peril. See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 31 FLRA 651 (1988).

Proposal 3 of PASS 2 provides that FAA shall use the HHS Scientific and Technical Guidelines for Drug Testing and that all drug testing will be performed by an independent contract laboratory certified by DOD. The first sentence in this proposal requiring the use of the HHS Guidelines is a restatement of a requirement in Executive Order 12564 and was included in DOT's Order. A proposal that simply restates that which an agency is required to do by law or regulation is negotiable. National Federation of Federal Employees, Local 2058, 31 FLRA 241 (1988), see proposals 2; American Federation of State County and Municipal Employees,

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29/ Presumably if the negotiability case proceeded first, the compelling need issues would be resolved by the FLRA therein and then all such matters could be the subject of the unfair labor practice case.

Local 3097, 31 FLRA 322 (1988), see proposals 1; and American Federation of Government Employees, Local 1923, AFL-CIO, 21 FLRA 178 (1986). However, the underlying proposal and its underlying subject must be otherwise negotiable. See U.S. Geological Survey, 21 FLRA 1109 (1986) and Department of Energy, 19 FLRA 224 (1985). Respondents contends that this portion of the proposal conflicts with "a reserved management right." Respondents do not explain or expand upon the nature of this reserved management right and I perceive no such management right being interfered with. Accordingly, I find the proposals first sentence is negotiable. The second sentence of this proposal, requiring use of a DOD approved laboratory, is alleged to be non-negotiable because it is in conflict with the HHS Guidelines. The HHS Guidelines, according to Respondents, require use of laboratories certified by HHS, citing Supplemental Appropriations Act of 1987, P.L. 100-71 (July 11, 1987) and the details for certification of drug testing facilities of the Secretary of HHS, 53 Fed. Reg. 11986.

The Supplemental Appropriations Act of 1987, P.L. 100-71 (July 11, 1987) does contemplate HHS issuing guidelines which provide for HHS setting standards and certifying drug testing laboratories. There is no dispute and I conclude that such guidelines issued by HHS which were to regulate the drug testing program throughout the federal government are "Government-wide" rules and regulations within the meaning of section 7117 of the Statute. On August 10, 1987, HHS issued proposed Guidelines entitled Scientific and Technical Guidelines for Federal Drug Testing Programs; Standards for Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies, 52 Fed. Reg., No. 157, 30638-30652, (August 14, 1987), hereinafter called the HHS August 1987 Guidelines. These were proposed guidelines, inviting public comment before they became final. These proposed guidelines included extensive provisions for certification of laboratories by the Secretary of HHS. However, the HHS August 1987 Guidelines, supra at 30638, provided "While the certification system proposed by this notice is in development, Federal agencies may use agency or contract laboratories that have been certified for urinalysis testing by the Department of Defense (DOD). The DOD certification process is extremely strict and sophisticated and, during the interim period while the DHHS certification process becomes operational, DHHS believes that DOD certification will be more than adequate to ensure the full reliability and accuracy of drug tests and the reporting of test results."

HHS issued its Final Guidelines on April 1, 1988 entitled Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. No. 69, 11970-11989, (April 11, 1988) hereinafter referred to as HHS April 1988 Guidelines. These guidelines set forth a detailed system for certifying laboratories by the Secretary of HHS and the Secretary of HHS "may consider to be certified and (sic) laboratory that is certified by a DHHS recognized certification program in accordance with these Guidelines." HHS April 1988 Guidelines, supra at 11987.

In light of the foregoing, at the time PASS made this proposal not only was the second sentence not in conflict with the then in effect HHS guidelines, HHS August 1987 Guidelines, supra but it was merely stating what was specifically encouraged by the guidelines and totally in conformity with their spirit.30/

Thus at the time Proposal 3 of PASS 2 was submitted by PASS it was not non-negotiable because it was inconsistent with then in effect laws or Government-wide rules and regulations. Accordingly, Respondents erred in declaring Proposal 3 of PASS 2 non-negotiable.

Proposal 22C of PASS 2 31/ provided that any randomly tested employee shall be given a sample of his own specimen and the employee shall be permitted to choose a laboratory to have a test made. Basically similar proposals were held negotiable by the FLRA in National Federation of Federal Employees, Local 15 and Department of the Army, U.S. Army Armament, Munition and Chemical Command, O-NG-1269 30 FLRA 1046 (1988), proposals 8 and 9, (hereincalled the U.S. Army Case).

30/ In so concluding I need not decide whether the proposal's second sentence was in conflict with HHS April 1988 Guidelines, supra, because they did not come into existence for 7 or 8 months after the proposal. It is not so clear that the proposal would have violated such guidelines, but that is irrelevant herein. The fact that a proposal lawful when made and declared non-negotiable at that time, later may become non-negotiable by subsequent events, does not justify the original refusal to negotiate. Similarly, it seems obvious that any lawful contact clause that becomes either unlawful or in violation of Government-wide rules and regulations would become unenforceable.

31/ Identical to Proposal 17C of PASS 3.

Respondents point out that HHS April 1988 Guidelines, supra at 11971 and 11985 (paragraph 2.7(b)) reject the split sample procedure option. Therefore Respondents urge the proposal is non-negotiable because it conflicts with a Government-wide regulation. Respondents further note that upon a motion filed by the Army, the U.S. Court of Appeals for the District of Columbia, by Order dated May 25, 1988, remanded the U.S. Army Case, supra, to the FLRA for consideration of its negotiability determinations in light of HHS April 1988 Guidelines, which had issued subsequent to the FLRA decision. By order dated July 13, 1988 the FLRA directed the parties to file supplemental briefs. At the time Proposal 22(c) of PASS 2 was submitted and declared non-negotiable HHS April 1988 Guidelines were not in effect; rather HHS August 1987 Guidelines were in affect and they contained no specific prohibition of the split sample procedure. Thus, I conclude that at the time Proposal 22(c) of PASS 2 was submitted and declared non-negotiable, it was not in conflict with any Government-wide regulation.

In this regard the difference between an unfair labor practice proceeding and a negotiability proceeding under section 7117 of the Statute must be examined. An unfair labor practice determines whether an agency or labor organization violated its statutory obligation at a specific time and, then if a violation is found, attempts to remedy such a wrong. Whereas a negotiability appeal determines whether a proposal is negotiable at the time the FLRA issues its decision and if it finds a matter is negotiable it issues a prospective order instructing a party to negotiate concerning the proposal. It does not try to remedy a past wrong or the unlawful denial of a right, but rather determine, in the future, if a proposal is to be negotiable.

Thus, the remand in the U.S. Army Case, supra is appropriate so the FLRA can determine if it is appropriate to issue a prospective negotiability order in light of the HHS April 1988 Guidelines, supra. In the subject unfair labor practice case it must be determined whether at the time Proposal 22(c) of PASS 2 was declared non-negotiable it was in fact non-negotiable or whether Respondents, at that time, denied PASS the right to bargain about Proposal 22(c) of PASS 2, before implementation of the random drug testing program. Of course, in considering the appropriate remedy, the current negotiability situation must be considered.

I conclude that at the time Proposal 22(c) of PASS 2 was submitted and declared non-negotiable, it did not violate any Government-wide rules and regulations and was negotiable.

See discussion in U.S. Army Case, supra, of proposals 8 and 9. Accordingly, Respondents erred when they declared it non-negotiable. The same conclusion applies to Proposal 17(c) of PASS 3.

Proposal 11 of PASS 2 32/ provided that PASS representatives will be given the opportunity to attend drug related training programs sponsored by FAA, on official time including travel and per diem. Both Respondents and General Counsel of the FLRA agree that normally training, including both the content of training and which employees shall receive training, is non-negotiable because it infringes on managements right to assign work. e.g. Overseas Education Association, 29 FLRA 734 (1987), proposal 47; American Federation of Government Employees, 22 FLRA 710 (1986); American Federation of Government Employees, 22 FLRA 574 (1986).

These cases all involved training of employees related to work and career advancement. The FLRA held in these situations a collective bargaining representative interfers with management's right to assign work when the union tries to limit or participate in planning these training programs. The subject case involves a different situation. PASS wished its representatives to participate, on official time, in employer sponsored drug training programs. Clearly such PASS representatives were to participate in their capacity as PASS representatives, not as FAA employees in duty status, so they could better be able to represent employees during the random drug testing program. Thus this proposal is not interfering with FAA's right to assign work. Rather it deals with an employee functioning as a representative of PASS in its representational capacity.

Section 7131(d) of the Statute specifically provides that an employee shall be granted official time, in the amount to which an agency and union agree, when the employee is representing an exclusive representative. In this regard and where relevant travel and per diem would be included in the official time provision, I conclude that Section 7131(b) of the Statute applies herein and thus Proposal 11 of PASS 2 is negotiable and Respondents erred in declaring it non-negotiable.

32/ Identical to Proposal 9 of PASS 3.

The FLRA has held that when an agency declares a proposal concerning a change in working conditions non-negotiable and then implements the change, it violates Section 7116(a)(1) and (5) of the Statute if the proposal was in fact negotiable. see Department of Health and Human Services, Social Security Administration, supra; Department of the Air Force, Air Logistics Command, Wright-Patterson Air Force Base, 22 FLRA 15 (1986) and Veterans Administration, Veterans Administration Regional Office, Buffalo, New York, 10 FLRA 167 (1982).

In these cases the agencies' good faith in making the non-negotiability determinations is irrelevant and not an issue. Of course FAA was obligated to bargain about the impact and implementation of the change in working conditions if the change has an impact on the employees in the units represented by PASS. It is evident that the imposition of the random drug testing would reasonably and foreseeably have an impact on the employees in the units represented by PASS and such impact would be more than de minimis.

Respondents also urge that PASS submitted its proposals as a package and that therefore, apparently, since some of the proposals are non-negotiable, Respondents did not violate the Statute even if it declared other proposals non-negotiable which were in fact negotiable. Respondents seem to be indicating that there was something sinister in PASS's alleged submission of its proposals as a package.

The record herein do not establish PASS unduly stressed or reiterated that its proposals must be dealt with as a package and that either all the proposals must be accepted, or none. Rather, PASS seemed to submit its various sets of proposals in the normal way such matters are handled during collective bargaining, with the general understanding that there is no final agreement until the parties reach agreement on all matters and the agreement is complete. This is the usual method of bargaining and each proposal or clause does not become effective when agreed upon, until the agreement is complete or the parties agree that those matters agreed upon will go into effect, while others may remain open.

PASS did not so condition its bargaining as to relieve Respondents of their obligations to bargain in good faith.

The record herein establishes that DOT and FAA jointly decided which PASS proposals were non-negotiable so, in effect both are responsible for that decision. However,

the record does not establish that during the latter part of September FAA sought from DOT permission not to implement the drug testing program. Rather, the record establishes that after PASS abandoned bargaining on September 16, FAA was prepared and willing to implement the random drug testing in the AVN and AF units. Thus, although FAA was operating under orders from DOT to implement the random drug testing program, the evidence does not establish that during late September FAA tried to get DOT to permit FAA to refrain from the program. Thus FAA is responsible for the implementation and did not so act because it was so compelled by DOT.

In light of all of the above, I conclude that FAA violated Section 7116(a)(1) and (5) of the Statute when it declared Proposals 3, 11, and 22(c) of PASS 2 and Proposals 9 and 17(c) of PASS 3, non-negotiable and then implemented the random drug testing program in the AVN and AF Units.

In the circumstances present in this case, I conclude that with respect to the violations of the Statute found herein that a status quo ante remedy is not appropriate. In so concluding I note the random drug testing program involves the public safety, one Proposal[33/] involved a matter that was negotiable at the time of the unfair labor practice but might not be negotiable now and another[34/] which although negotiable at the time of the unfair labor practices might be negotiable to a more limited extent now. Thus looking at the nature to the unfair labor practice, as a whole, the extent to which there can still be meaningful impact bargaining and the interest in the safety of the public, I conclude repealing the random drug testing program in the AVN and AF units is not warranted.

Having concluded that FAA violated section 7116(a)(1), (5) and (8) of the Statute by refusing to supply PASS with certain requested data and section 7116(a)(1) and (5) of the Statute by declaring certain PASS proposals non-negotiable and then implementing the random drug testing program in the AVN and AF units, I recommend the Authority issue the following Order.

ORDER

The complaint herein against the Department of Transportation is hereby DISMISSED.

33/ Proposal 3 of PASS 2.

34/ Proposal 22(c) of PASS 2.

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that Federal Aviation Administration shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of Professional Airways Systems Specialists, MEBA, AFL-CIO, a complete listing of all drug-related disciplinary/adverse action incidents that have occurred over the past three years in bargaining units it represents and for which Federal Aviation Administration has been upheld in either grievance or MSPB proceeding, in sanitized form and to the extent permitted by law.

(b) Failing and refusing to meet and negotiate with Professional Airways Systems Specialists, MEBA, AFL-CIO, the exclusive representative of certain employees, over negotiable proposals with respect to the procedures which the Federal Aviation Administration will observe in exercising its authority with regard to any change in random drug testing and concerning appropriate arrangements for employees adversely affected by such change, to the extent permitted by law.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of any right assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of Professional Airways Systems Specialists, MEBA, AFL-CIO, the exclusive representative of certain employees, furnish it with a complete list of all drug related disciplinary/adverse action incidents that have occurred over the past three years in bargaining units it represents and for which Federal Aviation Administration has been upheld in either grievance or MSPB proceedings, in sanitized form and to the extent permitted by law.

(b) Upon request of Professional Airways Systems Specialists, MEBA, AFL-CIO, the exclusive representative of certain employees, meet and negotiate with such representative concerning any of the proposals found negotiable herein and submitted in connection with the implemented changes in Federal Aviation Administration's random drug testing program, to extent permitted by law.

(c) Post at all of its facilities where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, 1111-18th Street, N.W., P.O. Box 33758, Washington, D.C. 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with the Order.

Issued, Washington, D.C., July 18, 1989

SAMUEL A. CHAITOVITZ
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of Professional Airways Systems Specialists, MEBA, AFL-CIO, a complete listing of all drug-related disciplinary/adverse action incidents that have occurred over the past three years in bargaining units it represents and for which Federal Aviation Administration has been upheld in either grievance or MSPB proceeding, in sanitized form and to the extent permitted by law.

WE WILL NOT fail and refuse to meet and negotiate with Professional Airways Systems Specialists, MEBA, AFL-CIO, the exclusive representative of certain employees, over negotiable proposals with respect to the procedures which the Federal Aviation Administration will observe in exercising our authority with regard to any change in random drug testing and concerning appropriate arrangements for employees adversely affected by such change, to the extent permitted by law.

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

WE WILL, upon request of Professional Airways Systems Specialists, MEBA, AFL-CIO, the exclusive representative of certain employees, furnish it with a complete list of all drug related disciplinary/adverse action incidents that have occurred over the past three years in bargaining units it represents and for which Federal Aviation Administration has been upheld in either grievance or MSPB proceedings, in sanitized form and to the extent permitted by law.

WE WILL, upon request of Professional Airways Systems Specialists, MEBA, AFL-CIO, the exclusive representative of certain employees, meet and negotiate with such representative concerning any of the proposals found negotiable and submitted in connection with the implemented changes in Federal Aviation Administration's random drug testing program, to extent permitted by law.

_____
(Agency)

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 - 18th Street, N.W., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.