

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

.
375th COMBAT SUPPORT GROUP
SCOTT AIR FORCE BASE, ILLINOIS
Respondent
and Case No. 75-CA-10036
NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES,
LOCAL R7-23, AFL-CIO, SEIU
Charging Party/Union
.
Captain David F. Brash
Counsel for the Respondent
Carl L. Denton
Representative of the Charging Party
Matthew L. Jarvinen
Counsel for the General Counsel, FLRA
Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (5), by implementing reduced working hours for seven unit employees and separation for five unit employees on September 30, 1990 without negotiating with the Union over the impact and implementation of these actions.

Respondent's answer denied any violation of the Statute.

The issue presented is whether the Union relinquished its right to bargain over the impact and implementation of

future management decisions to reduce working hours and separate employees by agreeing to certain procedures and arrangements in negotiated agreements.

A hearing was held in St. Louis, Missouri.^{1/} The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel 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 Fact

The Parties

The Charging Party, the National Association of Government Employees, Local R7-23, AFL-CIO, SEIU (the Union) is the certified exclusive representative of four separate bargaining units of employees at Respondent's Scott Air Force Base (AFB) facility in Illinois, including a unit of Non-Appropriated Fund (NAF) employees. At all times material, Carl Denton has served as the Union President, and John Cissell has served as the Union's First Vice President.

The 375th Combat Support Group, Scott AFB, Illinois is the Respondent in this case. Mr. Robert Nelson is the Labor Relations Officer at Scott AFB and acts for the Respondent in labor-management negotiations.

The September 30, 1990 Personnel Actions

By letters dated August 16, 1990, the Respondent, through Enlisted Club Manager Hank Lampert and Installation

^{1/} Counsel for the General Counsel's unopposed motion to correct the transcript is granted; the transcript is corrected as set forth therein. As a result of Respondent's motion, concurred in by the other parties, the transcript in Case No. 75-CA-00662, involving the same parties and heard the same day, is also considered as evidence applicable to this case. Unless otherwise noted, the citations in this decision are only to the transcript and exhibits in this case.

Club Manager Grover M. Maddux, notified 6 NAF unit employees that their hours would be reduced and 5 NAF unit employees that they would be separated from Scott AFB employment effective September 30, 1990. Each letter stated, "This business based action is taken within Article XXVIII, Section 29 of our collective bargaining agreement." The Union received copies of the letters on August 17.

By letter dated August 24, 1990, the Union requested to bargain over the business based actions to the extent allowable by law, including substance, impact and implementation. The Union requested the Respondent to maintain the status quo during negotiations. The Union stated that the employees were entitled to reduction in force rights and presented the following proposals:

a. To the extent that any employees are not covered by procedures in the Collective Bargaining Agreement (CBA) and/or AFR 40-7, the provisions of the CBA and AFR 40-7 shall be applicable.

b. If there are no provisions in the CBA or AFR 40-7 that are applicable to the impacted employees then the following shall apply:

(1) The provisions of the CBA and AFR 40-7 shall apply, if possible. If not possible, then:

(2) Employees shall be restored to their status as soon as possible, in accordance with seniority, as positions become available for which they qualify.

By letter dated August 30, 1990 Respondent took the position that there was no obligation to bargain, stating:

The procedures for taking business based actions was negotiated and agreed upon on 15 November of 1989. In Article XXVIII, Section 29 of the Nonappropriated Fund Contract you agreed to waive all language in the agreement which conflicted with "NAF EXPO" as provided to you on 7 July 1989. In view of your previous agreements with regard to NAF EXPO and Article XXXI of the NAF Contract I am surprised that you are now attempting to reopen negotiations on our contract. The actions will be taken as proposed. Procedures negotiated as part of NAF EXPO is the status quo.

By letter dated September 5, 1990, the Respondent, through Lampert, notified one NAF unit employee that her hours would be reduced effective September 30, 1990 pursuant to a business based action taken within Article XXVIII, Section 29 of the collective bargaining agreement. The Union received a copy of the letter on September 12 and, by letter dated September 19, requested to bargain over the reduction in hours. The Union stated that reduction in force procedures should apply, that it intended to file an unfair labor practice or grievance over management's violation of the collective bargaining agreement, the Air Force regulation, and the law. The Union also submitted the following proposals:

- a. That her employment status not be changed.
- b. That her duty hours and days remain the same.
- c. That if a and b above are not possible, that the following apply.

(1) That she be provided work for which she is capable that will keep her in a full-time status even though her hours may not be the same. In order to accomplish this, it may be necessary to displace (to some extent) employees in a lesser status, in the following order: temporary, intermittent-on-call, intermittent-part-time, regular-part-time.

(2) That she be provided RIF privileges in accordance with AFR 40-7 and the CBA.

(3) That she be reinstated, if downgraded or reduced in any way, as soon as possible, to jobs for which she is capable of doing until such time as she gets her original grade, status and hours reinstated.

By letter dated September 27, 1990 Respondent again took the position that the procedures for business based actions had already been negotiated in the NAF collective bargaining agreement and that the employee's reduction in hours had been accomplished in accordance with that agreement and the project EXPO guidelines for business based actions.

The parties stipulated that each of the proposed business based actions described above, including the separation of five NAF unit employees and the reduction of 7 NAF unit employees' hours, were implemented on September 30, 1990.

Union President Denton testified that the Union had hoped to bargain over such matters as seniority rights, recall rights, and scheduling.

The NAF Experimental Personnel Office Negotiations and the NAF Collective Bargaining Agreement.

The NAF Experimental Personnel Office (EXPO) was a national Air Force program to transfer certain personnel responsibilities from base civilian personnel offices to NAF managers.

On July 7, 1989 Respondent advised the Union that Scott AFB had been selected to participate in Project EXPO for a one year period beginning October 1, 1989. Respondent provided the Union 17 pages of proposed guidelines to be used during the test period and requested the Union's comments by July 26, 1989.

The introduction to the proposed guidelines referenced complaints "concerning the unnecessary bureaucracy in the current system" and pointed out that the procedures "reflect a streamlined, more efficient method of conducting routine business. . . . The most significant part of the proposed EXPO guidelines is the reduced administrative and procedural requirements. . . ." The proposed guidelines addressed the following areas: position classification and pay, employment categories, hiring guidelines, performance evaluations, incentive award programs, business oriented personnel actions, discipline guidelines, and the NAF grievance system. The proposed guidelines for business based actions provided:

GUIDELINES FOR BUSINESS ORIENTED PERSONNEL ACTIONS

. . . .

2. BUSINESS BASED ACTIONS

a. If it becomes necessary to reduce the staff, the immediate supervisor may reassign, reduce pay and/or hours, or furlough employees, by issuing a 24 hour notification. The supervisor must coordinate any determination with his or her immediate supervisor before taking any action.

b. Reassignments, reductions in pay/hours, and separations taken under this provision should

include the statement: "This action is without prejudice and does not preclude the employee from being hired by another NAF Activity."

c. Immediate supervisors should record the basis for the decision to reassign, demote or separate an employee in a notice letter. The notice letter should:

(1) State the reason(s) why the action was necessary;

(2) State action being taken (including position and pay rate for demotion or reassignment);

(3) Advise the employee of the right to grieve the action;

(4) Provide an advance notification of 30 days from separation for permanent employees; and

(5) Whenever possible, be hand delivered.

d. Severance Pay. A permanent employee who has completed at least one year (365 days) of service as a permanent DOD NAF employee and who is involuntarily separated from employment under this procedure is entitled to receive severance pay. The amount of severance pay is one weeks base pay for each year (365 days) or fraction thereof, up to four years of service, for a maximum of four weeks of pay.

On July 26, 1989, the Union responded to management's notification and proposals. The Union requested that the status quo be maintained and further requested to negotiate over the substance, impact, and implementation of NAF EXPO. The Union also forwarded an initial counterproposal that no changes be made and proposed a meeting on August 9, 1989 to negotiate over the matter.

The parties first met concerning NAF EXPO on August 9, 1989 at the Labor Relations Office.^{2/} Denton and Cissell

^{2/} Nelson recalled that the meeting was on August 24, 1989. Denton and Cissell remembered the date as August 9, 1989 and Denton's notes taken at the meeting reflect this date.

represented the Union; management was represented by Labor Relations Officer Robert Nelson, Jim Ward, Ray Witham and another person from Personnel. Nelson presented a briefing regarding NAF EXPO and gave the Union a copy of his briefing document.^{3/} The document read as follows concerning Business Based Action:

- Replaces RIF
- Only Permanent Employees
 - 30 Day Notice for Separations
 - Severance Pay
 - 24 Hour Notice on Reassignments, Reduced Hours or Furlough
 - Local Procedures
- Temporaries can be Terminated Within Existing Statutory Requirements

Denton questioned the properness of the statement "Replaces RIF" and stated that the Union could not agree with that. Nelson pointed out that if the Union advanced proposals, different things could be worked out, for example, RIF (reduction in force) actions in place of business based actions.

The parties' next meeting on NAF EXPO was held on August 24, 1989 with the same participants. The parties reviewed NAF EXPO to determine where there were conflicts with the NAF contract which, at that time, had been under negotiation for more than eight years. The parties also discussed pay banding (pay categories established according to a formula) and pay for employees hired off the street, but there was no discussion of business based actions.

When the parties reconvened on August 25, 1989, the Union presented management with a package proposal. This package included proposals relative to the Appropriated Fund contract, which was also under negotiation at the time, as

^{3/} Nelson initially testified that management used a different document in its presentation to the Union, (Respondent's Ex. 1), but later acknowledged he had a copy of General Counsel (G.C.) Ex. 2 in his negotiation file and that he may have shared it with the Union during the briefing. Denton's notes concerning the August 9 meeting refer to specific pages of G.C. Ex. 2. Moreover, Denton and Cissell denied seeing Resp. Ex. 1 until the day before the hearing and denied that management gave the Union a copy of Resp. Ex. 1 at any time during NAF EXPO negotiations.

well as proposals applicable to the negotiation of the NAF contract, and resolution of three grievances then pending arbitration. With respect to NAF proposals, the Union made proposals, among others, for a one year contract, a waiver of "all language in the new agreement that conflicts with project NAF EXPO as provided to the Union by letter dated 7 July 1989" with four exceptions, an agreement by the employer to bargain over permissive subjects, and a monthly meeting to discuss problems arising from NAF EXPO implementation. Although the Union reviewed its package proposal with Nelson on August 25, there was little discussion at that time. Rather, Nelson said he would take it under advisement.

The Union's purposes in proposing incorporation of NAF EXPO into the NAF contract included being able to secure management agreement to a one year NAF contract, which had been under negotiation for more than eight years, and permitting a one year test of NAF EXPO to see if measured up to management's billing as beneficial to employees. If the Union had problems with NAF EXPO, it felt it could address them during monthly meetings or seek to rectify the problems by reopening the contract after one year. It is also noted that a rival union was showing interest in other units at Scott AFB, so it was to the Union's advantage to secure a contract bar for the NAF unit as soon as possible.

The parties next meeting on September 8, 1989 involved a review of the Union's August 25 proposal, but centered on those proposals concerning the Appropriated Fund contract and the 3 grievances. There was little, if any, discussion of NAF EXPO and no discussion whatsoever of business based actions.

After the September 8, 1989 meeting, Denton revised the Union's package proposal and gave it to management that afternoon. This package, similar to the August 25, 1989 package, deleted the proposal regarding management's agreement to waive permissive bargaining rights.

The Union's September 8 proposal was discussed at a meeting on September 13, 1989. Nelson asked Denton whether the proposed monthly meetings were intended for negotiations or were to be like a consultation meeting. Denton responded that it was not the Union's intent to get involved in negotiations at the monthly meetings, but rather they were intended to give the parties an opportunity to meet to try to resolve problems. There was no discussion concerning business based actions.

In an effort to separate project EXPO from the other items the Union was interested in negotiating as a package, Respondent advised the Union on September 27, 1989 that it would implement project EXPO on October 15, 1989 absent any comment by the Union. By letter dated October 4, 1989 the Union requested to continue negotiations on October 10 and to maintain the status quo throughout the negotiation process.

The parties held a brief meeting on October 10, 1989. The Union asked for a copy of a NAF EXPO agreement at Andrews Air Force Base and asked some questions about who would be affected by NAF EXPO. Nelson deferred answers to the Union's inquiries, noting that Jim Ward would be attending some NAF EXPO training and would be able to answer the Union's questions on his return. Again, there was no discussion of business based actions.

Another meeting was held on October 13, 1989, but not much was discussed. The Union asked how trades and crafts employees would be affected by NAF EXPO, but the answer was deferred pending Ward's return from training. There was no discussion of business based actions.

On November 8, 1989, the Union presented the Respondent with another revised bargaining proposal deleting the pending grievance issues. Then, on November 15, 1989, Denton and Nelson signed an agreement to incorporate NAF EXPO into the NAF contract. The November 15 agreement deleted reference to the Appropriated Fund contract. Denton dropped the Appropriated Fund contract and grievance issues when it was apparent management was unwilling to work out a deal on those issues. The agreement was based on Respondent's concession on a one year NAF contract and a continuation of official time for Union representative for the Union's concession on the implementation of NAF EXPO.

The November 15, 1989 agreement on project EXPO was later incorporated into Article XXVIII of the parties' collective bargaining agreement. The collective bargaining agreement was signed on December 14, 1989 and approved on January 8, 1990. Article XXVIII provides, in pertinent part, as follows:

Section 29: The parties agree to waive select provisions of this contract. The language, terms and provisions of the contract will be reinstated and all waivers will expire, at the point in time that project EXPO has been discontinued or

abandoned by the Air Force. The project will remain the status quo until the new contract is completed. The Agency shall keep the Local informed of the status of project EXPO.

All language in this agreement that conflicts with project "NAF EXPO" as provided to the Union by letter dated 7 Jul 89, shall be waived with the following exceptions:

- (a) Article XXVI - Negotiated Grievance Procedure.
- (b) Article XXXI - Duration and Changes.
- (c) All employees shall be treated fairly and equitably in all aspects of their employment.
- (d) The starting rate of pay for new employees shall not be set at a rate higher than that which is paid the lowest paid employee doing similar work.

Section 30: The Parties shall meet monthly on the last Friday of each month at 0900 beginning in Jan 90, with a resolve to address and eliminate any problems resulting from the implementation of this agreement and project NAF EXPO.

The provisions of the referenced NAF EXPO guidelines of July 7, 1989 dealing with business based personnel actions were set forth above at pages 5-6.

Article XVII of the NAF agreement deals with procedures for a reduction-in-force. Under the procedures outlined, management agrees to do everything possible to avoid a reduction in force, to furnish the Union certain information, including retention registers, to provide employees 60 days notice, and to place RIFed employees on a priority placement list with Scott AFB, and provide placement assistance for other areas, and offer bargaining unit employees mandatory placement in vacant bargaining unit position.

Article IV of the collective bargaining agreement states that "matters appropriate for negotiation between the parties are personnel policies, practices and procedures related to working conditions which are within the discretion of the Employer, including but not limited to

such matters as safety, labor management cooperation, methods of adjusting grievances or appeals, granting of leave, promotion plans, reduction-in-force practices, and hours of work." Article IIIc. defines "negotiation" as, "Bargaining of the Employer and the Union on appropriate issues relating to terms of employment, working conditions and personnel policies and practices with a view of arriving as a mutually acceptable position."

Article V sets forth management rights, generally tracking section 7106(a) of the Statute, but specifically recognizing that the exercise of such rights is "[s]ubject to Subsection (b) of Section 7106 of the Statute." Article XVIII, Section 6, dealing with reduction/separation due to reclassification of a bargaining unit position specifically provides, in part, "RIF procedures do not apply."

Union President Denton testified that during the negotiation of the agreement on project EXPO the subject of the Union's bargaining rights concerning management's implementation of business based actions never came up; there was no discussion of the Union's bargaining rights; and the Union did not waive any such bargaining rights. Labor Relations Officer Nelson took the position that the Union's statutory right to bargain came up when the Union requested to bargain project EXPO; the obligation to bargain on business based actions was completed when bargaining was completed on the implementation of project EXPO; and nothing was said regarding it at the bargaining table because "[w]hen you're doing it, you don't think there's an obligation to mention it. You're living it right then."

Discussion and Conclusions

The General Counsel contends that Respondent violated section 7116(a)(1) and (5) of the Statute by separating five employees and reducing hours of seven employees without bargaining with the Union over the impact and implementation of such actions. The General Counsel claims that while the collective bargaining agreement addresses some of the procedures the Respondent will follow when taking business based actions, the agreement does not specifically cover the impact and implementation of the September 30, 1990 actions. The General Counsel asserts that the Union did not otherwise clearly and unmistakably waive its right to bargain about these matters as the agreement contains no express waiver and the bargaining history or part practice fails to establish such a waiver.

Respondent defends on the basis that it discharged its impact and implementation bargaining obligations when it proposed to change conditions of employment with project EXPO and that there was no change in conditions of employment and, thus, no obligation to bargain, when, some nine months later, it subsequently implemented the conditions of employment which had been formally changed. Respondent also claims that the Union's subsequent proposals concerning the business based actions were in conflict with the NAF EXPO business based actions and were waived by the contract language. Respondent claims the bargaining history also demonstrates a clear and unequivocal waiver as the specific subject of the Union proposal was brought up during earlier negotiations with no action taken by the Union thereon. Respondent asserts that a bargain was eventually struck on the basis of a straight quid pro quo--a one year NAF contract for the unimpeded implementation of NAF EXPO.

Respondent's action in implementing reduced working hours for seven bargaining unit employees and separations for five unit employees constituted a change in conditions of employment resulting in reduced pay and benefits and gave rise to an obligation to bargain concerning the impact and implementation of the change, Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 41 FLRA 690, 696-98 (1991), unless those matters are covered by the parties' negotiated agreement or the Union otherwise clearly and unmistakably waived its right to bargain about those matters. Department of the Navy, Marine Corps Logistics Base, Albany, Georgia, 39 FLRA 1060, 1065 (1991), (Marine Corps, Albany), petition for review filed sub nom. Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. FLRA, No. 91-1211 (D.C. Cir. May 9, 1991).

The Authority considers a matter covered by the agreement, and therefore removed from the area of mandatory bargaining, if the negotiated agreement specifically addresses the particular subject matter of a union's bargaining request. Marine Corps, Albany, 39 FLRA at 1065; Marine Corps Logistics Base, Barstow, California, 39 FLRA 1126, 1133 (1991), (Marine Corps, Barstow) petition for review filed sub nom. Marine Corps Logistics Base, Barstow, California v. FLRA, No. 91-1212 (D.C. Cir., May 9, 1991). Therefore, it must be determined whether the negotiated agreement specifically addresses the particular subject matter of the Union's bargaining request.

The Union requested to bargain over the business based separations and reduction in hours. The Union specifically

wanted to ensure that the employees are covered by the provisions of the collective bargaining agreement, including the reduction in force provisions, and have certain placement and recall rights.

The negotiated agreement specifically incorporated the project NAF EXPO guidelines furnished to the Union by letter dated July 7, 1989. These guidelines contained certain procedures for business based actions to reduce staff, including reassignments, reduction in pay or hours, or separations. The procedures addressed such matters as when advance notification to an employee must be given, what the notice shall contain, and who is entitled to severance pay. The procedures did not include or address such matters as reduction in force rights, seniority rights, placement rights, or recall rights.

Article XVII of the agreement does set forth detailed procedures to govern reduction in force actions including reference to retention registers and competitive levels and that employees be provided extensive placement assistance. However, the parties' NAF EXPO agreement, incorporated as Article XXVII, Section 29, as pertinent here, expressly waived "all language" of the NAF agreement that "conflicts with project NAF EXPO." Since Article XVII sets forth procedures for "reduction in force" and NAF EXPO prescribes the procedures for business based actions to "reduce staff," there is obviously some conflict in the language of the agreement and NAF EXPO. The parties specifically made their negotiated grievance procedure applicable to NAF EXPO. Accordingly, it was agreed that any dispute as to whether language in the agreement conflicts with project NAF EXPO and was waived, or would apply, would be resolved by the negotiated grievance procedure.

Thus, the parties specifically set forth certain procedures for business based actions, and, recognizing that certain other language might conflict, provided a means to resolve that conflict as to whether any other procedure applied. Accordingly, I conclude that the negotiated agreement specifically addresses the particular subject matter of the Union's bargaining request, namely the procedures to be followed and the provisions of the collective bargaining agreement to be applied when local business based actions are implemented.

The agreement itself does not expressly foreclose future bargaining over the implementation of business based actions, and there is no evidence of a past practice of the parties with respect to such actions. However, based on the

parties bargaining history I also find that the Union clearly and unmistakably waived its right to engage in further bargaining on the impact and implementation of the Respondent's September 30, 1990 actions.

The NAF EXPO program was a national Air Force program. It was designed to reduce then existing administrative and procedural requirements. Between July and November 1989 the parties engaged in negotiations to provide for the local implementation of that program at Scott AFB. The only specific discussion of the business based actions procedures proposed by management occurred at the initial briefing. Union President Denton noticed the comment in management's briefing document that "business based action replaces RIF" and commented that the Union could not agree to that. Mr. Nelson pointed out that if the Union advanced proposals, different things could be worked out, for example, RIF actions in place of business based actions. Mr. Denton testified that he was well aware of the existence and importance of RIF rights at the time NAF EXPO implementation was negotiated. He testified that nothing prevented him from addressing RIF procedures in the Union's counter-proposal. Nevertheless, the Union took no action thereon.

The Union was anxious to secure a one year NAF agreement, and management was anxious to implement NAF EXPO at Scott AFB. To take advantage of this situation, the Union counterproposed, in part, a one year NAF contract in exchange for waiving all language in the agreement that conflicts with NAF EXPO except for the grievance procedure and three other items. This, in the Union's view, would also permit a one year test of NAF EXPO.

When such a bargain was eventually struck, a reasonable interpretation is that the parties thereby agreed to the procedures set forth by management in NAF EXPO for business based actions subject to any additional procedural rights that might be available under the agreement, such as the reduction in force provisions, if they did not "conflict" with NAF EXPO and, thus, were not waived. By expressly making the negotiated grievance procedure applicable, the parties thereby agreed to resolve any disagreement as to whether additional language of the agreement applied through the negotiated grievance procedure.

I conclude that when such a bargain was struck as part of a straight quid pro quo, the bargaining history evidences a clear and unequivocal waiver by the Union of bargaining future procedural rights for the implementation of local

business based actions during the life of the agreement.
Cf. U.S. Department of the Navy, United States Marine Corps (MPL), Washington, D.C. and Marine Corps Logistics Base, Albany, Georgia, 38 FLRA 632 (1990).

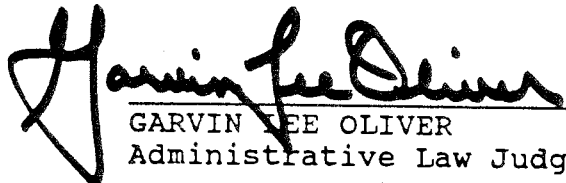
It is concluded that Respondent did not violate section 7116(a)(1) and (5) of the Statute by implementing reduced working hours for seven employees and separations for five unit employees on September 30, 1990 without negotiating with the Union over the impact and implementation of these actions. The record establishes that the procedures followed by the Respondent and applicable to the employees were those prescribed by the parties' negotiated agreement. Respondent's actions on September 30, 1990 did not constitute a change in established conditions of employment. Naval Amphibious Base, Little Creek, Norfolk, Virginia, 9 FLRA 774 (1982). The bargaining history in this case evidences a clear and unmistakable waiver by the Union of any future bargaining rights with respect to the subject of the Union's bargaining request during the term of the agreement.

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

ORDER

The complaint is dismissed.

Issued, Washington, DC, March 19, 1992


GARVIN LEE OLIVER
Administrative Law Judge