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

SOCIAL SECURITY ADMINISTRATION BALTIMORE, MARYLAND Respondent	
and	Case No. 5-CA-00495
NATIONAL COUNCIL OF SOCIAL SECURITY ADMINISTRATION FIELD OFFICE LOCALS, COUNCIL 220, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES Charging Party	

John F. Gallagher, Esq.
For the General Counsel

Mr. Richard A. Matthews
For the Respondent

Mr. Gary Schuman
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on June 11, 1990 by the National Council of Social Security Administrative Field Office Locals Council 220, American Federation of Government Employees (hereinafter called AFGE or the Union). A Complaint and Notice of Hearing was issued on September 24, 1991 by the Regional Director for the Chicago, Illinois Region, Federal Labor Relations Authority. The Complaint

alleges that Respondent refused to negotiate with the union regarding incentive awards for employees in an appropriate bargaining unit.

A hearing was held before the undersigned in Chicago, Illinois. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Both parties submitted timely briefs which have been fully considered. Thereafter, Respondent filed a motion to correct portions of its brief. The uncontested motion is granted.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

1. The AFGE represents a nationwide bargaining unit of Respondent's employees. Local 1346, as an agent of AFGE represents approximately 20 Social Security offices in Wisconsin.

2. The first master labor agreement between the parties went into effect in 1982 and was succeeded by a new master agreement on January 25, 1990.

3. An April 11, 1988, letter directed to the Commissioner of SSA from Arthur Johnson, AFGE General Committee Spokesperson, delegated AFGE's right to initiate bargaining to AFGE Locals:

> As you know, the D.C. Circuit Court of Appeals in FLRA v. IRS, 810 F.2d 295 (1987) upheld the union's right to initiate mid-term bargaining. The FLRA has adopted this ruling as well in IRS, 29 FLRA No. 12 (1987).
>
> It appears that some of your managers and supervisors have not received this information and are confused as to the delegation of authority AFGE has granted to the General Committee and its Councils and Locals in this matter.
>
> While we believe that the delegations of authority communicate to your predecessor several times are clear, we take this opportunity to dispel any questions in this regard.

The right to initiate mid-term bargaining has been, and still is delegated to our councils and locals as well as the General Committee. This is in accord with the delegation of authority provided to the Commissioner via letters dated October 18, 1979 and September 8, 1982 by National President Kenneth Blaylock.

Since we have receive no delegation of authority from you concerning the appropriate management official to receive these union initiated mid-term bargaining matters, it would appear that they should be addressed to you as per 6 FLRA No. 33. If you should delegate this authority to a subordinate, please let us know as soon as possible.

4. On December 12, 1989, after having submitted requests for bargaining and being rebuffed at the local level, AFGE Local 1346 President Wayne McKillen submitted the following request to negotiate and proposals concerning performance award money matters to Respondent's Commissioner:

This constitutes a Union initiated proposal(s) for Mid-term bargaining on remedies for performance awards disputes. The authority for this action is NETU v. FLRA, 810 F.2d 295. The Union proposal is as follows:

1. The Manager will notify the Union President immediately in writing when performance award money becomes available.

2. This notification will include total dollar amount designated for performance awards in the office.

3. Twenty percent of the award money shall be set aside for unit employees whose appraisals are subsequently raised later because of grievance or EEO complaint remedies.

Please notify us who your chief negotiator will be.

. . .

PS: The AFGE General Committee has delegated full Authority to local presidents for this new statutory bargaining.

5. In addition, along with the December 12 letter, McKillen submitted ground rule proposals concerning several items inter alia, for official time for Union negotiators, time and place for negotiations, caucuses and distribution of the final agreement.

6. In a January 25, 1990, letter, Respondent, by Michael Grochowski, Associate Commissioner for Resource Management, refused to negotiate stating, in part:

> We do not agree that it would be appropriate to bargain in regard to aspects of performance awards during the term of the collective bargaining agreement in place between the American Federation of Government Employees and the Social Security Administration. Such proposals as those presented in your letter would have been appropriate for consideration during the spring and summer of 1988 when bargaining on a new term agreement was conducted.
>
> During this process, Article 17 of the National Agreement (Incentive Awards) was modified by the parties. As a result of the Impasses Panel's decision of December 22, 1989 (Case No. 89 FSIP 132), the new National Agreement, including an expanded Article 17, will be implemented nationwide on January 25, 1990. In our view, any further changes in Article 17 should not be considered by the parties until the next round of term bargaining is conducted.

Discussion and Conclusions

A. Positions of the parties.

The General Counsel's position is, Respondent violated the Statute when it refused to bargain on January 25, 1990, following McKillen's request to initiate bargaining over performance award matters. It relies primarily on Internal Revenue Service, 29 FLRA 162, 166 (1987) (IRS), where the Authority held that a union has the Statutory right to initiate bargaining "during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter." Therefore, the General Counsel argues that to establish a violation of the Statute in this case it need only demonstrate, as it did, by a preponderance of the

evidence, that AFGE submitted a request to negotiate and negotiable proposals on matters not contained in the agreement, that the agency refused to bargain, and that AFGE did not waive its right to bargain about performance awards.

Respondent's posture is that it had no duty to bargain under the circumstances of this case, even if the Union submitted a request along with negotiable proposals. Respondent defends its failure to engage in negotiations here by claiming (1) AFGE had waived its right to initiate bargaining; (2) that there is no Statutory right to initiate bargaining on matters unrelated to master labor agreement issues when master labor agreement negotiations are ongoing; and, (3) McKillen's request was not valid since he did not have the authority to initiate bargaining.

In support of its position, Respondent submits that the proposals regarding performance awards were made during the term of the collective bargaining agreement, therefore AFGE should have raised these issues when the parties were bargaining for a new agreement in 1988. Respondent proposes the issues are as follows: (1) whether it has the obligation under the Statute to bargain with AFGE at levels below the level of recognition in a consolidated unit of recognition and while a national collective bargaining agreement between the parties exists; (2) whether it is obligated to bargain the same general issue of awards procedures simultaneously with AFGE at the national level and at a level below the national level while the parties are at impasse before the Federal Service Impasses Panel (hereinafter called the Panel), regarding the national level bargaining for a new term agreement which covered the general issue of performance award procedures, as AFGE requested to bargain at the national recognition level; (3) whether under either the 1982 collective bargaining agreement or the January 25, 1990 agreement, it has any further obligation to bargain with AFGE on awards since it waived its rights by contract to bargain over the three local level proposals submitted by McKillen, in December 1989.

Respondent thus asserts that since no procedures exist in the agreement for union initiated bargaining, such bargaining can only occur at the level of recognition unless otherwise mutually agreed to by the parties at the level of recognition. The answer to this contention is simply that (IRS) makes it clear that an agency has a responsibility to bargain pursuant to union-initiated requests "during the term of a collective bargaining agreement." The case seems to make it clear that such procedures as suggested by

Respondent need not be in place before it must honor its Statutory duty to bargain in good faith over properly raised mid-term initiatives. Accordingly, this argument is summarily rejected.

The parties rely, although for different reasons, on Department of Health and Human Services, 6 FLRA 202 (1981) (SSA), as well they should, since it is the mother of this controversy. The case clearly establishes that the level of exclusive recognition between Respondent and AFGE as the exclusive representative of a consolidated unit of SSA employees, is at the national level. Respondent urges that the General Counsel's position that any of the 211 local AFGE presidents before consolidation could initiate bargaining would definitely render the SSA/AFGE consolidation meaningless. Since the exclusive recognition is at the national level, the Statute, in the absence of agreement between the parties, or other appropriate delegation of authority, does not require negotiations at any other level. Department of Defense Dependents Schools and Overseas Education Association, 12 FLRA 52, 53 (1983). This rationale has been confidentially applied by several of my colleagues. See, United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas, OALJ 92-94 (July 13, 1992); Department of Treasury, U.S. Mint, OALJ 87-92 (August 19, 1992).

B. Was McKillen's request to bargain made at the proper level of recognition and was it sufficient to initiate mid-term bargaining at the national level of recognition?

At the outset it is necessary to reiterate that McKillen's request was for "Mid-term bargaining on remedies for performance awards disputes." This is, therefore a mid-term bargaining case governed by IRS and thus, the request for mid-term bargaining could only be made under the terms of the agreement which was effective at the time it was made. In my view, the date Respondent allegedly refused to bargain on this request is immaterial since the request was made during the term of the 1982 agreement which contains a provision in Article 7 that it would automatically renew itself from year to year thereafter. Although unnecessary, because of the automatic renewal clause of Article 7 of the collective bargaining agreement, the parties agreed to continue the terms and conditions of the old agreement without a memorandum of understanding until a new agreement was negotiated. While it is true that the parties spent a considerable amount of time negotiating a new agreement, it is crystal clear that they did not abide by that new agreement until ordered to make it effective by the Panel some 10

days after McKillen's request to bargain. The Authority has already made it certain that an agency has a responsibility to bargain on a union initiated request "during the term of a collective bargaining agreement." (IRS) Despite all the maneuvering, in both briefs, to apply the 1990 agreement to redound to their benefit of course, the instant record establishes that the 1982 agreement remained in effect until the 1990 agreement became effective in January. Thus, the request to bargain was made under the 1982 agreement and any response to that request must be answered under that agreement. Moreover, Respondent's waiting until the new agreement went into effect on January 25, before answering McKillen's request to bargain has all the ear marks of bad faith bargaining. Waiting, in my view, neither changed nor mooted its obligation to bargain the mid-term proposals raised here. Accordingly, any claim that the relevant document in this case is the 1990 agreement because it was the agreement "in effect" at the time Respondent refused to negotiate, is rejected.

Moving to the principle established in (SSA) that the mutual obligation to bargain remains at the level of exclusive recognition in the absence of a mutual agreement by the parties, authorizing negotiations at a lower level. In this regard, Respondent resolutely contends that it is under no obligation to bargain below the national level of recognition absent mutual agreement to do so by contract or other means of negotiations. Here there is no record evidence of any such mutual agreement. Nevertheless, the General Counsel does not view the (SSA) rationale as precluding a labor organization from initiating bargaining, but insists that it means only that bargaining must be initiated at the level of exclusive recognition. See Department of the Air Force, Odgen Air Logistics Center, Hill Air Force Base, Utah, and Wright-Patterson Air Force Base, Ohio, (Wright-Patterson IV), 39 FLRA 1409 (1991) and Ogden Air Logistics Center, Hill Air Force Base, Utah, and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, (Wright-Patterson III), 39 FLRA 1381 (1991). Thus, McKillen's request to bargain made to the individual designated at the national level cannot be deemed as per se improper, but leaves open the question whether, in these circumstances McKillen could initiate mid-term bargaining in this consolidated bargaining unit at the national level.

McKillen testified that his attempts to bargain at the local level were "rebuffed" leading him to request bargaining at the level of recognition. Consistent with Authority guidance, the record establishes that McKillen was a properly

designated agent of AFGE for the purpose of initiating bargaining at the level of exclusive recognition. SSA had been informed, at the Commissioner level, by AFGE, that AFGE locals were so authorized. McKillen, as President of AFGE Local 1346, submitted the request to negotiate to the SSA Commissioner, the level of exclusive recognition. It is noted, McKillen was not a member of the AFGE negotiation team and that he had never been engaged in national contract negotiations. In the letter however, he referred the Commissioner to AFGE's prior delegation of authority. Finally, the General Counsel notes that Respondent in its January 25 "refusal" letter, never questioned the authority of McKillen to request bargaining on behalf of AFGE. Accordingly, it is found that McKillen was properly designated to initiate bargaining for AFGE and that his request was made to the proper national level official of Respondent.

McKillen's having been properly delegated authority to bargain notwithstanding, in Wright-Patterson IV it was found that the delegation to locals was not effective "unless AFLC agreed to local level bargaining." If that principle is applied in this case, the theory that a local president could effectively initiate bargaining at the national level for proposals which did not effect the nationwide unit fails. The evidence here reveals that while AFGE delegated authority to initiate mid-term bargaining to its councils, locals and General Committee and that it informed Respondent of those delegations on several occasions prior to McKillen's 1989 request to negotiate. It is totally silent concerning whether Respondent agreed to negotiations with the many AFGE designees. Nor does the General Counsel argue that Respondent agreed. Had Respondent agreed to the delegations, the request to negotiate with the ultimate agent of Respondent at the level of exclusive recognition, would have been appropriate. Absent any evidence that Respondent agreed to bargain with AFGE designees, it must be found that Respondent had no obligation to bargain with McKillen over the local proposals at the national level.

Also rejected is the General Counsel's premise that this case involves the issue whether an exclusive representative has the Statutory right to designate its own representative. American Federation of Government Employees, Local 1738, AFL-CIO, 29 FLRA 178, 188 (1987) (AFGE). It is unsuccessful simply because the issue goes beyond merely designating a representative and amounts to whether under the Wright-Patterson cases the parties must agree to bargain at a level other than the national level of recognition. These cases,

in my view create a distinction which abrogates a union's right to designate its own representative in some circumstances. When applied in cases such as this, the requirement that union delegations be approved by the agency allows an agency merely to remain silent, thereby restricting a union's ability to delegate its representatives. In my view, this is an undesirable result. Although the undersigned finds it difficult to reconcile the Wright-Patterson distinctions with the AFGE case, I am constrained to follow Authority precedent. Accordingly, it is found that Respondent had no obligation to bargain over mid-term initiatives concerning local incentive awards at the national level with this local president, since it had never agreed to negotiate with delegates designated by AFGE, and absent agreement by Respondent were such delegations not effective.

C. Assuming arguendo that McKillen had been properly authorized to negotiate, did AFGE waive its right to bargain over incentive awards at the local level or did it foreclose further bargaining on awards by its agreement to such provisions in the master labor agreement?

While the undersigned found above that AFGE delegations were not effective and Respondent had no obligation to bargain, were the delegations agreed to, the outcome of this matter would be different. For the foregoing reasons Respondent's other defenses are rejected.

An agency must bargain in good faith during the term of a collective bargaining agreement on negotiable union proposals concerning matters not included in the agreement unless the union has waived its right to bargain about the subject mater involved. The waiver may be either by express agreement or bargaining history but must be "clear and unmistakable." (IRS)

Respondent's approach here was to argue waiver from every angle. First, it asserts that because of contract language found in both the 1982 and 1990 agreements in Article 17, Section 4 concerning awards information and McKillen's December 1989 request prove that AFGE, at the national level, opted through that language to have Respondent provide such award information as McKillen was seeking on an annual basis. It is pointed out that, Part A of Section 4 of the 1982 and Section 6 of the 1990 contract agreements say that the award information "will show distribution of case awards and Quality Step Increases by grade and organization for Headquarters, OHA Central Office, Regions by components, DOCs and PSCs.

However, McKillen's proposals, on their face, requested information, not on an annual basis after awards were given, but for information prior to awards so that the Local would be able to deal with remedies for performance award disputes.

Secondly, it argues that the proposals submitted are not bargainable, in view of the fact that AFGE, at the national level compromised proposal numbers 1 and 2. It is asserted that AFGE at the national level agreed to a percent of the award money. (1) There would be pending litigation over the granting of awards; and (2) that an individual not given an award would or might be entitled to an award based on a third party proceeding. The fact that an employee might receive an award as a result of such litigation proceedings should not abrogate management's right to grant award amounts. Both of the above assertions can be answered in the same manner. On their face, proposals 1 and 2 call for management to provide monetary information prior to management making its award decisions. Article 17, Section 4, does not even mention specific money matters. In addition, it is obvious that the contractual provisions require that Respondent provide the information to the Union after Respondent has made its award decisions. The proposals would require that the monetary information be supplied to the Union before management makes its award decisions. There is nothing inherently contradictory between a union wanting certain information before the awards are given and a union wanting other information after awards are given. Therefore, it is found that proposals 1 and 2 were negotiable proposals.

It is less clear that McKillen's third proposal is negotiable. What is clear is that at least 2 proposals submitted by McKillen were negotiable. Respondent argues that proposal 3 has the same affect as the union's proposals in United States Department of the Navy, Navy Underwater Systems Center, Newport, Rhode Island v. FLRA, No. 91-1045 (D.C. Cir. July 23, 1991); 43 FLRA No. 3, November 4, 1991) pp. 51-53. In its decision on remand the Authority rejected the agency's argument that two proposals dealing the payment of award were inconsistent with a Government-wide regulation issued by OPM that governed review and approval of performance awards. While the petition for review was pending in court, OPM issued interim regulations that included a provision addressing the review and approval of performance awards. Upon remand, the Authority directed the parties to file briefs concerning the effect of the interim regulations. Thereafter, the Authority concluded that the proposals would effectively preempt the authority of the reviewing official with respect to determining the amount of

an award by prescribing a range within which the amount must fall. Accordingly, the proposals were found to be inconsistent with the Government-wide regulations. In view of this determination, Respondent urges that Union proposal 3 in the instant case would preempt its authority to grant award amounts by requiring it to set aside 20 percent of the award money and is, therefore, nonnegotiable. Concerning the third proposal, while a question remains about its negotiability, there is no provision in the master labor agreement which is even remotely similar to the third proposal. Consequently, it cannot be argued that AFGE expressly waived its right to initiate bargaining on the subject matter of that proposal even if it is nonnegotiable.

Based on the foregoing, and having found that proposals 1 and 2 are negotiable, it is further found that the Union did submit negotiable proposals in this matter.

1. Express Waiver

Respondent asserts that AFGE, similar to the union in Wright-Patterson IV, is foreclosed from further bargaining by agreeing to a single supplement to the contract. Thus, it contends that AFGE foreclosed itself from bargaining over incentive awards during the term of the parties' 1982 contract by agreeing in the contract that outside of the seven (7) topics designated in Article 5, Supplemental Agreements, "there will be no other supplemental agreements." Article 5 of the 1982 contract authorized each AFGE component to negotiate a Supplemental Agreement to this agreement with their respective SSA component. Thus, the parties agreed that there would be no "other supplemental agreements" other than seven enumerated supplementals which were as follows: Union rights; Employee rights; Health and Safety; Facilities; Parking and Transportation; Time and Leave; and, Flextime - including Data Operations Centers. Based on all of the above, the Respondent argues that it has been proven beyond a reasonable doubt that it fully disposed of its obligation during the negotiations of both the 1982 and 1990 show a conscious yielding of rights by the Union.

With respect to Respondent's claim that Article 5, Section 3 of the 1982 master labor agreement, acts as a waiver of the union's right to initiate bargaining on all issues except those identified in that section, such a claim ignores the Authority's holding that this very same master labor agreement provision "applies only to supplemental agreements negotiated by components of the organization." Social Security Administration, 39 FLRA 633, 634 (1991).

Further, there is no evidence in the record establishing that the negotiations in this case were to involve the component levels of Respondent, but establishes only that McKillen intended that any negotiated agreement which resulted would apply only to the approximate 20 offices of Respondent in Wisconsin, not for an entire component.

Respondent also argues that AFGE waived its rights to negotiate over the subject matter of the December 12 proposals because the parties had negotiated similar provisions in the master labor agreement. While a labor organization can waive its right to initiate bargaining under such circumstances, a proposal which relates to a general subject area covered in an agreement does not relieve an agency of its bargaining obligation. The mere fact that the parties had previously agreed on items arguably related to the general subject matter does not mean that the labor organization has forfeited its right to initiate bargaining on a specific subject matter. Department of the Navy, Marine Corps Logistics Base, Albany, Georgia, 39 FLRA 1060, 1066-68 (1991).*/

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*/ Department of the Navy, Marine Corps Logistics Base, Albany, Georgia, 39 FLRA 1060 (1991), Marine Corps Logistics Base, Albany, Georgia v. FLRA, Nos. 91-1211 and 91-1212 (D.C. Cir. Apr. 24, 1992) contained issues very similar to those raised by Respondent herein. However, in 45 FLRA No. 42 (July 15, 1992) the Authority dismissed the complaint in the case on instructions from the court. The court stated that under the Authority's test an "agency must engage in mid-term negotiations over an otherwise bargainable matter raised by the union, except when: (1) the matter is covered by the parties' collective bargaining agreement; or (2) the union has 'clearly and unmistakably' waived its right to bargain, either by express agreement (e.g., a zipper clause), or through its bargaining history with the agency." The court also held that the Authority had improperly applied a waiver analysis to determine when a matter is "covered by" a negotiated agreement." Finally, the court concluded that impact and implementation of the subject matter of the complaint was "covered by" an article of the master labor agreement although that article did not specifically address the full range of impact and implementation issues that might arise. Thus, the court found the agency was not obligated to bargain with the union over matters which had already been bargained and were covered by the master labor agreement and because it had followed the negotiated procedures. In a
(Footnote continued on next page.)

A comparison of the contractual provisions with the three proposals demonstrate that the specific subject matter of the proposals submitted by McKillen were not addressed in either of the master labor agreements. While Article 17 concerns incentive awards, it clearly does not address issues raised by McKillen concerning immediate notification when performance award money becomes available; dollar amounts of awards designated to the local office; or, set aside money. In other words, the McKillen request was over strictly local and not national issues.

2. Waiver Based Upon Collective Bargaining History

In the absence of an express waiver, the analysis must turn to examine whether the record contains "clear and unmistakable" evidence that AFGE waived its right to bargain on the subject matter at issue based upon the collective bargaining history. In my view, there is no such clear and unmistakable evidence on the record.

The testimony of Herbert Collender, a negotiator for both the 1982 and 1990 agreements, and the correspondence between the parties' chief negotiators firmly establish that AFGE never waived its Statutory right to initiate mid-term bargaining as the subjects were not discussed in the negotiations.

Concerning whether AFGE waived its right to initiate bargaining on the specific subject matter at issue, once again, there is no clear and unmistakable evidence of such a waiver. Respondent, through its witness, Paul Arca, claimed that the Union's proposals submitted during the 1982 negotiations are evidence of a waiver. However, as previously discussed, Arca admitted that those proposals concerned information that management would give the Union after management had made its decision. And as previously

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nonprecedential decision Administrative Law Judge Etelson, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, OALJ 92-66, pp. 9-18, (June 4, 1992) offers a cogent discussion of this case and its history. To the extent it is applicable here, I will follow that approach. The dismissal at the courts direction does not necessarily mean that the Authority changed its approach in waiver cases or that the Authority has changed its policy in this area. Consequently, I am constrained to follow Authority law until changed.

discussed, there is no bargaining history of any proposal which is even remotely similar to the third proposal in this case. Moreover, Collender who was AFGE's negotiator for both agreements, testified that there never was a full discussion of matters related to the proposals at issue in this case during master labor agreement negotiations.

The record as a whole, is insufficient to establish a waiver either by express agreement or bargaining history. Thus, it appears that the proposals or like proposals were not specifically addressed in the master labor agreement. Therefore, it is found that there is insufficient evidence to establish, clearly and unmistakably that AFGE waived its Statutory right to initiate bargaining on the subject matter of the three proposals which were submitted to Respondent on December 12.

D. If Respondent had agreed to local level bargaining, could AFGE initiate bargaining on matters related to the 1982 agreement while negotiations for a new agreement were underway?

The record reveals that when the 1982 agreement expired on June 11, 1988 it was reopened by mutual consent of the parties under the terms of Article 7 and the parties commenced negotiations on a new agreement. Although Respondent argues otherwise, it is clear that the earlier agreement automatically renewed itself from year to year. Impasse was reached on the new agreement after the AFGE membership failed to ratify the agreement. The unratified agreement contained provisions on incentive awards, the subject matter of this case. Sometime in April 1989, the dispute was submitted to the Federal Service Impasses Panel (hereinafter called the Panel). Respondent's position there, in part, was that the agreement should be implemented as negotiated. AFGE submitted additional proposals. Thereafter, in late December 1989, the Panel ordered the agreement implemented as negotiated and it went into effect on January 25, 1990.

McKillen's December 12, 1989 bargaining request for the three proposals on incentive performance awards was made while the matter was pending before the Panel. There is no dispute that McKillen intended to bargain about award remedies within his Local's jurisdiction.

Based on those facts, Respondent argues that the parties' previous agreement had expired and therefore the total bargaining obligation was at the national level. In

that regard it notes that ground rules had been framed and negotiation teams had been put together to specifically bargain at that level. In addition the parties' dispute was at the Panel when McKillen made his request to bargain. There is no quarrel about whether bargaining on the national agreement was taking place when the bargaining request was submitted. But, there is some question whether the McKillen request concerned a matter which was covered by the new agreement then before the Panel. Thus, it is asserted that McKillen's request was in fact a request to bargain over the very same matter for which bargaining had not been concluded since the entire new national agreement was pending before the Panel for resolution.

The General Counsel counters that the mere fact that the parties are engaged in negotiations for a master labor agreement and may have had certain matters before the Panel does not preclude AFGE from initiating bargaining on matters outside the scope of those master labor agreement negotiations. In its view, Respondent's reasoning that a union has no right to initiate bargaining as long as master labor agreement negotiations are in progress lacks validity because (IRS) requires bargaining pursuant to union-initiated requests "during the term of a collective bargaining agreement."

Respondent's argument that there is no Statutory right to initiate bargaining on matters unrelated to master labor agreement issues when master labor agreement negotiations are ongoing is unpersuasive. As already found, the 1982 agreement remained in effect until January 1990, when a new agreement became effective. (IRS) certainly does not preclude a union from initiating bargaining on matters which it deems outside the scope of any ongoing negotiations. Since the parties indeed had an agreement which was effective until amended, modified or replaced, Respondent would not be relieved of its duty to negotiate on that agreement until one of those conditions was fulfilled. Respondent waited, in this case until the date the new agreement became effective to answer the request made under the 1982 agreement. This wait whether conscious or not no doubt was an attempt by Respondent to moot the issue. Respondent's motivation notwithstanding this wait did not change its obligation to bargain this mid-term initiative: see infra, p. 7. In that regard, undersigned agrees with the General Counsel that not only would it be inherently unfair to preclude a labor organization from initiating bargaining during the period of time when an agency retains its Statutory right to change conditions of employment, such

an outcome would be contrary to the intent of the Statute to assure equality in the positions of the unions and agencies when the parties are at the bargaining table. Therefore, it is found that Respondent's argument lacks merit.

Based on all of the foregoing it is recommended that the Authority adopt the following:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 5-CA-00495 be, and it hereby is, dismissed.

Issued, Washington, DC, September 3, 1992

ELI NASH, JR.
Administrative Law Judge