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

DEPARTMENT OF HEALTH AND HUMAN SERVICES, REGION IV, OFFICE OF CIVIL RIGHTS, ATLANTA, GEORGIA Respondent	
and	Case No. 4-CA-10346
NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 210 Charging Party	

Patricia A. Randle, Esq. and
William H. Spates
For Respondent

Marcia Fishman, Esq. and
William Harness, Esq. on the Brief
For the Charging Party

Sherrod G. Patterson, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose 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. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent (sometimes referred to as OCR), the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the

Atlanta Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by implementing the reduction and renovation of office space without completing bargaining with the Union on the substance or impact and implementation of the changes and failing to maintain the status quo prior to the renovation after the Union had involved the services of the Federal Service Impasses Panel (FSIP).

A hearing on the Complaint was conducted in Atlanta, Georgia, at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent, the Union and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material National Treasury Employees Union (NTEU) has been the exclusive collective bargaining representative of various of Respondent's employees and NTEU Chapter 210 has been an agent of NTEU for the purpose of representing those employees.

The Office of Civil Rights (OCR) is responsible for enforcing compliance with various civil rights statutes as they apply to applicants or recipients of funds obtained from the Department of Health and Human Services (HHS). The Atlanta, Georgia Regional Office of OCR includes a Regional Manager, two Division Directors, four Branch Chiefs and approximately 13 Equal Opportunity Specialists (EOS). The EOSs are bargaining unit employees whose duties include investigating allegations of non-compliance with HHS civil rights regulations which apply to various HHS entitlement programs. In order to comply with General Services Administration (GSA) space regulations, OCR was required to reduce their workspace from 6,259 square feet to 4,514 square feet. Thus, the OCR facility would require substantial renovations to accommodate the reduced space allocation.

The office space occupied by OCR prior to the renovation had the configuration of a "U" with one shorter side and had exterior floor to ceiling window walls on its three sides. The Regional Manager and two Division Directors had enclosed offices on exterior windows which were enclosed by interior walls from floor to ceiling. The four Branch Chiefs also

had offices on exterior windows but their offices were separated from other work areas by approximately six foot high partitions. Unit employees worked in cubicles which were also partially surrounded by six foot partitions. Testimony revealed that approximately 23 vents located on the ceiling along the window walls provided the primary ventilation to the work area.1/

In early June 1990 Respondent notified its employees and the Union of the space reduction and that the existing work area would have to be reconfigured. The new configuration was to be "L" shaped with only two window sides. Regional Manager Marie Chretien, after consultation with space planners, decided that the most effective and efficient use of allocated space would be achieved by providing Branch Chiefs, Division Directors and herself with enclosed offices and utilizing a modular furniture concept for unit employees. Unit employees' work sites would no longer accommodate a chair for guests and would be somewhat separated from one another by approximately five foot high partitions. Electrical lines would be revised and a new telephone system installed. In the process, a library previously used for interviews, meetings, employee lunches and housing resource materials would be eliminated.2/

On June 12, 1990 Respondent furnished the Union with its proposed floor plan for the work site drawn to scale. The plan revealed, among other things, that all management employees would have fully enclosed offices and the offices of the Regional Manager, both Division Directors and one Branch Chief would be located on outside window walls. One Division Director's office was in a corner of the building and therefore had two window exposures. The floor plan also presented models, to scale, of the modular furniture and the precise work place which would be occupied by all non-supervisory employees as well. On June 25 the Union requested various information from Respondent concerning space allocations before and after the planned renovation.

1/ Apparently other vents within the perimeter of the building were also sources of air supply.

2/ The library was in an outside corner location.

In reply Respondent included the following information:

- Total Space
  Before - 6,274 square feet
  After - 4,498 square feet

- Linear feet of window space
  Before - 91
  After - 51

- Enclosed space
  Before - 940 square feet
  After - 1356 square feet

- Average square feet of Work Stations
  Before - 142 square feet
  After - 109 square feet

. . . . .

- Description of Methodology to assign space:

  We plan to assign to the extent possible, all staff in the VCO Division to the space on the Spring Street side of the building. The Investigation Division will be assigned to the Marietta Street side of the building. All of our Equal Opportunity Specialist, except Supervisors, are GS-12 except one which is a GS-11. Two un-filled vacancies will be filled at the GS-7 level. To the extent possible, window space will be assigned by GS-12 seniority in the two Divisions.

- New enclosed space will be on the interior walls with the exception of two Division Directors who currently occupy window space. Those are on the Marietta Street side. As a result of the configuration of our space, one Branch Chief enclosed space will be partially on window space on the Spring Street side.

The result would place the Regional Manager on a window at one end of the "L" shaped facility, one Division Director next to the Manager's office on the window wall, one Division Director at the corner of the "L" with two window walls and one Branch Chief on the window wall at the far end of the"L".

On July 12, 1990 representatives of management and the Union met to discuss the matter. Union representatives expressed their concern that the proposed renovation appeared to them to constitute an inequitable distribution of space and degradation of the work environment for unit employees as a result of the perceived conversion of premium space by management.

On July 13, 1990 Union steward James Simpson, responsible for negotiations concerning redesign of the office on behalf of the Union, wrote to Regional Manager Chretien and conveyed the Union's objections to Respondent's proposed plan as follows:3/

> OCR proposes to reduce its total space by 28.3% and the average work station of bargaining unit professional staff by 45.5% (existing work stations are 88 sq. ft., proposed work stations are 48 sq. ft.). At the same time, OCR proposes to increase branch chief space from 88 sq. ft. to 120-140 sq. ft. and enclose this new space with wall construction. Total new GM enclosed space will increase by 44.2%.
>
> OCR proposes to build two large enclosed offices (200 sq. ft. each) on window walls currently open in the agency's new location.
>
> OCR's GM staff, at a time of proposed total reduction in floor and window space, are appropriating grossly disproportionate shares of total space and window space at the expense of bargaining unit members.
>
> NTEU will not object to all GM staff having enclosed offices if OCR will arrange them on interior walls only, excepting the Regional Manager space and an extension of the existing window office occupied by Mr. Givens.

The Union supplemented its July 13 letter by a memorandum of July 18 in which it expressed its concerns regarding the health and safety of unit employees due to its view that offices along the outer walls of the workspace

---

3/ The communication also noted various areas of agreement on the renovation plans.

would interfer with proper air flow of the primary ventilation through the work area. The Union also supplied rough sketches of its proposals for possible office locations, the majority of which were away from outer walls. The July 13 letter stressed the Union's concern with the increase in enclosed or "closed space" and decrease in "open space" and the Union's desire to maximize unit access to exterior window walls.

Regional Manager Chretien replied to the Union's July 13 and 18 correspondence on August 10, 1990. Chretien's letter indicated she had consulted with the building management engineers and she rejected the Union's contention that a health or safety issue was presented by the location of the Division Director's offices along the outer walls and enclosed correspondence from building engineer to support her position. Chretien's response further stated:

> The floor plan which we designed provides for functional location of Division Directors, Branch Chiefs, and the employees whom they supervise. Your proposal does not allow management that prerogative to the extent that management deems it appropriate and necessary.

Thereafter, the parties acknowledged that "outside" help was necessary and Respondent's Personnel Office wrote to the Federal Mediation and Conciliation Service (FMCS) for assistance. The request indicated that at issue was ". . . the impact and implementation of changes to office space - specifically the building of enclosed offices for two (2) Division Directors against present window areas". The parties met with a mediator on September 1 and October 16 but with no success. Management's proposed office arrangement remained exactly the same as its initial proposal presented to the Union on June 12. According to Union chief negotiator Simpson, he met with other Union officials after the mediation session and "did some cutting and pasting" to produce an "alternate" Union proposal. On October 17, 1990 the Union sent management the following proposal:

1. All new construction be on interior walls only. NTEU is amenable to the building of two Division Director's offices against the windows if they are confined to the extreme rear and front area of your agency. One office maybe placed at the site of the present location of Ms. Chretien's office (front area) and at the site of Mr. Lloyd Givens office (rear). These

locations will be the least restrictive in terms of the configuration of floor space and air flow, along with similar associated problems. We are attaching a diagram.

2. If OCR feel that the proposal is unacceptable, NTEU proposes that we return to our initial position that no new offices be built against existing window space. We request that our position be presented before a Federal Impasse panel.

a. At a minimum, NTEU request that the Impasse panel determine whether the following things should be done as an aside to any new construction in the Office for Civil Rights.

> The completion of an impact study by NIOSH on the present quality of existing air in your agency and the impact of space reduction (e.g. office enclosures, and any future increation [sic] of staff) might have on future air quality.
>
> The completion of an impact study on what possible effects the heat and radiation from DPU's and other heat producing office equipment might have on existing and future air quality.

The diagram the Union attached to its written proposal showed the locations of the offices it was concerned with plus the placement of the modular furniture. The Union's proposal would remove the Division Director's office from the corner of the "L" on two window walls and put one Division Director's office on a window at one end of the "L" shaped facility and the Regional Manager's office and the other Division Director's office on the other end of the L. Branch Chiefs would all have enclosed offices on interior walls. The Union closed by indicating it would be available for further discussion.

Having received no reply from Respondent, Union chief negotiator Simpson sent Respondent the following letter dated November 15, 1990:

> On October 16-17, 1990, the NTEU engaged you and the Office for Civil Rights in substantive dialogue concerning OCR's plans on office space reduction

through systems furniture. NTEU placed before you and the legal representative of the Federal Impasse Panel a final proposal which would resolve this matter. You were given a reasonable period of time to respond to this proposal. It has been approximately twenty-nine (29) days since that meeting and we have not had a response from you concerning our latest proposal. Inasmuch as NTEU is limited in the amount of time that it can expend on informal discussions concerning space reduction in any one agency, we must request that you respond to us and the Impasse Panel Representative within three (3) working days of the receipt of this letter. Your failure to respond in the allotted timeframe will signify to NTEU that you have rejected the proposal. We will then take appropriate actions to fully resolve this stalemate.4/

We caution you against taking any action concerning the initiation of any construction within your work place until this matter is formally resolved. We urge you to continue to bargain impact and implementation of your proposal of space reduction in good faith.

After receiving the Union's proposal of October 17, Regional Manager Chretien consulted a space planner from Respondent's Regional Administrative Support Center and received the following information:

A furniture systems planner from Unicor reviewed the proposed plan labeled Attachment "A" this week and made the following observations:

(1) When using the 1/8 scale, the furniture placement in Plan "A" (the Union Proposal) doesn't allow sufficient space for accessibility to the work stations. All files need to be accommodated in Plan "A" and Plan "B" (Management's plan).

(2) In Plan "A" a secretary's work station would have to be provided in close proximity to the Division Director. This would require a

---

4/ Apparently Simpson thought the Federal Service Impasses Panel and the FMCS were related organizations.

modification to the configuration of furniture, resulting in an increase of planning and procurement costs.

(3) Both Plan "A" and Plan "B" must be able to accommodate an emergency exit. The emergency exit in Plan "B" is more accessible to staff.

I trust this analysis by Ms. Amy Galloway from Unicor will provide you with the information you need to make your decision.

On November 16, 1990 Chretien sent the Union the following letter:5/

The National Treasury Employees Union presented on October 17, 1990 . . ., NTEU's final proposal before the Mediation and Conciliation Service. This proposal was in regard to the Office for Civil Rights' space reduction plan.

The final proposal presented by NTEU dated October 17, 1990, has been examined by the Division of Administrative Services, a space planner from Unicor Federal Prison Industries, Incorporated, and the 101 Marietta Tower construction engineer. Additionally, I, as the Office Manager, have examined the proposal. Based on all information available to me, it is my decision that the NTEU's proposal dated October 17, 1990, is not acceptable. The proposal is not acceptable and cannot be implemented for the following reasons:

-- Management's need for both Division Directors in close proximity to the Regional Manager, as well as, the staff which they supervise;

-- Other Management priorities designed to improve office productivity and quality of the work product, as well as, to enhance open and positive communication between all members of the staff.

5/ Regional Manager Chretien testified she did not recall receiving the Union's November 15 letter before she sent her own November 16 letter.

-- NTEU's proposal does not allow sufficient space to enter and exit the individual cubicles. It does not allow for sufficient space to provide for an emergency exit at the rear of the rear of the work space. This proposal would place OCR's work space in noncompliance with the Uniform Federal Accessibility Standards, which proscribe technical requirements for making the work space accessible to disabled persons. OCR is charged with enforcement responsibilities for compliance with Section 504 of the Rehabilitation Act of 1973.

-- The Division Director's Secretary must be in close proximity to the Division Director. Additionally, NTEU's proposal would call for additional procurement and planning expense to modify the configuration of the clerical work station.

Installation of the system furniture has been fixed for December 12, 1990. All demolition, re-construction, carpeting and painting must be completed prior to December 12, 1990. The best estimate is that at least three (3) weeks prior to the December 12, 1990, delivery date is required to complete construction. The construction and installation was planned for this period, to cause a minimum of disruption to staff and the required government work. During this period, most staff are in travel or on vacation. Any further delay in completing the required space reduction will cause a severe disruption of the required mission of this office, inconvenience to staff and financial costs which is fiscally irresponsible given the current budget constraints.

We must go forward with our plans as approved by GSA and presented to NTEU on June 12, 1990.

On November 19, 1990 the Union replied to Respondent's November 16 correspondence with a letter similar to the Union's November 15 letter, indicating the matter was at impasse and being referred to the "Federal Mediation and Conciliation Service Impasse Panel for a resolution". The Union also cautioned Respondent against initiating any construction until the matter was formally resolved.

Regional Manager Chretien replied to the Union on November 26, 1990 as follows:

> This responds to your letter to me dated November 19, 1990, concerning the bargaining impasse we have reached.
>
> My letter to you dated November 16, 1990, explained why the final proposal presented by NTEU on October 17, 1990, is not feasible. I did in fact give every consideration to your proposal by having professional space planners re-evaluate the plan. GSA requirements, accessibility requirements for the disabled under Section 504 of the Rehabilitation Act of 1973, the needs of our employees, and management needs were all reconsidered. Thus, the timeliness of my reply was affected by the fact that other professional advice was sought before my decision was made.
>
> I am advised by the Regional Labor Relations Officer that my November 16, 1990, letter constituted appropriate notice that after having negotiated in good faith to impasse and employing the assistance of a Mediator from the Federal Mediation and Conciliation Service, there exists an overriding exigency that necessitates implementation of the construction plans approved by GSA and presented to you on June 12, 1990.6/

By letter dated November 26, 1990 the Union sent a Request for Assistance to the FSIP, a copy of which Respondent received on November 30. The request indicated that the issue was enclosed offices against outside windows for Division Directors, the Union taking the position that the Agency's proposed construction would obstruct air flow to bargaining unit employees working in the surrounding areas. The request further stated: "The Union has suggested several alternative methods of meeting the Agency's perceived need for this space, including; constructing the new offices along interior walls and constructing them in the extreme rear and front areas."

6/ A Labor Relations Specialist testified that she had discussed the contents of this letter with Chretien before it was sent to the Union and Chretien was warned" . . . that by construction of these offices we were doing so at our own peril."

Regional Manager Chretien met with OCR employees on November 28, 1990 and told them the renovation would proceed. Chretien testified that she implemented the renovation at this time since around this time most employees take holiday leave or are in travel status so the renovations would have less of a disruptive affect on business operations, and she wished to have the work completed by the end of the calendar year since the continuing negotiations with the Union pushed renovations beyond the end of the fiscal year (September 30) as she had originally planned.7/ Remodeling of the OCR office space was completed on December 19, 1990.

Additional Findings, Discussion and Conclusions

The General Counsel essentially contends Respondent violated the Statute when it implemented the remodeling of its facility without completing bargaining with the Union, including presentation of the matter before the FSIP, on the substance, impact and implementation of the office renovation and further violated the Statute by failing to maintain the status quo after the Union timely invoked the services of the FSIP. As part of a remedy, the Charging Party requests a return to the status quo ante. The General Counsel urges that Respondent be required to return to the status quo ante by eliminating "the four new offices", but does not urge replacing the modular furniture or new carpeting or telephone system before the matter is considered by the FSIP.8/

Respondent denies it violated the Statute and takes the position that the Union proposal: did not relate to conditions of employment of unit employees; directly interferes with the Agency's right to determine the technology and methods and means of performing its work and; violates applicable law. Respondent further contends that it implemented the changes herein prior to the services of the FSIP being invoked and, in any event, the Agency was privileged to implement the change due to "overriding exigency" and consistent with the necessary functioning of

---

7/ The record does not disclose the precise date specific renovations actually began.

8/ I am not sure what specific offices counsel for the General Counsel is referring to.

the Agency.9/ Respondent takes the position that if a violation of the Statute is found to have occurred, a return to the status quo ante would not be an appropriate remedy.

The record reveals that the total amount of space allocated to Respondent was the result of "downsizing" to come into compliance with GSA space utilization regulations. These regulations are Government-wide regulations within the meaning of section 7117(a)(1) of the Statute. American Federation of Government Employees, Local 12 AFL-CIO and Department of Labor, 19 FLRA 161 (1985). Respondent's testimony in support of this claim was never challenged by the General Counsel or the Charging Party. Thus, I conclude the decision to reduce space was beyond the duty to bargain. See American Federation of Government Employees, Local 12, AFL-CIO and Department of Labor, 27 FLRA 363 (1987). However, while the decision to reduce the space occupied by Respondent was nonnegotiable under the Statute since the action was taken to conform to a Government-wide regulation, Respondent nevertheless was obligated to negotiate with the Union on the impact and implementation of the change. See Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA 543 (1982) and Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 31 FLRA 651 (1988) (SSA Mesa) dealing with the Agency's obligation to negotiate concerning its decision to adopt "Front End Interviewing" procedures.

In Department of Health and Human Services, Social Security Administration, and Social Security Administration Field Operations, Region II, 35 FLRA 940, 948-949 (1990) the Authority stated that after impasse in negotiations have been reached, an agency must afford a union sufficient notice of when a charge will be implemented in order to provide the

---

9/ Various of Respondent's positions and arguments overlap and are intertwined in support of its numerous defenses. In such instances it is not always clear as to the weight of such arguments counsel for Respondent is urging be given to a particular matter. Although not always specifically mentioned in my treatment of a subject I have nevertheless considered all such arguments and the entire record evidence when dealing with specific issues raised by Counsel.

union with a reasonable opportunity to timely invoke the services of the FSIP. In the case herein Respondent and the Union engaged in negotiations on matters flowing from the reduction in space allocated to the activity on various occasions between July and October 17, 1990 when the Union presented Respondent with its final proposal. Although Respondent's position had not changed since it initially supplied the Union with its proposed floor plan on June 12, 1990, in its final proposal of October 17 the Union was satisfied to accept Respondent's proposed renovation plans with the exception of the placement of the Division Director's office with the two window walls. The Union clearly indicated that this was a final offer and failure to agree with the proposal would result in placing the impasse before the FSIP. Respondent's November 16 rejection of the Union's October 16 proposal resulted in the Union's November 19 announcement to Respondent that the impasse was being forwarded to the FSIP for resolution and admonition not to begin construction at the facility. On or about November 26 the Union sent the FSIP a request for assistance to resolve the impasse, a copy of which Respondent received on November 30, concerning the window corner placement of the Division Director's office. However, renovations proceeded sometime after Respondent notified employees on November 28 of the pending renovations.

In Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA 466 (1985) (BATF), the Authority held:

> . . . once parties have reached an impasse in their negotiations and one party timely invokes the services of the Panel, the status quo must be maintained to the maximum extent possible, i.e., to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action is deemed appropriate. A failure or refusal to maintain the status quo during such time would, except as noted above, constitute a violation of section 7116(a)(1), (5) and (6) of the Statute.

Based on the record herein I conclude the Union invoked the services of the FSIP in a timely fashion. Respondent was aware of the impasse in mid-October 1990 after the last meeting with the Union since its own position had not changed regarding the one outstanding issue--the location of the District Director's office--from when it was originally drawn up in July and clearly Respondent's position was not

going to change. In its October 17 letter, the Union indicated Respondent's failure to agree to its proposal would result in FSIP procedures being invoked and on November 19 the Union unambiguously stated the matter was being referred to the FSIP for resolution and indicated proceeding with construction in these circumstances would be improper. On November 30 Respondent received formal notification of FSIP having been contacted by the Union by letter of November 26, but nevertheless sometime later began the actual construction at the site. No evidence was submitted that on November 30 construction had begun on the site and absent credible evidence, which Respondent surely would have submitted if it existed, I infer that actual construction did not begin until after Friday, November 30. In these circumstances I find and conclude Respondent improperly implemented the renovations while the parties impasse was pending before the FSIP. In any event I conclude that even if construction atually commenced on November 30, in order to avoid violating the Statute the circumstances herein would have required Respondent to restrain from proceeding with construction at that time since Respondent was clearly put on notice the Union was in the process of invoking the services of the FSIP.

Respondent contends that the Union's proposal did not relate to "conditions of employment" of unit employees since it pertained "exclusively "to a non-bargaining unit employee. Respondent argues that under Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235 (1986) (Antilles) and subsequent cases, the Authority, in determining whether a proposal involved a condition of employment of bargaining unit employees, indicated it would consider whether (1) the matter proposed to be bargained pertains to bargaining unit employees and the record establishes that there is a "direct connection" between the subject matter of the proposal and the work situation or employment relationship of bargaining unit employees. Respondent also cites American Federation of Government Employees, Local 32 AFL-CIO and Office of Personnel Management, 33 FLRA 335 (1988), enforced sub nom. U.S. Office of Personnel Management v. FLRA, 905 F.2d 430 (D.C. Cir. 1990) (Office of Personnel Management), for the Authority holding that a proposal which affects both employees in and outside the bargaining unit is negotiable under the Statute if it "vitally affects" the working conditions of unit employees and (2) is consistent with applicable law and regulation. The Authority subsequently held that under the "vitally affects" test, the effect must be "significant or material" as opposed to "indirect or

incidental." See Federal Employees Metal Trades Council of Charleston and U.S. Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 36 FLRA 148 (1990) (Charleston Naval Shipyard). Thus Respondent argues that there is no reliable and probative evidence that enclosure of the corner office or its location had a "direct effect" on the working conditions of unit employees or had a "significant and material" as opposed to an "indirect or incidental" effect on unit employees. Rather, Respondent suggests, the evidence indicates that erection of the supervisory office in the corner did not affect the air quality in the open area occupied by unit employees.

Respondent's argument is rejected. If the Union's demands are met, the window space Respondent reserved for the District Director will be given to unit employees. The Authority has held that the location in which employees perform their work, and other aspects of employees' office environments, are "matters at the very heart of the traditional meaning of 'conditions of employment.'" U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, et al., 36 FLRA 655 at 668 (1990) (HHS Fitchburg District Office) citing Library of Congress v. FLRA, 699 F.2d 1280, 1286 (D.C. Cir. 1983). The Authority also stated in HHS Fitchburg District Office at 668 that "employees and management's competing interests in office space 'present the sort of questions collective bargaining is intended to resolve'" citing National Treasury Employees Union, Chapter 83 and Department of the Treasury, Internal Revenue Service, 35 FLRA 398 (1990) (Internal Revenue Service). In my view what is at issue herein clearly concerns unit employees' work environment. Thus, if the Union's demands are met, the window space Respondent reserved for the District Director's office will be given to unit employees. The question of the justification the Union uses to obtain that space to maximize the amount of window space available to unit employees does not determine the negotiability of the demand. The basic issue herein concerns the location of unit employees and where they wish to be situated. The Union may have taken its position based upon what it perceived as an adverse affect the floor to ceiling walls of the District Director's office has on air circulation or convection transfer of heat or cold off the windows or a desire to have more natural light available to unit employees or a more pleasant view. However, in my opinion the Union need not specifically prove air will circulate better without the walls or prove employee morale would be improved by having more natural light, etc. available in order to establish that the location is a

condition of employment since clearly the location of unit employees in which they perform their work has been acknowledged to be a negotiable condition of employment within the meaning of Antilles, Office of Personnel Management and Charleston Naval Shipyard. See HHS Fitchburg District Office and Internal Revenue Service.

Respondent also contends the Union's proposal directly interferes with the Agency's right to determine the technology, methods and means of performing work. As to the "methods and means" argument, in National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service, Ft. Lauderdale, Florida, 41 FLRA 1283, 1288-1289 (1991) (IRS Fort Lauderdale) the Authority summarized its approach to such questions as follows:

> The Authority employs a two-part test to determine whether a proposal interferes with management's right to determine the methods and means of performing work. First, an agency must show a direct and integral relationship between the particular method or means the agency has chosen and the accomplishment of the agency's mission. Second, the agency must show that the proposal would directly interfere with the mission-related purpose for which the method or means was adopted.
>
> The Authority has construed "method" as referring to the way in which an agency performs its work. "Means" refers to any instrumentality, including an agent, tool, device, measure, plan or policy used by an agency for accomplishing or furthering the performance of its work. Id. at 407. The term "performing work" is intended to include those matters that directly and integrally relate to the agency's operations as a whole.
>
> The relative importance of a particular "means" of performing work is irrelevant to a determination of whether a proposal interferes with the right to determine the methods and means of performing work. The means employed need not be indispensable to the accomplishment of an agency's mission. Rather, the means need only be "a matter that is 'used to attain or make more likely the attainment of a desired end' or 'used by the agency for the accomplishing or furthering of the performance of its work.'" . . . (Citations omitted).

Respondent seeks to support its position that the placement of the one District Director's office constituted a "method" or "means" of performing Agency work by alluding to the reasons its set forth in its letter to the Union of November 16, 1990, supra, specifically, the "need" for both Division Directors to be in "close proximity" to the Regional Manager and the staff they supervise and to further other management priorities designed to improve office productivity and quality and enhance open communication between all members of the staff. Respondent in its brief further relies on testimony of Regional Manager Chretien that such close grouping of employees would facilitate: the handling of complex cases; handling compliance reviews in teams; and insure that confidentiality of the work in the office (files and employees conversations) would be secure from member of the public who come into the office. Respondent also suggests that the Union proposal would prevent the District Director's secretary from being located near to his office. Thus Respondent essentially argues that the Union's proposal, which is that the Division Director's office not be on the window corner, would interfere with management's right to determine its methods and means since only if the District Director's office is located in the window corner can the Agency determine the methods and means of performing its work.

Applying the Authority's two part test, supra, I conclude the Union's proposal does not interfere with management's right to determine methods and means of performing work. The entire office space which houses OCR is relatively small, comprising only approximately 4500 square feet of overall space and a total of 91 linear feet of window space on two walls which define the outside of the "L" shaped space. Accordingly, "proximity" of the various employees to supervisors cannot be of such a significant problem as Respondent makes out. Further, notwithstanding the matters which Regional Manager Chretien raised in her testimony, Respondent obviously performed its mission in a competent manner prior to changing the floor plan and there is no credible evidence that problems covering communications, confidentiality or case handling previously existed.10/ Indeed it appears that Respondent's exaggerated support for its methods and means argument simply indicates a preference in the placement of the office in question in

---

10/ Chretien acknowledge on cross-examination that she had not been told by supervisors in the recent past that OCR had not been meeting its minimum performance requirements.

performing its work. The Union's essential position was that the office not be not placed on the outside corner wall with no particular preference as to its placement, or the placement of employees, as long as additional window space was not utilized. Respondent had a wide range of configuration options open to it which would not interfere with its right to determine the methods and means of performing its work which it chose not to explore or consider. Accordingly, Respondent's arguments are rejected.11/ See Internal Revenue Service at 406-409 and IRS Fort Lauderdale at 1290.

With regard to Respondent's claim that the Union's proposal directly interferes with the Agency's right to determine the technology of performing work, the Authority has held that in order to support such an assertion an agency must demonstrate that its choice of office space design has a technological relationship to accomplishing agency work and that the union's proposal would interfere with the purpose for which the office space was adopted. American Federation of Government Employees, Local 12, AFL-CIO and Department of Labor, 25 FLRA 979, 983 (1987). Respondent avers that the technological relationship requirement is established since the lack of library space in the new work area created a need for private enclosed offices where Branch Chiefs and Division Directors could talk to individual employees and conduct staff meetings in a confidential setting.12/ Respondent also argues that the Union's proposed design for the office lay-out was not technologically feasible and interfered with the work technology due to lack of sufficient space for certain employees, lack of adequate room for employees to maneuver through the office, and did not provide privacy for those coming to the office on business.

I reject Respondent's contentions. While enclosed offices may well facilitate confidential discussions and private meetings, I am unpersuaded by the record that the location of the one office in dispute in the circumstances herein has a technological relationship to accomplishing agency work. The Union's proposal was essentially that the

---

11/ Related arguments urged by Respondent to support this contention are similarly unpersausive.

12/ Testimony indicated that confidential employee discussions and staff meetings were previously held in the library.

one Division Director's office be located somewhere away from the window. Clearly the Union was not concerned with the placement of other employees to facilitate the objective of having only a minimum of window area blocked by management offices. In my view facilitating the location of employees, meetings with employees and the public, and assurance of confidentiality are not substantially affected by the placement of the office in question in this rather limited office space. Nor is it reasonable that only Respondent's design would permit sufficient space for placement of emergency exits or otherwise as Respondent implies. Accordingly, I conclude Respondent has not demonstrated that the placement of the Division Director's office in question has a technological relationship to accomplishing the Agency's work nor has it shown that the Union's proposal of getting the office away from the window would significantly interfere with management's legitimate functions. See American Federation of Government Employees, Local 12, AFL-CIO and Department of Labor, 27 FLRA 363 (1987).

Respondent also argues that the Union's proposal interferes with the accomplishment of the Agency's work because it does not allow sufficient space for employees to enter their cubicles or sufficient space to provide for file cabinets or an emergency exit and "would place OCR's work space in noncompliance with the Uniform Accessibility Standards, which (set forth) technical requirements for making the work space accessible to disabled persons." Again, it is clear that the Union's underlying proposal in this entire matter is to have the one window office on the corner of the workspace placed elsewhere so the work area would be opened up and employees would have more access to free flowing air and outside view. In all other respects the layout of the office does not appear to have been of any substantial concern to the Union as long as window space was open to employees. The plan the Union submitted to Respondents on October 17 was obviously merely an attempt to show how the office in question could be relocated within the work area and not an engineering proposal for the specific placement of all employees, furniture and fixtures. Further, no persuasive evidence has been presented as to how moving the one office away from the window would not permit sufficient space for employee movement, file cabinets, an emergency exit or prevent the facility from compliance with law regarding accessibility for disabled persons.

Accordingly, based on the foregoing and the entire record herein I reject Respondent's claim that the matter concerned the technology, method or means of accomplishing

the Agency's work and it was therefore privileged to proceed with renovation of the office without fulfilling its Statutory bargaining obligations with the Union.

Respondent further contends there existed an "overriding exigency" which privileged Respondent to implement the renovations when it did, even if the matter was pending before the FSIP, and such implementation was "consistent with the necessary functioning of the agency." To support its contention Respondent suggests: a need to spend money that had been obligated for the fiscal year ending September 30, 1990 in conjunction with uncertainty whether money would be available later on; November and December renovations would be less disruptive to the office since numerous employees would be on leave during that period, and; delay in renovations could well result in a rise in construction costs if implemented at a later date.[13/]

The record evidence discloses no requirement that allocated money for the reconstruction be spent before September 30, and indeed it was not, nor is there anything more than speculation that the delay in implementing the reconstruction would have any definite adverse financial consequences on Respondent. Further, some employee disruption is to be expected during reconstruction of an office and the explanation concerning lessening the disruption was unpersuasive when considering the legal obligations imposed by the Statute and, in any event, was conclusionary at best. Moreover a possible rise in construction costs if a delay occurred because of fulfilling legal obligations under the Statute is insufficient, standing alone, to vitiate these obligations. Cf. U.S. Department of Housing and Urban Development and U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri, 23 FLRA 435 (1986). Thus, the reasons Respondent proffers simply are not adequate to constitute an "overriding exigency" justify implementation of the renovations while the matter was pending before the FSIP nor does the evidence herein indicate that Respondent's actions were taken "for the necessary functioning of the agency" so as to privilege its conduct from constituting a

---

13/ A telephone contractor indicated that he could not guarantee past December the original pricing of a new telephone system agreed to in June 1990 and if his costs increased, he would want to renegotiate the price of the equipment.

violation of the Statute. Cf. 22 Combat Support Group (SAC), March Air Force Base, California, 25 FLRA 289 (1987); Bureau of Government Financial Operations Headquarters, 11 FLRA 334 (1983); and Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA 466 (1985). Accordingly, Respondent's contention is rejected.

Remedy

Counsel for the General Counsel and counsel for the Charging Party very strongly urge that a remedy be imposed requiring Respondent return the facility the to status quo ante prior to the parties resuming negotiations on the matter. Counsel for the General Counsel would however only eliminate the "four new offices" so the Union will be allowed to submit the issue to the FSIP on an "equal footing" with Respondent.14/ Indeed the General Counsel and Charging Party argue the only effective remedy in situations as herein must include a return to the status quo ante. Thus the Charging Party argues:

> . . . The mandate of the Statute to bargain in good faith over conditions of employment is indeed rendered meaningless if an agency can, with impunity, make unilateral changes and suffer only the consequences of a posting and a prospective bargaining order. By the time the change has been unilaterally made, irreparable damage has been done, both to the affected employees' working conditions and to the bargaining relationship. What possible motivation would any agency have to obey the law if it knew that its decision to impose changes unilaterally would not be reversed? When managers as stubbornly insistent as Ms. Chretien were involved, there would be no stopping the unilateral modification of the work environment, whether it be matters relating to office space or other negotiable matters.

Similarly, the General Counsel argues:

> To not impose a status quo ante remedy here will send a message to other agencies or managers that it is all right -- so long as they build new walls -- to implement where it is undisputed that

---

14/ It is not clear to me which offices counsel would designate as the "four new offices."

implementation has adversely affected some employees and while a matter is pending before the Panel. If this is the case, the bigger the project, the less likely it will be that a judge will order an agency to restore an office to its pre-implementation floor plan because of the expense and disruption to operations involved. This would preclude the Panel from becoming involved in any matter involving changes in floor plans, and strike a severe blow to any union's chance of ever prevailing in such a matter, notwithstanding the reasonableness of its proposals.15/

I have found above that with regard to the renovation, Respondent was obligated to bargain with the Union on the impact and implementation of such decision. In Federal Correctional Institution, 8 FLRA 604 (1982), the Authority held that in making a determination whether to impose a status quo ante remedy in a particular case which involved the obligation to bargain over impact and implementation, it would consider 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.

Respondent contends that a status quo ante remedy would be inappropriate. Respondent takes the position that its conduct was not willful and unit employees were only minimally affected by the change. However, I conclude Respondent's implementation of the renovation under the circumstances herein constitutes willful conduct within the

---

15/ In my view the FSIP is not precluded from ordering changes in floor plans when resolving a negotiation impasse. However, I am unaware of any case where the FSIP has ever imposed such a requirement.

meaning of Federal Correctional Institution. I also conclude the record clearly establishes that the renovation had a substantial adverse impact on working conditions of unit employees. Virtually the entire work area changed. Cf. HHS Fitchburg District Office, at 668. Individual work spaces and furniture was replaced and unit employees' offices would no longer accommodate guest chairs. The new arrangement permits employees less privacy than they previously enjoyed. Being placed closer together, noise and heat from office equipment is more noticeable to unit employees. Moreover, with the reduction of outside windows available to unit employees since additional enclosed managerial offices are now located on the outside window walls, employees have a diminished availability to light and view. Further, the Union was concerned with what it perceived as a lessening of ventilation and air circulation occasioned by enclosed offices being placed against the outside walls where air vents were located in the reduced work areas.16/

Respondent further urges that a status quo ante remedy in this case should not be imposed because it would severely disrupt the Agency's operations. Respondent argues the space it previously occupied has been released back to SSA;17/, the old furniture has been given to other agencies, new "system furniture" was purchased at a cost of almost $85,000 and if a new space design is agreed to, additional system furniture might be needed; the old telephone system, which would be costly to reinstall and maintain, has been

---

16/ The Property Manager for the building testified that no curtailment of air circulation or ventilation to the open area in the office would occur by the placement of enclosed offices on the outside window walls. However, he did acknowledge "minimal" convection currents of hot or cold air radiated from the window walls. The Union President testified that since the renovations the Union has recieved more complaints of upper respiratory ailments. I would leave a final determination as to the actual effect of enclosed offices on the heat, air conditioning, and general ventilation on unit employees working in the internal office area to the FSIP if the matter found its way to that forum.

17/ However, the space was unoccupied at the time of the hearing and testimony indicated the space was being made available for occupancy by the Regional Special Program Coordinator for Administrative Services Division of HHS.

traded in and a new system purchased and installed at a cost of approximately $10,000; the new telephone system permits the staff to "function more effectively and efficiently"; and tearing down walls erected by the renovation and reconstructing the OCR "the way they were" would cost in excess of $22,000, $6000 alone to demolish and reconstruct the corner office. Regional Manager Chretien testified that a return to the status quo ante would result in "total chaos."[18/] Thus Chretien testified that in addition to problems concerning restoring a telephone system and obtaining furniture for employees:

> You would have to remove staff while walls are being demolished, carpet being removed from the floor. We have some very delicate and cheap computers that can not stand a lot of manipulation in terms of moving them around too much. Plus, for security reasons, I can't move those computers into some temporary space that I do not have control over, because of the sensitive nature of the information that is stored in those computers.
>
> (Employees) would be disrupted in terms of time frames that have been given to them by their supervisors for processing the cases because they would be moved from where they are now working to some temporary quarters where they may or may not have all of the supplies and equipment available to them to get their work done.
>
> Q. How about the work that the (employees) do, in meeting time frames, and meeting goals?
>
> A. All the time frames would go out of the window, as well as our goals going out of the window. Which would certainly have an impact on all of our performance.

18/ I was unimpressed with Ms. Chretien as a witness and I found she was inclined to substantial exaggeration. Indeed, she implied in her testimony that a return to the status quo ante may delay the processing of cases involving AIDS complaints who might die during the delay. Obviously the Agency would take precautions in case handling to insure that the expeditious processing of such cases continued in a normal fashion.

Q. The work that you do, how would it be affected?

A. We couldn't do it if we were in such turmoil.

Respondent also suggests that by taking away the new "state of the art" and more pleasant office equipment, fixtures and surroundings, employee morale would suffer from a return to the status quo ante.

Respondent urges that if a violation is found, a prospective bargaining order would be an appropriate remedy to effectuate the purposes and policies of the Statute. Respondent indicates that in the alternative a bargaining order with a retroactive effect might be suitable citing e.g. Department of the Treasury Custom Service, Washington, D.C. and Customs Service Northeast Region, Boston, Massachusetts, 38 FLRA 989 (1990).

The General Counsel's and Charging Party's arguments for a remedy embracing a return to the status quo ante are persuasive. Indeed, the Authority has held that effectuation of the purposes and policies of the Statute may require a return to the status quo ante in order not to render meaningless the obligation to bargain. See Department of the Navy, Navy Underwater Systems Center, Newport, Rhode Island, 30 FLRA 697, 701 (1987). The Authority has also held that the purpose of "make-whole" remedies is to place those who have been adversely affected by an improper action back into the situation where they were or would have been if the improper action had not occurred. See Department of Health and Human Services, Social Security Administration, Dallas, Texas, et al., 32 FLRA 521, 525 (1988). Thus, a "make-whole" remedy effectuates the purposes and policies of the Statute where it does not substantially disrupt or impair the efficiency or effectiveness of the agency's operations. Id.

In my view a remedy calling for a prospective bargaining order without a return to the status quo ante in some measure in this case would render meaningless the obligation to bargain. To effectuate the purposes and policies of the Statute the parties should be returned to the office arrangement in existence when Respondent engaged in the illegal conduct found herein so that in future bargaining on the matter the parties can proceed on an equal footing. Otherwise, if the change were allowed to remain in effect during future negotiations, the Union would have to convince Respondent, and perhaps eventually the FSIP, to first undo what the Agency wanted to do in the first place and then

accept what the Union has proposed. The Union should not be placed in such a disadvantageous position when it is not the party responsible for the Statutory violation and current situation. However, I am not unmindful of the disruption which would occur in the work place while the renovations were occurring.21/ But any remedy, no less a remedy requiring a return to the status quo ante, will result in some disruption to the efficiency and effectiveness of the operations to some degree. The more substantial the illegal change, the more substantial the disruption required to return the situation to conditions in existance prior to the agency's conduct. This was the Respondent's risk or "peril". In any event, when Respondent initially renovated the facility in December 1990 it obviously worked through the attendant disruption satisfactorily and there is no reason to believe it cannot do so to return the work place in some degree to what it was previously and properly function while fulfilling its collective bargaining obligations.

Having considered the request for a status quo ante remedy, and keeping in mind the above holdings of the Authority, and having applied the criteria announced in Federal Correctional Institution, and in all the circumstances herein, I conclude a partial status quo ante remedy is appropriate in this case. Returning to the prior office area, office furniture, layout, space assignments, telephone system, carpeting, etc. would, in my judgment go further than what would be permissible to restore bargaining conditions and effectuate the purposes and policies of the Statute considering the disruption and possible impairment to the efficiency and effectiveness of the Agency's operations. What appears to be the greatest concern to the Union is the placement of enclosed offices on the window-walls. Prior to the renovation Respondent had three enclosed managers' offices on the outside window-walls: the Regional Manager's office and two Division Directors'

21/ While costs involved must be considered, (Cf. U.S. Department of Housing and Urban Development and U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri, 23 FLRA 435, 437 (1986)), if costs alone becomes the controlling factor than a status quo ante remedy would rarely be available and the greater and more extensive the change, the more the agency would be insulated from having to undo the fruits of the illegal conduct.

offices.22/ Only two of these offices were located within the area of the present "L" shaped office: the Regional Manager's and the majority of one Division Director's office. The reconstruction resulted in adding two enclosed offices along the window wall, including the construction of the Division Director's office located at the turn of the "L". Accordingly, to return the office configuration as closely as possible in its reduced state to the previous configuration I recommend Respondent remove the enclosures on the two Division Director's offices. That will leave the Regional Manager's office and one other enclosed office, currently designated a Branch Chief's office, on the outside window wall. Thereafter, the parties may continue negotiations on the reconstruction until the matter is ultimately resolved. Meanwhile, Respondent will have the Regional Manager's office and the four enclosed offices currently assigned to Branch Chiefs to utilize and assign as it deems best for the efficiency and effectiveness of the Agency's operations during negotiations.

In view of the entire foregoing I conclude Respondent violated section 7116(a)(1) and (5) of the Statute by implementing the reconstruction of its facility without completing negotiations with the Union and Respondent violated section 7116(a)(1) and (6) of the Statute by implementing the reconstruction of its facility after the Union had invoked the services of the FSIP. Accordingly, in view of the entire foregoing I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Health and Human Services, Region IV, Office of Civil Rights, Atlanta, Georgia, shall:

1. Cease and desist from:

(a) Unilaterally implementing the decision to remodel the Office of Civil Rights without completing bargaining with the National Treasury Employees Union, Chapter 210, the agent of the employees' exclusive representative, on the procedures to be observed in

---

22/ The library also occupied an outside wall.

implementing the decision and the impact of such decision on unit employees' conditions of employment.

(b) Unilaterally implementing its decision to remodel the Office of Civil Rights while an impasse in negotiations is pending resolution before the Federal Service Impasses Panel or otherwise failing or refusing to cooperate in impasse procedures as required by the Federal Service Labor-Management Relations Statute.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of 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 Relations Statute:

(a) Upon request of the National Treasury Employees Union, Chapter 210, the agent of the employees' exclusive representative, remove the walls constructed in December 1990 enclosing the two Division Directors' offices and negotiate with Chapter 210 on the procedures to be observed in implementing the decision to remodel the Office of Civil Rights and the impact of such decision on unit employees' conditions of employment.

(b) Post at its Atlanta, Georgia Regional Office 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 Regional Manager 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Regional Office, Federal Labor Relations Authority,

in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, February 4, 1992.

SALVATORE J. ARRIGO
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 unilaterally implement the decision to remodel the Office of Civil Rights without completing bargaining with the National Treasury Employees Union, Chapter 210, the agent of the employee's exclusive representative, on the procedures to be observed in implementing the decision and the impact of such decision on unit employees' conditions of employment.

WE WILL NOT unilaterally implement the decision to remodel the Office of Civil Rights while an impasse in negotiations is pending resolution before the Federal Service Impasses Panel or otherwise fail or refuse to cooperate in impasse procedures as required by the Federal Service Labor-Management Relations Statute.

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 of the National Treasury Employees Union, Chapter 210, the agent of the employees' exclusive representative, remove the walls constructed in December 1990 enclosing the two Division Directors offices and negotiate with Chapter 210 on the procedures to be observed in implementing the decision to remodel the Office of Civil Rights and the impact of such decision on unit employees' conditions of employment.

_____
(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, Atlanta Regional Office, whose address is: 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30367, and whose telephone number is: (404) 257-2324.