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

FEDERAL AVIATION ADMINISTRATION Respondent	
and	Case No. 3-CA-00225
NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, MEBA/NMU, AFL-CIO Charging Party	

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Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent (FAA) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by implementing a new policy of medically disqualifying Air Traffic Control Specialists, GS-2152 series, (ATCS or Controllers) who have diabetes mellitus without affording the Charging Party (Union) notice and an opportunity to negotiate over the impact and implementation of the change in conditions of employment.

FAA's answer admitted the jurisdictional allegations as to FAA, the Union, and the charge, but denied any violation of the Statute. FAA admitted that there was a new policy, but stated that it affected only those diabetics who were dependent upon insulin. FAA claimed that it and the Union had already negotiated arrangements for medically disqualified employees in their collective bargaining agreement.

The following issues are presented:

1. Whether the impact on employees of the FAA's policy of medically disqualifying controllers with insulin-dependent diabetes mellitus is more than de miminis, therefore requiring bargaining over the impact and implementation of the change.

2. If so, whether Article 45 of the parties' collective bargaining agreement arguably already covered arrangements for adversely affected employees.

3. If not, whether an overriding exigency or the nature of the Union's response excused compliance by the Agency with the Statute's requirements.

4. Whether, if there was a duty to bargain, the remedy should include a status quo ante order including restoration of the controllers to their former positions with full back pay and benefits.

For the reasons set forth below, I conclude that a preponderance of the evidence establishes that FAA committed the unfair labor practices as alleged. A status quo ante remedy, including restoration of the affected controllers to their former positions, is not recommended because it would impair FAA's mission to protect the flying public. However, due to the egregious and deliberate nature of the violation, it is recommended that the controllers be made whole for any loss of pay or benefits while serving in other positions until the required collective bargaining between the parties on procedures and arrangements for adversely affected employees is completed.

A hearing was held in Washington, D.C. The FAA, Union, and the General Counsel were all afforded full opportunity to be heard, adduce relevant evidence, examine and cross-

examine witnesses, and file post-hearing briefs. All of the parties filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Facts

At all times material herein, the Union has been the exclusive bargaining representative of Air Traffic Control Specialists, GS-2152 series, employed by the FAA in terminal and enroute facilities. The Respondent and Union are parties to a collective bargaining agreement which went into effect May 1, 1989 for a period of three years. (Jt. Ex. 1, at 2).

Air traffic controllers of the FAA are an integral part of the system designed to prevent midair collisions and ensure the safety of the flying public. The work they perform demands a high degree of mental and physical fitness. Comprehensive medical standards have been prescribed for entry into the controller workforce, and controllers are required to requalify in annual medical examinations. (Jt. Ex. 7, 8).

Prior Medical Standard

Diabetes mellitus is a disqualifying condition for initial appointment to controller positions. However, prior to October 1989, those controllers who contracted diabetes mellitus after their employment and became insulin-dependent were evaluated for continued duty based upon their degree of control of the disease. They were granted waivers, with or without limitations, by Regional Flight Surgeons on a case-by-case basis. The standard for retention was:

> Whether by diet alone, or diet and hypoglycemic drugs, control which results in the absence of symptoms and the absence of complications of the disease or the therapy, may be considered as satisfactory control. A controller with diabetes mellitus who cannot demonstrate satisfactory control over specified and observed periods of 48 hours is not cleared for duty involving active air traffic control. (Joint Exh. 8, Medical Standards, at 9).

For many years the FAA has known that a number of insulin-dependent diabetic controllers demonstrated satisfactory control of the disease or the therapy and continued to control air traffic. During all of this time there was no evidence that these diabetic controllers were creating operational hazards or experiencing difficulties on the job. (Tr. 142-143). The parties stipulated that as of August 1, 1989, all controllers in the unit represented by the Union who had diabetes which required insulin shots had been previously medically cleared by the FAA to work in their air traffic control positions in the towers directing airplanes. (Tr. 7-8).

Olpp Incident

On June 22, 1989, an insulin-dependent controller was unable to begin his shift on time at the Don Scott Airport in Columbus, Ohio. Ronald Olpp, an FAA controller for over 15 years and insulin-dependent for six years, arrived at the facility feeling dizzy shortly before his 7 a.m. shift. This hypoglycemia (or low blood sugar) episode occurred after Olpp took his insulin in the morning and ate a doughnut instead of his normal breakfast. Olpp telephoned his supervisor in the tower and secured permission to rest for a while in the locker room and outer office area. At no time did Olpp lose consciousness or require assistance. He rested on a couch for approximately 20 or 25 minutes and then proceeded to the tower about 7:30 a.m., stating that he was feeling better and was ready to work. Olpp completed all of the duties of his position without incident for the remainder of the day. (Tr. 37-39; General Counsel's Ex. 2(d)). Olpp had never had any previous incident growing out of his diabetes condition and was commended for his sick leave record in 1988. (Tr. 40-41; General Counsel's Ex. 2).

On June 30, 1989, the FAA's Regional Flight Surgeon temporarily medically disqualified Olpp as a controller. He was assigned to a non-operational position.

Action By Federal Air Surgeon

This incident was brought to the attention of the FAA Federal Air Surgeon, Dr. Robert M. McMeekin, and others in the FAA's Office of Aviation Medicine. The original report they received contained erroneous information as to the

degree of Olpp's incapacitation. It was falsely reported that Mr. Olpp was found lying unconscious in the tower.1/

Based on this information, and after discussions with the medical staff of the agency, both in the headquarters and the regions, McMeekin concluded that the Agency could not continue to accept the risk of insulin-dependent controllers in the system (Tr. 114).

On October 16, 1989, McMeekin sent a memorandum to the Associate Administrator for Air Traffic in which he stated, in part, "In the future, all ATCS's acquiring diabetes mellitus will be disqualified for continued ATCS duties unless they can demonstrate their ability to control the disease by diet without the use of insulin." McMeekin requested the Associate Administrator's comments before formalizing this policy. (Jt. Ex. 2(a)).

Notice to Union of Proposed Policy

Over a month later, on November 20, 1989, FAA's Director of Labor and Employee Relations provided the Union with the Federal Air Surgeon's October 16, 1989 proposal and solicited the Union's comments "prior to the time it becomes policy."2/ FAA offered the Union a briefing prior to commenting, if it

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1/ The true facts as to the degree of Olpp's incapacitation were not known by the national office of FAA until after Mr. Olpp had been permanently medically disqualified as a controller on March 12, 1990. He was not interviewed about the incident. After finding the erroneous statement in his medical record that he had been found on the floor, Olpp furnished FAA with a sworn statement by his supervisor setting forth the actual facts concerning the incident. (Tr. 113, 125-130; General Counsel's Ex. 2(d)).

2/ Article 7, Changes in Working Conditions, of the parties' collective bargaining agreement provides that the Employer shall not change personnel policies without prior notice to, and negotiation with the Union. The Union has 30 days within which to request a meeting regarding the change unless operational necessity requires a shorter notice period. (Jt. Ex. 1, p. 12). There is no evidence that the Union was ever advised of a shorter notice period because of "operational necessity." As set forth infra, the Union's response to FAA's November 20, 1989, notice came within this 30-day period.

wanted one. The Union was not informed of any proposed date for implementation of the new policy. (Joint Ex. 2; Tr. 18). In mid-December 1989, Richard Gordon, Jr., the Union's Director of Labor Relations, telephoned Malachy T. Coghlan, the designated contact on the FAA's labor relations staff, to request a briefing on the proposed policy. (Tr. 19).

New Policy Issued

Without waiting for the briefing and the Union's response, Federal Air Surgeon McMeekin, following further discussions with division managers and regional flight surgeons, issued his final determination in the matter on December 6, 1989. It consisted of a medical guidelines letter which permanently medically disqualified controllers with insulin-dependent diabetes mellitus. (Tr. 114-115, 123, 171). The letter stated, in part, as follows:

> Following investigation of an incapacitation involving an ATCS with insulin dependent diabetes mellitus, I have concluded that medical clearance of such ATCS's is incompatible with safety in the national airspace system. In the future, all ATCS's acquiring diabetes mellitus that requires insulin for control will be disqualified for continued ATCS duties. A poll of our regional medical divisions indicates that there are a few diabetics requiring insulin who have been retained on duty as ATCS's. This is the practice which is now discontinued. (Joint Ex. 3).

The Union was not timely notified of the Federal Air Surgeon's final determination.3/

Union Response

On December 18, 1989, Richard Gordon, the Union's Director of Labor Relations, received a telephone call from a local union representative in Charlotte, North

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3/ The December 6, 1989 determination was not provided to the Union until January 8, 1990, when it was provided in response to the Union's December 18, 1989 request for relevant agency directives. (Tr. 25; Joint Ex. 4, 8).

Carolina notifying him that one of the diabetic controllers had been advised of his impending medical disqualification. Gordon immediately telephoned Melachy Coghlan, FAA's Director of Labor and Employee Relations, to advise him of the news. Gordon requested a meeting, bargaining on impact, and asked that FAA "not go forward until that bargaining is completed." (Tr. 19-20). Gordon sent a letter to Coghlan the same day referencing their conversation and the Agency's earlier offer on November 20, 1989, to provide a briefing. Gordon requested appropriate agency directives in order that the parties could meet to discuss the matter under Article 7 of the collective bargaining agreement and asked that "no action be taken to initiate this policy prior to this action taking place." (Jt. Ex. 4; Tr. 21).

Also, on December 18, 1989, Gordon restated the Union's concerns and its request for bargaining at a meeting with the FAA's Associate Administrator for Air Traffic and his associate, Mr. Owens. Owens called Gordon after the meeting and told him that the new policy had been implemented and had not been coordinated with the Union as its should have been. Gordon restated the Union's objections to the implementation of the policy. (Tr. 22-23).

On December 22, 1989, FAA notified the Union that a briefing in the matter of medical disqualification of controllers with insulin-dependent diabetes was scheduled for January 10, 1990.

Policy Implemented

On January 2, 1990, the Federal Air Surgeon issued procedures for implementing the new policy to Regional Flight Surgeons and others. It was suggested that each controller with insulin-dependent diabetes mellitus be advised that controllers who use insulin could no longer be retained in operational control positions. The controller was to be given 60 days within which he/she could submit a diabetes mellitus status report from a physician showing satisfactory control without the use of insulin and the absence of complications of the disease. The report would be reviewed by Regional Flight Surgeon and then sent to the Washington, D.C. headquarters for further review. In the meantime, the controller was to be given a temporary medical disqualification for 60 days and assigned other duties not involving operational control. (Joint Ex. 6(a), 8; Tr. 115-116).

Briefing Cancelled

Because of the Administrator's desire that no final personnel action be taken in the case of individual controllers until all of the medical information had been received and reviewed, the briefing meeting scheduled with the Union for January 10, 1990, was cancelled on January 5, 1990. (Tr. 24-25, 115-116, 120-121). The Union filed the instant unfair labor practice charge the same day. (Tr. 24).

The parties never met to bargain over the impact and implementation of the new policy. Each time the issue was raised thereafter by the Union with the FAA's Labor Relations Office the response was "that the Agency was not prepared to bargain." (Tr. 27-28).

Article 45

The FAA has applied Article 45 of the collective bargaining agreement to assign the affected controllers to other duties while they are medically disqualified. Article 45 provides as follows:

ARTICLE 45
TEMPORARILY DISABLED EMPLOYEES/
ASSIGNMENTS

Section 1. When requested by the employee, an employee recuperating from an illness or injury, who is temporarily medically or physically unable to perform active air traffic control duties, shall be assigned other facility duties which are commensurate with the employee's position to the extent such duties are available.

Section 2. Such employees shall continue to be considered for promotional opportunities for which they are otherwise qualified.

Section 3. Employees assigned duties under the provisions of this Article shall continue to be considered as bargaining unit employees and shall be entitled to all provisions of this Agreement and those provided by law and regulation.

Section 4. When requested by the employee, employees temporarily prohibited from performing control duties because of medications restricted by the Employer's directives shall be assigned other temporary duties within the employee's facility to the extent such duties are available.

Section 5. Temporarily disabled employees may be assigned part-time employment at their request based on Agency guidelines.

Section 6. When work is not available under Sections 1 and/or 4 of this Article, sick leave shall be authorized in accordance with the provisions of Article 25. (Joint Ex. 1).

Barry Krasner, Union co-spokesman for the negotiation of the parties' agreement, testified, without contradiction or even rebuttal from FAA, that the purpose of Article 45 is to allow a controller, recovering from an illness or injury or using a prohibited medication, to work and not exhaust his/her available sick leave. He testified that the provision has nothing to do with the disqualification of controllers for medical reasons. (Tr. 91-94). The FAA has followed Article 45 in the past to temporarily assign controllers to other duties without negotiating with the Union. Such controllers were temporarily prohibited from performing control duties, most commonly because of taking certain medications. (Tr. 167-169). The plain language of the provision makes it clear that any such assignment is at the employee's request.

Impact

The FAA's policy of medically disqualifying controllers who are insulin-dependent affects about 20 employees of whom approximately 13 are bargaining unit employees. (Tr. 151; Joint Ex. 7 at 3). They have been taken off active control duties and temporarily assigned to other facility duties. (Tr. 30-31, 40, 55, 166). Their details to other positions have been extended more than once. (Tr. 57, 176).

The affected controllers have temporarily retained their current grades, wages, 5% operational differential, retirement, health insurance, life insurance, leave, and any

applicable pay demonstration allowance. They have lost various premium pay differentials they normally earned on occasion in their controller positions and would have continued to earn had they not been reassigned. These include 10% differential for night shift work, Sunday pay, holiday pay, overtime pay, and training differential. Controller Ronald Olpp has lost between $3000 to $3,500 over the last eleven months. Franklin Snoke estimated that he lost approximately $3,285.99 over a six month period.

The affected controllers now work an 8 1/2 hour day instead of the 8 hour day they worked as controllers. In addition, there is a loss of career progression and promotional opportunities. Depending on the staff position to which they are assigned, they may also lose free familiarization flying privileges. Their rights to early retirement under Public Law 92-297 for employees engaged in the separation of aircraft duties are clouded by questions as to whether the temporary assignments will count as "good time." Controllers who are medically disqualified to perform active control duties may even face involuntary termination.

The FAA's action has adversely affected the morale of some of the affected controllers and their families. (Tr. 65, 79). FAA's Deputy Associate Administrator for Aviation Standards, Darlene Freeman, acknowledged on May 24, 1990, before a Congressional Subcommittee "the hardship to these individuals from this medical judgment." (Joint Ex. 7 at 4).

Evidence of Disruption or Impairment of the Efficiency and Effectiveness of the Agency's Operations

As noted, for many years the FAA has known that insulin-dependent diabetic controllers were directing air traffic. Up until the Olpp incident in the summer of 1989, it was never brought to the attention of the Medical Specialists Division, Office of Aviation Medicine that these controllers were creating any operational hazards or experiencing trouble on the job. (Tr. 142-144).

Apart from the Olpp incident, where Olpp reported for his duty position some 30 minutes late due to an episode of hypoglycemia associated with dizziness, the only other incident reflected in the record is that of a Miami controller, Franklin H. Snoke. This incident occurred in December 1987. Snoke had a hypoglycemic episode at work during which he was in and out of consciousness for a few minutes.

Snoke was in his team supervisor's office and was not working his position at the time. During the attack Snoke wrote down a series of meaningless words on a slip of paper. (Respondent's Exhibit 1). Snoke attributes this incident to the "newness of the insulin, lack of a break to take a snack and [an] oncoming cold." Snoke took sick leave for the rest of the day, saw his doctor, and returned to work the next day. After the December 1987 incident, Snoke was informed by FAA that it was his responsibility to ensure that he had snacks in the future and he would be given a break or lunch whenever he requested. Snoke has had no further hypoglycemia episodes. He has never had a systems error during his nearly 19 years of controlling traffic including 12 years as a diabetic. This includes 2 1/2 years after the 1981 controller's strike when he worked an average of 48 to 54 hours a week while taking oral hypoglycemic medications for diabetes. (Tr. 73-74). Snoke was medically cleared each year to perform control duties until his clearance was revoked on December 20, 1989, due to the change in policy. (Tr. 54-59; General Counsel's Ex. 3-3(c)).

As of late 1989 there was no new medical evidence of any increased risk presented by controllers who take insulin. (Tr. 141-142).

Dr. William H. Hark, Manager, Medical Specialists Division, Office of Aviation Medicaine, FAA, testified concerning the risk of insulin-dependent controllers suffering episodes of hypoglycemia. His testimony supported the statement of Darlene Freeman, Deputy Associate Administrator for Aviation Standards, FAA before the House Committee on Post Office and Civil Service, Subcommittee on the Civil Service, on May 24, 1990, which was jointly submitted for the record. She stated, in pertinent part, as follows:

> It is a medically accepted fact that individuals with insulin-dependent diabetes mellitus are at risk of suffering episodes of hypoglycemia (or low blood sugar), during which the victim may experience disabilities ranging from impaired vision and cognitive function to seizures. What is equally troubling is that the early symptoms of these disabilities may be subtle in onset and may not be evident to either the victim or to persons nearby. This means that a controller undergoing an episode of hypoglycemia

> could continue to direct aircraft without full control of his or her physical or mental faculties and without realizing that fact; supervisors and other controllers might be equally unaware of the controller's state. The ramifications to the safety of airline passengers are clear. In my judgment, the threat to the traveling public was too great to permit these individuals to continue to control traffic. (Joint Ex. 7 at 3-4).

This statement was disputed somewhat at the time by that of Dr. Robert Ratner, Associate Director of Medicine and Director, Diabetes Center, George Washington University Medical Center, as follows:

> For the vast majority of individuals with diabetes, these warning symptoms [nervousness, sweating and a rapid heart beat] occur sufficiently early to allow for eating of simple foods - for example a glass of juice, lifesavers, or a glucose preparation - to prevent impaired thinking or loss of consciousness which occurs only with sustained and severe hypoglycemia.
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> The risk of developing hypoglycemia is dependent upon the level of aggressiveness of diabetes care and the reliability of the individual with the disorder in maintaining their own health . . . . The appropriate establishment of glucose goals, monitoring of blood glucose levels [through new therapeutic monitoring techniques now available], and adjustment of diet, exercise and insulin is the clearest way of preventing hypoglycemia.
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> There are of course those situations in which hypoglycemia may occur despite the best intentions and abilities of the individual and his or her health providers. Unconscious reactions occur in small minority of patients, sometimes without warning symptoms. In a recent large scale study of Type 1 diabetes,

less than 10% of individuals receiving standard care experienced a single episode of severe hypoglycemia in the year of the study. Of particular interest, those individuals suffering from recurrent severe hypoglycemia tend to segregate. As a result, obtaining the history of an unconscious reaction or the history of an episode of severe hypoglycemia without warning symptoms allows for the exclusion of these individuals at highest risk for alterations of thinking in association with hypoglycemia. This translated into a 50% reduction in the occurrence of hypoglycemia in the subsequent 2 years of the study. Thus, history provides us with the greatest indicator of those individuals at highest risk for this complication of diabetes care and allows exclusion of this group. . . . I recognize not all individuals with insulin treated diabetes should be allowed to perform sensitive jobs which may be compromised by the unexpected occurrence of hypoglycemia. Those individuals with a history of unconscious reactions, or those individuals who have hypoglycemia without warning I believe can and should be excluded from these positions. On the other hand, the other approximate 95% of individuals with insulin treated diabetes would be able to function adequately in these positions. Second, studies would suggest that the initial occurrence of severe hypoglycemia with alterations of thinking would occur in approximately 4-10 individuals per 1,000 per year. At the current time, there is no methodology available for predicting in which individuals this may occur. However, this compares favorably to the occurrence of heart attacks and strokes in individuals with mild hypertension. According to data obtained from the Framingham study, individuals with borderline high blood pressure - values no higher than 140/90 will suffer heart attacks at the rate of 10 per 1000 per year. Since the Federal

Aviation Administration currently allows individuals with blood pressure in this range to function both as air traffic controllers and as pilots, they have, in fact, accepted this level of risk. The addition of insulin treated individuals with diabetes in the absence of severe hypoglycemia to the work force would carry no additional risks as compared to the hiring of an individual with mild high blood pressure. (General Counsel's Ex. 4).

Positions of the Parties

The General Counsel and the Charging Party contend that FAA violated section 7116(a)(1) and (5) of the Statute when, on December 6, 1989, it implemented a change with respect to FAA's long-established policy of previously permitting insulin-dependent controllers to perform the duties of the controller position without affording the Union notice and an opportunity to negotiate over the impact and procedures for implementation of the change. The General Counsel and the Charging Party claim that Article 45 of the parties' agreement did not waive the right to negotiate; that the impact was, and still is, more than de minimis; and that the requirements for a status quo ante remedy have been met, requiring restoration of the controllers to their former positions with full back pay and benefits.

Respondent FAA defends on the basis that the decision to apply the medical standards was a reserved management right. FAA also maintains that the decision had de minimis impact on the employees since the controllers are in other temporary positions at the same rate of pay and lost only speculative benefits which depend totally on their assignment of work, i.e., if they do not work nights, Sundays, holidays, overtime, they cannot earn premium pay for such assignments. FAA also contends that Article 45 of the parties' negotiated agreement already contains appropriate arrangements for temporarily medically disqualified employees, and any dispute as to whether the provision permits unilateral action should be resolved through the parties' grievance and arbitration procedure. FAA also claims that since the only proposal put forth by the Union was to delay the decision to apply the medical standards, the Agency had no choice but to act. FAA argues that a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the Agency's operations.

The Agency claims it would be totally irresponsible to allow an employee who could suffer a hypoglycemic attack, possibly impairing cognitive function, to control air traffic.

Discussion, Conclusions, and Recommendations

There is no dispute that the FAA's decision to medically disqualify all controllers with insulin-dependent diabetes mellitus from operational control positions constituted an exercise of its rights under section 7106(a) of the Statute. The Authority has held that management's rights to assign employees under section 7106(a)(2)(A) and to make selections in filling positions under section 7106(a)(2)(C) encompass the rights to establish qualification standards, to change them, and to determine whether individual employees meet the standards. Department of Defense Dependents Schools, Pacific Region and Overseas Education Association, 31 FLRA 305, 312-13 (1988). However, where management exercises a reserved management right to change conditions of employment, there is nevertheless a duty to bargain consistent with section 7106(b)(2) and (3) of the Statute over the procedures that management will follow in exercising such rights and appropriate arrangements for employees who may be adversely affected thereby.4/ Department of Transportation, Federal Aviation Administration, Washington, D.C., 20 FLRA 486, 489 (1985).

4/ Section 7106(b)(2) and (3) provides:

§ 7106. Management rights

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating --

. . . .

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

There is no dispute that the change concerns "conditions of employment," which are defined by section 7103(a)(14) of the Statute as "personnel policies, practices, and matters . . . affecting working conditions." See Fort Stewart Schools v. FLRA, 110 S. Ct. 2043, 2047 (1990) (definition of "conditions of employment" suggests that phrase refers to "qualifications demanded of, or obligations imposed upon, employees.")

The statutory duty to negotiate under section 7106(b)(2) and (3) comes into play if the change results in an impact upon unit employees or such impact was reasonably foreseeable. U.S. Government Printing Office, 13 FLRA 203 (1983). In order to determine whether the change in conditions of employment requires bargaining, or is de minimis it is necessary to carefully examine the facts and circumstances, placing principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986) (HHS, SSA). The appropriate inquiry involves an analysis of the reasonably foreseeable effect of the change in conditions of employment at the time the change was proposed and implemented, including temporary and transitory effects. U.S. Customs Service, (Washington, D.C.) and U.S. Customs Service, Northeast Region (Boston, Massachusetts), 29 FLRA 891, 899 (1987).

Applying the HHS, SSA standard to this case, the record establishes that the change in the working conditions of unit employees gave rise to an obligation to bargain. Where management determines that an employee no longer is physically qualified to perform the duties of the job to which the employee is assigned, that determination adversely affects the employee. "This exercise of management's right has an immediate and clearly defined adverse impact on the employee: the employee no longer will be able to hold that job." International Federation of Professional and Technical Engineers, Local 4 and Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 35 FLRA 31, 39 (1990). I agree with counsel for the General Counsel who declares, "The impact of the decision was obviously foreseeable and predictable, significant and severe." As FAA's Deputy Associate Administrator for Aviation Standards stated, it was a "hardship" on affected controllers. The record reflects that the impact pervades nearly every aspect of the affected employees' conditions of employment and had

an effect, or reasonable foreseeable effect, on their take-home pay, job assignments, job security, hours of work, career progression, retirement, and morale.

The record establishes that FAA did not afford the Union appropriate notice and an opportunity to bargain over the impact and implementation of the change in policy. The proposed policy was formulated on October 16, 1989, but was not furnished to the Union for comment until November 20, 1989. The Union was offered a briefing and its comments were solicited "prior to the time it becomes policy," but no proposed implementation date was given. Respondent, without providing the Union the briefing it requested, and without further notice, implemented the policy on December 6, 1989. When the Union learned of the implementation, on December 18, 1989, it requested bargaining and asked that FAA not go forward with the policy until bargaining was completed. FAA then scheduled a briefing, but in the meantime proceeded to issue procedures for implementing the policy on January 2, 1990. FAA then cancelled the scheduled briefing for the Union and advised the Union that it was not prepared to bargain.

FAA's argument that Article 45 of the parties' collective bargaining agreement already covers arrangements for adversely affected employees and, therefore, (1) it had no further duty to bargain, and (2) any dispute over the contract provision should be resolved through the negotiated grievance and arbitration procedure, is untenable.

In the first place, Article 45 covers "Temporarily Disabled Employees/Assignments." The evidence, including all FAA directives in evidence and the witnesses' interpretation of those directives, clearly establishes that FAA's decision to change its policy and medically disqualify all insulin-dependent diabetic controllers from operational control positions is permanent, not temporary.5/ Article 45 does not purport to address the procedures to be followed in implementing such a permanent change in conditions of employment or appropriate arrangements for employees

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5/ The only temporary aspect of the matter is FAA's determination not to take any final personnel action concerning the individual controllers until all of the medical information in the 13-20 cases has been reviewed. (Tr. 24-25, 115-16, 120-21). The controllers will be retained in "temporary" assignments until that review is completed. (Tr. 176).

adversely affected thereby. Therefore, FAA's contention that Article 45 sanctions its action is obviously insubstantial.

Second, FAA introduced no evidence to refute the Union's interpretation and the plain language of Article 45 of the collective bargaining agreement. The Union and the General Counsel introduced uncontradicted evidence, based on bargaining history, that the intent of Article 45 was to allow a controller recovering from an illness or injury, or using a prohibited medication, to temporarily work in other positions and not exhaust his/her available sick leave. In fact, Section 6 of Article 45 provides that when alternative "work is not available . . . sick leave shall be authorized." The plain language of the provision specifies that alternative assignments must be "requested by the employee." FAA provided no evidence that the provisions of Article 45 have ever previously been used on its own initiative in situations like the instant one where controllers with certain conditions have been permanently medically disqualified from operational control positions.

Therefore, it is concluded that Respondent's position is not arguably justified by Article 45 and does not raise an issue concerning different and arguable interpretations of the collective bargaining agreement in which the remedy for the aggrieved party would be through the parties' negotiated grievance and arbitration procedure. Compare, Immigration and Naturalization Service and Immigration and Naturalization Service, Newark District, 30 FLRA 486 (1987), (unilateral change in local practice concerning reimbursement of employees for mileage expenses held to raise different and supportable interpretations of the national agreement not appropriate for resolution in an unfair labor practice proceeding where national agreement specifically included a procedure for reimbursing employees for mileage expenses); Consolidated Rail v. Railway Labor Exec. Ass'n., 109 S. Ct. 2477 (1989) (Inclusion of drug testing in physical examinations was arguably justified by implied terms of collective bargaining agreement and, therefore, under Railway Labor Act, was a minor dispute subject to compulsory and binding arbitration before adjustment board.)

The Authority has held that the duty to negotiate in good faith under the Statute requires that a party meet its obligation to negotiate prior to making changes in established conditions of employment, during the term of a collective bargaining agreement, absent a clear and unmistakable waiver. Department of the Air Force, Scott Air

Force Base, Illinois, 5 FLRA 9 (1981); Internal Revenue Service, 29 FLRA 162 (1987); Department of the Air Force, Scott Air Force Base, Illinois, 35 FLRA 844, 852 (1990). There is no evidence of a clear and unmistakable waiver of the right to bargain in this case.

FAA's defense is without merit that it had no choice but to act in the face of the only proposal put forth by the Union, which was that FAA not go forward with the change in medical standards until bargaining was completed. The Authority has held that proposals which require an agency to maintain the status quo during the bargaining process, consistent with its obligation to bargain, are negotiable procedures under the Statute. National Weather Service Employees Organization and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, 37 FLRA 392, 396-397, 402-404 (1990), (NWSEO), (distinguishing the proposal at issue in U.S. Customs Service, Washington, D.C. v. FLRA, 854 F.2d 1414 (D.C. Cir., 1988) relied upon by FAA); Department of the Air Force, Scott Air Force Base, Illinois, 35 FLRA 844, 858 (1990); Overseas Education Association and Department of Defense Dependents Schools, 28 FLRA 936, 942-44 (1987).

Moreover, there is no evidence that the Union was ever given an opportunity to present all of its proposals. The Union was offered a briefing if it desired prior to commenting on the changes, but its requested briefing was eventually cancelled, and the Union was advised that the Agency was not prepared to bargain. Since no negotiations have been held the record is silent as to what the Union would propose during those negotiations. There is, therefore, no basis on which to conclude that the Union necessarily would offer nonnegotiable proposals. NWSEO, 37 FLRA at 403.

Consistent with an agency's obligation to bargain, an agency may not implement changes in conditions of employment of unit employees, without agreement of the Union, except in specific circumstances, such as where implementation is consistent with the necessary functioning of the agency. NWSEO, 37 FLRA at 396. There is no evidence that an overriding exigency existed which precluded compliance with the Statutory requirements. FAA has not borne its burden of demonstrating that good faith bargaining as contemplated by the Statute could not have commenced within the time frame it itself followed before it implemented the change. The incapacitation of controller Olpp, which precipitated the change, occurred on June 22, 1989. He was temporarily

medically disqualified under the then existing criteria on August 16, 1989. The new policy to disqualify all controllers with insulin-dependent diabetes mellitus was proposed on October 16, 1989, but was not placed in effect until December 6, 1989. Implementing procedures were not forwarded to the field until January 2, 1990. In addition, the parties' collective bargaining agreement provides that the time period for notice and bargaining may be reduced when required because of operational necessity. (Joint Ex. 7, Article 7, 12-13). At no time did the FAA advise the Union that it desired to invoke these contractual provisions.

It is concluded that FAA violated section 7116(a)(1) and (5) of the Statute, as alleged, by implementing a new policy of medically disqualifying controllers who have insulin-dependent diabetes mellitus without affording the Union appropriate notice and an opportunity to bargain over the impact and implementation of the change in conditions of employment.

The Union and the General Counsel request a status quo ante remedy in this case including the restoration of the controllers to their former positions with full pay and benefits. When an unfair labor practice involves the agency's failure to bargain concerning procedures and appropriate arrangements under section 7106(b)(2) and (3) of the Statute (impact and implementation bargaining), the Authority balances the nature and circumstances of the particular violation against the degree of disruption in Government operations that would be caused by such a remedy. Federal Correctional Institution, 8 FLRA 604, 605-06 (1982) (FCI). In FCI the Authority set forth these factors, as follows:

> [T]he Authority considers, among other things, (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent

of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

With respect to number 1 above, concerning notice, the evidence shows that the Union had no notice of the "change decided upon." What the Union knew on November 20, 1989, was that there was an "issue" over the "medical disqualification" of certain controllers with diabetes, but the Union was never apprised when implementation would occur. In fact, it occurred on or about December 6, 1989, and beginning around December 18, 1989, certain controllers with diabetes began to learn of their disqualification. It was not until January 8, 1990, that the Union was furnished a copy of the December 6, 1989, "change decided upon," well after implementation was in full-stride. Obviously, then, the Union never received proper notice of Respondent's change prior to implementation.

With respect to number 2 above, concerning whether bargaining was requested, the evidence establishes that the Union, orally and in writing, requested negotiations on December 18, 1989, the very day it first learned that the policy change was being implemented. Moreover, the record shows that FAA disregarded the Union's December 18, 1989, request to delay implementation of the change of policy pending negotiations.

With respect to number 3 above, concerning willfulness, the evidence shows that FAA went forward with its plan to disqualify certain air traffic controllers with diabetes without regard for the Union's statutory role as the exclusive bargaining agent for affected unit employees. Thus, the record shows that, while the Union was notified that there was an "issue" over "medical disqualification," it was never notified as to the implementation date. Additionally, on December 22, 1989, when FAA advised the Union of the briefing scheduled for January 10, 1990 (ultimately cancelled by FAA), it failed even to tell the Union about or furnish the Union with the December 6, 1989, memorandum from Dr. McMeekin announcing the policy change. By December 22, 1989, the evidence shows that FAA had gone forward to notify certain controllers with diabetes that they had been disqualified from performing operational duties but it failed even then to notify the Union as to the implementation which was occurring. The Union had to first learn about the matter from a bargaining unit employee.

With respect to number 4 above, concerning the impact on adversely affected employees, the record reflects that the impact on affected employees was reasonably foreseeable as well as substantial and severe. As noted, the impact pervades every aspect of affected employees' conditions of employment, including take-home pay, temporary job assignments, job security, hours of work, retirement, career progression, career uncertainty and morale.

With respect to number 5 above, concerning whether and to what extent a status quo ante would disrupt or impair the efficiency and effectiveness of the agency's operations, the record shows that controllers with insulin-dependent diabetes mellitus met the demands of their positions for many years while operating under the previous policy where they had to demonstrate satisfactory control of the disease yearly on a case-by-case basis. The two incidents where controllers had hypoglycemic episodes were not shown to have created operational hazards. On the other hand, the medical data reveals that at least a few individuals with insulin treated diabetes are at risk of suffering episodes of hypoglycemia involving impaired thinking or loss of consciousness, sometimes without warning symptoms. While individuals with a history of such reactions could possibly be identified and disqualified on a case-by-case basis, as was done under the previous policy, the Federal Air Surgeon apparently does not want the first episode of what could become that "history" to occur while the employee is controlling traffic. Therefore, he has chosen to disqualify all controllers with insulin-dependent diabetes mellitus as "incompatible with safety in the national airspace system." Since protection of the safety of the flying public is a primary mission of the FAA, and millions of Americans entrust their safety to the FAA's stewardship of the air transportation system, I conclude that a status quo ante remedy would disrupt or impair the efficiency or effectiveness of the agency's operations.

Balancing the nature and circumstances of the violation against the degree of impairment of Government operations, I conclude that a status quo ante remedy is not warranted.

Although a status quo ante remedy is not being recommended, primarily because of the potential impact on the safety of the flying public, FAA engaged in an egregious violation of the Statute. It was not privileged to implement the change in conditions of employment without affording the exclusive representative of its employees appropriate notice and an opportunity to bargain. An agency does not avoid the

duty to bargain by anticipating as many of the employees' concerns as it can and attempting to resolve those concerns as it sees fit. The exclusive representative of the employees has the right to make proposals on their behalf and bargain to agreement with the agency prior to the implementation of a change affecting their working conditions.

A prospective bargaining order will require FAA to bargain with the Union over the impact and implementation of the change. This will remedy FAA's failure to recognize the Union's role under the Statute, but will not provide appropriate relief to the affected controllers who, as a result of FAA's unilateral action, lost their medical qualifications to control air traffic and other benefits associated with controlling traffic, including a withdrawal or reduction in pay, allowances or differentials. A partial "make whole" remedy for these adversely affected employees, not involving restoration to their original positions, would not substantially disrupt or impair FAA operations inasmuch as FAA has temporarily placed the employees in non-operational positions. Such a remedy would effectuate the purposes and policies of the Statute. Therefore, the Agency should make the employees whole for any loss of pay or benefits while serving in other positions, including backpay for any withdrawal or reduction in pay, allowances or differentials, and employees should have such benefits, rights, or privileges restored and/or be paid for any continuing losses consistent with law and regulation until collective bargaining on the procedures and arrangements for adversely affected employees is completed. Any questions as to the actual amount to be paid will be left to the compliance stage. Cf. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 37 FLRA 278, 288-92 (1990); Department of Health and Human Services, Social Security Administration, Dallas Region, Dallas, Texas, 32 FLRA 521, 524-27 (1988).

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

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the Federal Aviation Administration, shall:

1. Cease and desist from:

(a) Implementing changes in the medical disqualifications for Air Traffic Control Specialists, GS-2152 series, without affording the National Air Traffic Controllers Association, MEBA/NMU, AFL-CIO, the exclusive representative of an appropriate unit of such employees, appropriate notice and an opportunity to bargain over the procedures which management will observe in implementing its decision and appropriate arrangements for adversely affected employees.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Statute:

(a) Upon request, bargain in good faith with the National Air Traffic Controllers Association, MEBA/NMU, AFL-CIO, over the procedures which management will observe in implementing its December 6, 1989 decision to medically disqualify Air Traffic Control Specialists, GS-2152 series, with insulin-dependent diabetes mellitus and appropriate arrangements for adversely affected employees.

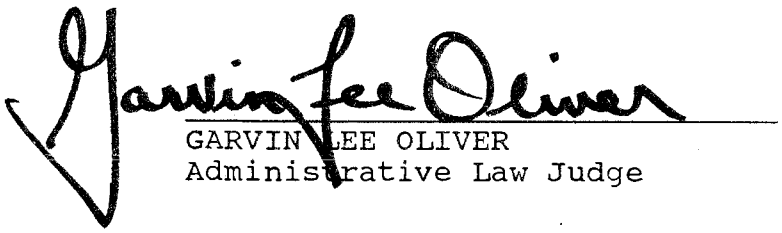
(b) Partially make whole any bargaining unit employee who was adversely affected by the unilateral implementation of its December 6, 1989, decision to medically disqualify Air Traffic Control Specialists, GS-2152 series, with insulin-dependent diabetes mellitus. Employees shall not be restored to operational control positions, but shall be made whole for any loss of pay or benefits while serving in other positions, including backpay with interest for any withdrawal or reduction in pay, allowances, or differentials. Employees shall also have such benefits, rights, or privileges restored and/or shall be paid for any continuing losses consistent with law and regulation until collective bargaining with the National Air Traffic Controllers Association, MEBA/NMU, AFL-CIO, on the procedures which management will use in implementing its decision and appropriate arrangements for adversely effected employees is completed.

(c) Post at its facilities, 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 the Administrator of the Federal Aviation Administration, 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 insure 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 herewith.

Issued, Washington, D.C., November 15, 1990



GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement changes in the medical disqualifications for Air Traffic Control Specialists, GS-2152 series, without affording the National Air Traffic Controllers Association, MEBA/NMU, AFL-CIO, the exclusive representative of an appropriate unit of such employees, appropriate notice and an opportunity to bargain over the procedures which management will observe in implementing our decision and appropriate arrangements for adversely affected employees.

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

WE WILL, upon request, bargain in good faith with the National Air Traffic Controllers Association, MEBA/NMU, AFL-CIO, over the procedures which management will observe in implementing our December 6, 1989 decision to medically disqualify Air Traffic Control Specialists, GS-2152 series with insulin-dependent diabetes mellitus and appropriate arrangements for adversely affected employees.

WE WILL partially make whole any bargaining unit employee who was adversely affected by the unilateral implementation of our December 6, 1989, decision to medically disqualify Air Traffic Control Specialists, GS-2152 series, with insulin-dependent diabetes mellitus. Employees shall not be restored to operational control positions, but shall be made whole for any loss of pay or benefits while serving in other positions, including backpay with interest for any withdrawal or reduction in pay, allowances, or differentials. Employees shall also have such benefits, rights, or privileges restored and/or shall be paid for any continuing losses consistent with law and regulation until collective bargaining with the National Air Traffic Controllers Association, MEBA/NMU, AFL-CIO, on the procedures which management will use in

implementing our decision and appropriate arrangements for adversely effected employees is completed.

_____
(Activity)

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., P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.